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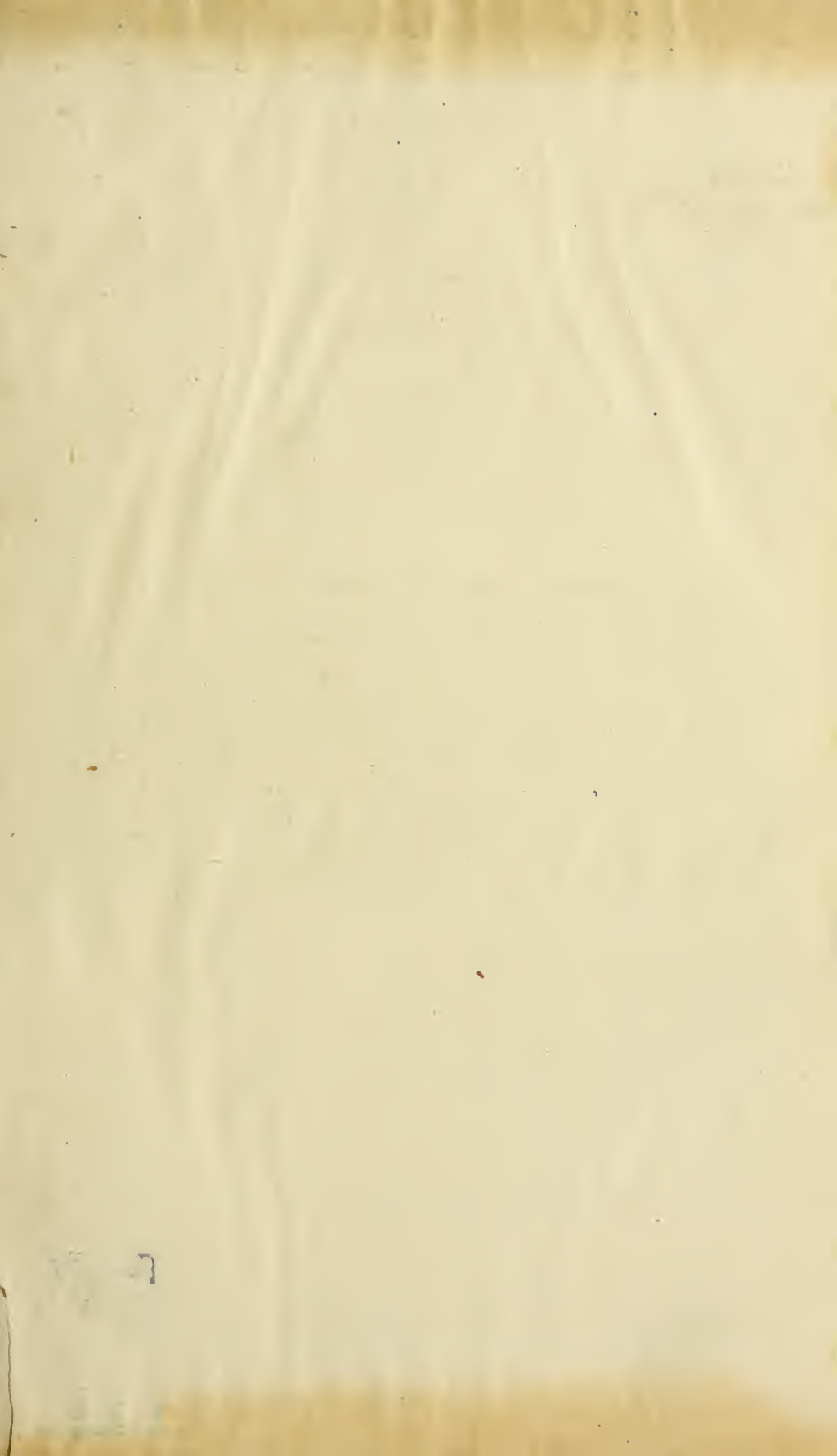
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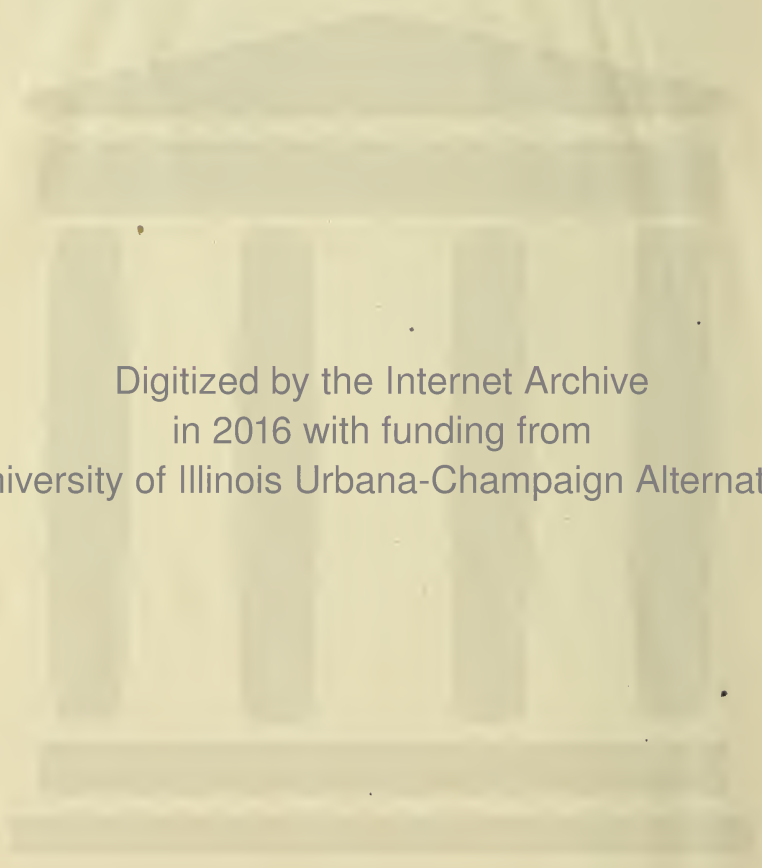
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INTERSTATE COMMERCE REPORTS

VOL. II.

DECISIONS AND PROCEEDINGS
OF THE
INTERSTATE COMMERCE COMMISSION
UNDER THE
INTERSTATE COMMERCE ACT
OF FEBRUARY 4, 1887,
AND AMENDMENTS,
TOGETHER WITH ALL
DECISIONS OF THE COURTS
RELATING TO
INTERSTATE COMMERCE,
WITH NOTES.
June, 1888, to May, 1890.

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INTERSTATE COMMERCE REPORTS, VOL. II.

APPENDIX I.

EXTRACTS FROM THE APPENDICES TO THE SECOND ANNUAL REPORT
OF THE INTERSTATE COMMERCE COMMISSION.*

APPENDIX A.

[This Appendix (referred to in the Report at page 289, *ante*,) contains a copy of the Act to Regulate Commerce, and a statement of existing legislation upon similar matters in Canada and in England.

The Act to Regulate Commerce will be found in 1 Interstate Commerce Reports, p. 3.]

CANADIAN LEGISLATION.

An Act respecting railways, to be known as "The Railway Act," was adopted by the Senate and House of Commons of Canada during the present year, which became a law on May 22, 1888.

A Royal Commission of five members had previously examined the general subject, and filed a report under date of January 14, 1888.

The new Railway Act comprises 309 sections, covering the entire ground of railway legislation, including organization, capital stock, powers, right of way, tolls, working of the railway, accidents, statistics, etc.

The following sections are those which relate to subjects corresponding in their nature to the matters of regulation embraced in the Act to Regulate Commerce of the United States.

* * * * *

The Railway Committee.

8. The railway committee of the Privy Council shall consist of the minister of railways and canals, who shall be chairman thereof, of the minister of justice and of two or more of the other members of the Queen's Privy Council for Canada to be from time to time appointed by the Governor in council, three of whom shall form a quorum; and such committee shall have the powers and perform the duties assigned to it by this Act.

9. The deputy of the minister of railways and canals, or some other fit person appointed by the committee, shall be secretary of the committee.

10. The railway committee may—

(a) Regulate and limit the rate of speed at which railway trains and locomotives may be run in any city, town, or village, or in any class of cities, towns, or villages described in any regulation; limiting, if the said railway committee think fit, the rate of speed within certain described portions of any city, town, or village, and allowing another rate of speed in other

portions thereof, which rate of speed shall not in any case exceed 6 miles an hour, unless the track is properly fenced;

(b) Make regulations with respect to the use of the steam whistle within any city, town, or village, or any portion thereof;

(c) Make regulations with respect to the method of passing from one car to another either inside or overhead, and for the safety of employes while passing from one car to another, and for the coupling of cars;

(d) Impose penalties, not exceeding \$20 for each offense, on every person who offends against any regulation made under this section—which penalties shall be recoverable upon summary conviction;

(e) The imposition of any such penalties shall not lessen or affect any other liability which any person may have incurred.

11. The railway committee shall have power to inquire into, hear, and determine any application, complaint, or dispute respecting—

(a) Any right of way over or through lands owned or occupied by any company;

(b) Changes in location for lessening a curve, reducing a gradient, or benefiting the railway, or for other purposes of public advantage;

(c) The construction of branch lines exceeding one quarter of a mile in length, but not exceeding 6 miles;

(d) The crossing of the tracks of one company by the tracks of another company;

(e) The alignment, arrangement, disposition or location of tracks;

(f) The use by one company of the tracks, stations or station grounds of another company;

(g) The construction of works in navigable waters;

(h) The construction of railways upon, along, and across highways;

(i) The proportion in which the cost of fencing the approaches to crossings on railways constructed or under construction on the 19th of April, 1884, shall be borne by the company and the municipality or person interested;

(j) The compensation to be made to any person or company in respect of any work or measure directed to be made or taken, or the cost thereof, or the proportion of such cost to be borne by any person or company;

(k) Tolls and rates for the transportation of passengers and freight;

(l) The adjustment of such tolls and rates between companies;

(m) Running powers or haulage;

(n) Traffic arrangements;

*See the Report, *ante*, 249-289.

(o) Transshipment or interchange of freight;
 (p) Unjust preferences, discrimination, or extortion;

(q) Any highway or street, ditch or sewer, water, gas, or other pipes, or mains over or through lands owned or occupied by the company; or

(r) Any matter, act, or thing, which by this or the special Act is sanctioned, required to be done, or prohibited.

12. The railway committee or the minister may appoint or direct any person to make an inquiry and report upon any application, complaint, or dispute, pending before such committee, or any matter or thing connected therewith or incident thereto.

* * * * *

15. The railway committee, the minister, and every such engineer, commissioner, or person, shall have the same power to enforce the attendance of witnesses and to compel them to give evidence and produce the books, papers, or things which they are required to produce, as is vested in any court in civil cases.

16. Every person summoned to attend before the railway committee, or the minister, or before any such engineer, commissioner, or person, shall receive the same fees and allowances for so doing as if summoned to attend before a court of civil jurisdiction in the Province in which he is required to appear.

17. Any decision or order made by the railway committee under this Act may be made an order of the Exchequer Court of Canada, or of any Superior Court of any Province of Canada, and shall be enforced in like manner as any rule or order of such court.

18. The railway committee may review and rescind or vary any decision or order previously made by it.

19. The railway committee may, if it thinks fit, at the instance of any party to the proceedings before it, and upon such security being given as it directs, state a case in writing for the opinion of the Supreme Court of Canada upon any question which in the opinion of the committee is a question of law.

20. The Supreme Court of Canada shall hear and determine the question or questions of law arising thereon and remit the matter to the railway committee, with the opinion of the court thereon.

21. Subject to the provisions of section 18, every decision and order of the railway committee shall be final: Provided always, that either party may petition the Governor in council, and the Governor in council may, in his discretion, rescind, change, or vary such order as he deems just and proper.

22. The costs of and incidental to any proceeding before the railway committee shall be in the discretion of the committee.

23. Every document purporting to be signed by the chairman and secretary of the railway committee, or by either of them, or by the minister, shall be received in evidence without proof of any such signature, and until the contrary is proved shall be deemed to have been so signed and to have been duly executed or issued by such committee or by the minister as the case may be.

24. Every decision and order of the railway committee shall be considered as made known

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to the company by a notice thereof, signed by the chairman and the secretary of the committee or by either of them and delivered to the president, vice-president, managing director, secretary, or superintendent of the company, or at the office of the company; and every order of the minister or of the inspecting engineer shall be deemed to be made known to the company by a notice thereof, signed respectively by the minister or the engineer, and delivered as above mentioned.

25. Every company shall, as soon as possible after the receipt of any order or notice of the railway committee or the minister or the inspecting engineer, give cognizance thereof to each of its officers and servants, by delivering a copy to him, or by posting up a copy thereof in some place where his work or his duties, or some of them, are to be performed.

* * * * *

57. No person who holds any office, place, or employment in, or who is concerned or interested in any contract under or with the company, or is surety for any contractor, shall be capable of being chosen a director, or of holding the office of director, nor shall any person who is a director of the company enter into, or be directly or indirectly, for his own use and benefit, interested in any contract with the company, other than a contract which relates to the purchase of land necessary for the railway, or be or become a partner of or surety for any contractor with the company.

* * * * *

62. The directors shall cause to be kept and, annually, on the 30th day of June, to be made up and balanced, a true, exact, and particular account of the moneys collected and received by the company or by the directors or managers thereof, or otherwise for the use of the company, and of the charges and expenses attending the erecting, making, supporting, maintaining, and carrying on the undertaking, and of all other receipts and expenditures of the company or the directors.

* * * * *

71. No dividends shall be declared whereby the capital of the company is in any degree reduced or impaired, or be paid out of such capital, nor shall any dividend be paid in respect of any share, after a day appointed for payment of any call for money in respect thereof, until such call has been paid; but the directors may, in their discretion, until the railway is completed and opened to the public, pay interest at any rate not exceeding 6 per centum per annum on all sums called up in respect of the shares, from the respective days on which the same have been paid; and such interest shall accrue and be paid at such times and places as the directors appoint for that purpose.

72. No interest shall accrue to any shareholder in respect of any share upon which any call is in arrear, or in respect to any other share held by such shareholder while such call remains unpaid.

* * * * *

223. Subject to the provisions and restrictions in this and in the special Act contained, the company may, by by-laws, or the directors, if thereunto authorized by the by-laws, may, from time to time, fix and regulate the tolls to be demanded and taken for all passengers and

goods transported upon the railway, or in steam vessels belonging to the company.

224. Such tolls may be fixed either for the whole or for any particular portions of the railway; but all such tolls shall always, under the same circumstances, be charged equally to all persons, and at the same rate, whether per ton, per mile, or otherwise, in respect of all passengers and goods and railway carriages of the same description, and conveyed or propelled by a like railway carriage or engine, passing only over the same portion of the line of railway; and no reduction or advance in any such tolls shall be made, either directly or indirectly, in favor of or against any particular company or person traveling upon or using the railway.

225. The tolls fixed for large quantities or long distances may be proportionately less than the tolls fixed for small quantities or short distances, if such tolls are, under the same circumstances, charged equally to all persons; but in respect of quantity no special toll or rate shall be given or fixed for any quantity less than one car load of at least ten tons.

226. The company, in fixing or regulating the tolls to be demanded and taken for the transportation of goods, shall, except in respect to through traffic to or from the United States, adopt and conform to any uniform classification of freight which the Governor in council on the report of the minister, from time to time, prescribes.

227. No tolls shall be levied or taken until the by-law fixing such toll has been approved by the Governor in council, nor until after two weekly publications in the Canada Gazette of such by-law and of the order in council approving thereof; nor shall any company levy or collect any money for services as a common carrier, except subject to the provisions of this Act.

228. Every by-law fixing and regulating tolls shall be subject to revision by the Governor in council, from time to time, after approval thereof; and after an order in council ordering the tolls fixed and regulated by any by-law has been twice published in the Canada Gazette, the tolls mentioned in such order in council shall be substituted for those mentioned in the by-law, so long as the order in council remains unrevoked.

229. In all cases a fraction in the distance over which goods or passengers are transported on the railway shall be considered as a whole mile; and for a fraction of a ton in the weight of any goods, a proportion of the tolls shall be demanded and taken, according to the number of quarters of a ton contained therein, and a fraction of a quarter of a ton shall be deemed and considered as a whole quarter of a ton.

230. The company shall, from time to time, cause to be printed and posted up in its offices, and in every place where the tolls are to be collected, in some conspicuous position, a printed board or paper, exhibiting all the rates of tolls payable, and particularizing the price or sum of money to be charged or taken for the carriage of any matter or thing.

231. Such tolls shall be paid to such persons and at such places, near to the railway, in such manner and under such regulations as the by-laws direct.

232. No company, in fixing any toll or rate, shall, under like conditions and circumstances, make any unjust or partial discrimination between different localities; but no discrimination between localities, which by reason of competition by water or railway, it is necessary to make to secure traffic, shall be deemed to be unjust or partial.

233. No company shall make or give any secret special toll, rate, rebate, drawback, or concession to any person; and every company shall, on the demand of any person, make known to him any special rate, rebate, drawback, or concession given to anyone.

238. The directors of any company may, at any time, make and enter into any agreement or arrangement with any other company, either in Canada or elsewhere, for the regulation and interchange of traffic passing to and from the company's railways, and for the working of the traffic over the said railways respectively, or for either of those objects separately, and for the division and apportionment of tolls, rates, and charges in respect of such traffic, and generally in relation to the management and working of the railways, or any of them, or any part thereof, and of any railway or railways in connection therewith, for any term not exceeding twenty-one years, and to provide, either by proxy or otherwise, for the appointment of a joint committee or committees for the better carrying into effect any such agreement or arrangement, with such powers and functions as are considered necessary or expedient, subject to the consent of two thirds of the stockholders voting in person or by proxy, and also to the approval of the Governor in council.

239. Before such approval is given, notice of the application therefor shall be published in the Canada Gazette for at least two months previously to the time therein named for the making of such application; and such notice shall state a time and place when the application is to be made, and that all persons interested may then and there appear and be heard on such application.

240. Every company shall, according to its power, afford all reasonable facilities to any other railway company for the receiving and forwarding and delivery of traffic upon and from the several railways belonging to or worked by such companies respectively, and for the return of carriages, trucks, and other vehicles; and no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every company which has or works a railway which forms part of a continuous line of railway, or which intersects any other railway, or which has any terminus, station, or wharf near to any terminus, station, or wharf of any other railway, shall afford all due and reasonable facilities for receiving and forwarding by its railway all the traffic arriving by such other railway, without any unreasonable delay, and without any such preference or advantage, or

prejudice or disadvantage, as aforesaid, and so that no obstruction is offered to the public desirous of using such railway as a continuous line of communication, and so that all reasonable accommodation, by means of the railways of the several companies, is, at all times, afforded to the public in that behalf; and any agreement made between any two or more companies contrary to this section shall be unlawful, and null and void.

241. Every officer, servant, or agent of any company, having the superintendence of the traffic at any station or depot thereof, who refuses or neglects to receive, convey or deliver at any station or depot of the company for which they are destined, any passenger, goods, or thing, brought, conveyed or delivered to him or such company, for conveyance over or along its railway from that of any other company, intersecting or being near to such first mentioned railway, or who in any way willfully violates the provisions of the next preceding section, and the company first mentioned are, for each such refusal neglect, or offense, severally liable, on summary conviction, to a penalty not exceeding fifty dollars over and above the actual damages sustained; which penalty shall be recoverable with costs, by the railway company or by any person aggrieved by such neglect or refusal, and such penalty shall belong to the said railway company, or other person so aggrieved.

242. Every company which grants any facilities to any incorporated express company or person shall grant equal facilities on equal terms and conditions to any other incorporated express company which demands the same.

* * * * *

276. No company shall, either directly or indirectly, employ any of its funds in the purchase of its own stock, or in the acquisition of any shares, bonds or other securities issued by any other railway company in Canada; but this shall not affect the powers or rights which any company in Canada now has or possesses by virtue of any special Act to acquire, have, or hold the shares, bonds or other securities of any railway company in the United States of America or Canada; nor shall it interfere with the right conferred on the Northern Railway Company of Canada, or the Hamilton and Northwestern Railway Company, to acquire stock in the Northern and Pacific Junction Railway Company, under the Acts relating to the said first named companies, respectively, passed by the Parliament of Canada in the forty-seventh year of Her Majesty's reign.

277. Every director of a railway company who knowingly permits the funds of any such company to be applied in violation of the next preceding section shall incur a penalty of \$1,000 for each such violation, which penalty shall be recoverable on information filed in the name of the Attorney-General of Canada; and a moiety thereof shall belong to Her Majesty, and the other moiety thereof shall belong to the informer; and the acquisition of each share, bond, or other security, or interest, as aforesaid, shall be deemed a separate violation of the provisions aforesaid.

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289. Every company, director, or officer doing, or causing or permitting to be done, any
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matter, act or thing contrary to the provisions of this or the special Act, or to the orders or directions of the Governor in council, or of the railway committee or minister made hereunder, or omitting to do any matter, act, or thing required to be done on the part of any such company, director or officer, is liable to any person injured thereby for the full amount of damages sustained by such act or omission; and if no other penalty is in this or the special Act provided for any such act or omission, is liable, for each offense, to a penalty of not less than \$20, and not more than \$5,000, in the discretion of the court before which the same is recoverable.

(2) This section shall only apply to companies and directors and officers of companies within the legislative authority of the Parliament of Canada.

290. Every person from whom any company exacts any unjust or extortionate toll, rate, or charge shall, in addition to the amount so unjustly exacted, be entitled to recover from the company as damages an amount equal to three times the amount so unjustly exacted.

* * * * *

299. Every company shall annually prepare returns in accordance with the forms contained in schedule 1 to this Act, of its capital, traffic, and working expenditure, and of all information required, as indicated in the said form, to be furnished to the minister; and such returns shall be dated and signed by, and attested upon the oath of the secretary, or some other chief officer of the company, and of the president, or, in his absence, of the vice-president or manager of the company.

(2) Such returns shall be made for the period included from the date to which the then last yearly returns made by the company extended, or from the commencement of the operation of the railway, if no such returns have been previously made, and, in either case, down to the last day of June in the then current year.

(3) A duplicate copy of such returns, dated, signed, and attested in manner aforesaid, shall be forwarded by such company to the minister within three months after the 1st day of July in each year.

(4) The company shall also, in addition to the information required to be furnished to the minister, as indicated in the said schedule 1, furnish such other information and returns as are, from time to time, required by the minister.

(5) Every company which makes default in forwarding such returns in accordance with the provisions of this section shall incur a penalty not exceeding \$10 for every day during which such default continues.

(6) The minister shall lay before both Houses of Parliament, within twenty-one days from the commencement of each session thereof, the returns made and forwarded to him in pursuance of this section.

300. Every company shall, weekly, prepare returns of its traffic for the next preceding seven days, in accordance with the form contained in schedule two to this Act, and a copy of such returns, signed by the officer of the company responsible for the correctness of such returns, shall be forwarded by the company to the minister, within seven days from the day in

each week up to which the said returns have been prepared; and another copy of each of such returns, signed by the same officer, shall be posted up by the company within the same delay, and kept posted up for seven days, in some conspicuous place in the most public room in the head office of the company in Canada, and so that the same can be perused by all persons; and free access thereto shall be allowed to all persons during the usual hours of business at such office, on each day of the said seven days not being a Sunday or holiday.

(2) Every company which makes default in forwarding the said weekly returns to the minister, or which fails to post up and keep posted up a copy thereof as aforesaid, and to allow free access thereto as aforesaid, shall incur a penalty not exceeding \$10 for every day during which such default continues.

301. Every person who, knowing the same to be false in any particular, signs any return required by the two sections next preceding, is guilty of a misdemeanor.

A few extracts are also presented in this connection from the above mentioned report of the Royal Commission on Railways.

Canadian and American Railways.

Two natural causes exist whereby the very important advantage of low cost for transportation is insured to Canada. No doubt the cost of our railways enables their managers to work at smaller charges for capital account; but the main reasons are to be found, first, in competition by water; second, in competition by American railways at all points accessible by our navigable waters.

The competition by water is created by the natural geographical position of Canada and its possession of means of internal communication and export by the great lakes, the River St. Lawrence, and in the maritime Provinces, the Gulf of St. Lawrence and the ocean. There is in fact no business center of any importance in the older Provinces which is not directly situated upon the channel of water communication with the outside world. Canadian railways have to consider this in the establishment of their tariffs, and avoid by too high rates all inducement to merchants and others to hold over their imports and exports till the season of open navigation.

The American system of railways, also connecting the great lakes with the ocean, is able during the season of navigation to take very low rates from points in Ontario to the maritime Provinces, and having also possession of one important railway in Ontario, the Canada Southern, can practically compete with the Canadian lines during the entire year; the whole trade of Canada undoubtedly benefiting by the water and rail competition of rival routes. By possessing the control of the St. Lawrence, Canada offers the shortest and cheapest route to the seaboard from the Western States bordering upon the great lakes. Her railways are thus enabled to draw largely upon the commerce of these States, making them contributory to the maintenance of her internal system of transportation, and cheapening the cost of performing it.

Other recent causes are also now operating to develop and extend these advantages. The

Canadian Pacific Railway, in completing its line to the Pacific Ocean, points to an early revolution in the future carrying trade of Eastern Asia and Australia, while the connection of the same railway at Sault Ste. Marie with the new lines leading from Saint Paul and Minneapolis seem to insure the diversion through Canada of a large part of the traffic of the Northwestern States with New England and New York—a point of the greater importance, as it is proved that the wheat-growing zone in America is, from some unknown climatic influence, steadily moving northward, promising shortly to be in a great measure confined to the Northwestern States, Manitoba, and our own Northwest Territories.

In proof of the direct advantage of this through American trade to Canada the evidence of Mr. Hickson, the able manager of the Grand Trunk Railway, may be cited. He says: "The payments by the Grand Trunk Railway in Canada in working the through traffic have not been less than \$4,000,000 annually for the last four years. The effect of such an expenditure in employment and in the consumption of supplies must have been very beneficial, while as a necessary consequence the railway service of the entire Grand Trunk system must have been largely extended, to the manifest advantage of local districts."

The importance of maintaining and developing the foreign traffic passing through Canada can scarcely be exaggerated; and the natural advantages we possess, when supported and increased through a wise system of railway construction and management, can not fail to promote in the highest degree the prosperity of the country.

* * * * *

Classification of Freight.

The convenience to the public and also to the several railway companies of a uniform classification is so obvious that the Commission consider it unnecessary to offer any extended remarks upon it, so far as it applies solely to railways in Canada. But as regards the through traffic from and to the United States, or such traffic as is carried on in connection with United States railways, it does not appear desirable to insist upon the Canadian classification being made applicable to such transportation.

They therefore recommend "that a uniform classification of freight be established and maintained by all railway companies, subject to the adoption, if desired by them, of the American classification for through traffic to and from the United States."

Tariffs.

The Commission have carefully considered all the information before them on this important subject, and believe the interests of commerce will be best served by leaving the arrangement of tariff rates for passengers and goods in the control of the several railway companies respectively, subject only to approval and revision of the maxima rates by an authorized tribunal.

They therefore recommend, "that the railway companies may make and establish tariffs, subject to the approval and revision of the maxima rates by such tribunal as may be constituted."

Long and Short Haul.

Uniform mileage rates.—This question has probably given rise to more discussion than almost any other point connected with railway management. It forms the subject of much of the evidence given before the Commission, and the greatest diversity of opinion exists upon it.

It has been the subject of repeated legislation in the United States, and in the celebrated "Granger" agitation in the West uniformity of mileage rates was imposed upon the railways by state legislation. Experience, however, tended to prove that the effect of such laws was injurious, leading to their early repeal or modification.

The subject has also received the greatest attention in connection with the Interstate Commerce Bill, and the principle of uniformity of mileage rates was finally sanctioned by the Act, reserving, however, to the Railway Commission power to suspend its operation on sufficient reason being shown. This power has since been exercised by the Commission in certain cases, and it is not now imperative on all railways to establish uniform mileage rates under like conditions and in the same direction for long and short distances.

The reasons given for the suspension of this section of the Interstate Commerce Act have received the greatest attention by the Commission. They can not lose sight of the fact that where conveyance by water comes into competition with railways, it is not in the public interest to compel railways to transport freight at uniform mileage rates, as it involves the establishment either of such low rates as render the local traffic unremunerative, or such high rates as leave the through traffic between the competitive points wholly at the mercy of the carriers by water. The public interest will be best served by permitting rates between such competitive points to be determined by the respective carriers.

It is, moreover, manifest that the through traffic of Canada by railway, which the Commission regard as of the utmost importance, can not possibly be carried on except at such rates, in combination sometimes with navigation, but more generally with American railways, as would be utterly inadequate if applied to ordinary local traffic.

While stating their opinion that the competition by water and rail from almost every important business center in Canada forbids the adoption of uniform mileage rates, the Commission have not lost sight of the alleged unfair treatment of certain localities in Canada itself by railways. They believe, however, that such cases can be considered and relief obtained under the powers which they hereafter recommend should be granted.

They therefore recommend: "That it is inexpedient to adopt a rule of equal mileage rates, irrespective of distance and cost of service."

* * * * *

Discrimination.

Individuals.—Undoubtedly one of the most frequent causes of complaint against all railways, not only in Canada but also in Great Britain and the United States, is that of dis-

crimination of an unjust or partial character between individuals under like conditions. It interferes most improperly with legitimate trade, and should certainly be prohibited by law. It can not be the desire of the principal railway officers or managers to permit such favoritism, but it is generally the act of local agents, especially such as are paid by commissions, and influenced either by personal favoritism or desire of gain. The practice should be peremptorily ended and such penalties imposed as will secure the attention of the railway managers to the strict observance of the law by their servants and employes.

The Commission recommend: "That discrimination of an unjust or partial character between individuals under like conditions be effectively prohibited and any infraction of such law punished by severe penalties."

Localities.—Much complaint has also been made of discriminations in favor of one locality over another. These cases differ widely from the preceding, and are found generally to arise from the presence of competition, either by water or by rail. They seem to be inseparable from any railway system and each case requires special investigation. Where like conditions exist, such discriminations should be prohibited and under the pressure of being exposed to penalty the railway managers must exercise the power of determining the respective rates of transport.

The Commission believe that these cases will generally be amicably arranged if the following recommendation be adopted, and the difficulty will be met which has been referred to under the head of Long and Short Haul—Uniform Mileage Rates: "That discrimination of an unjust or partial character between different localities under like conditions be effectively prohibited, and any infraction of such law punished by penalties, after due cognizance having been taken of the effect of water and rail competition."

Special Rates.

The objection to secret special rates, rebates, drawbacks, and all concessions to shippers of a discriminative character are fully set forth, not only in the testimony given in Canada, but also in the great body of evidence furnished from the United States. The practice is not only unfair to traders engaged in the same business, but has been shown to be opposed to the best interests of the railways themselves, and should certainly be prohibited under penalties for infraction of the law.

The Commission do not, however, desire to object to such special rates or concessions where made to all parties alike, and their existence made public. It is in the interests of commerce, as shown in treating of discriminations, that railway managers should be permitted to grant special relaxation of their tariff rates in certain cases; but such concessions should be alike available to all.

It is believed the case will be met by the adoption of the following recommendations: "That all secret special rates, rebates, drawbacks, or concessions to shippers be declared illegal and made subject to penalties, and that every special rate be made public on demand of any inquires"

Free Passes.

The practice of granting free passes is shown, by the evidence obtained from the United States, to be in many respects equivalent to "discrimination," and therefore objectionable. Its abolition is clearly in the interests of the railway companies, and it certainly can not be claimed that the public, under any circumstances, are entitled to free transportation.

Under the Interstate Commerce Law free passes have been abolished, and it is understood the change has given much satisfaction and been beneficial to the railways. It is true that the law in question reserves the right of railway companies to exchange "passes," which is clearly unobjectionable as simply as an exchange of service. In Canada, where the Government as representing the public are the owners of one important railway, it seems proper that they should at all times be entitled to pass over and examine their railway, but the Commission consider that the privilege of obtaining "passes" from other railways should be strictly confined to the actual officials of the Dominion Railway.

They therefore recommend: "That the grant of free passes by railway companies be abolished, saving the reservations contained in the United States Interstate Commerce Act, and excepting members of the Federal or Provincial Government on Federal or Provincial Railways respectively."

Uniform Railway Reports.

It is evidently desirable, in the public interest, that the several railway companies should render their reports to the Government in the same form and for the same periods.

It is recommended: "That the railway companies be enjoined to furnish their several reports to the Government as required by law, in a uniform shape and for the same periods."

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Formation of Tribunal.

In considering the important question of the character and composition of a tribunal to give effect to the various recommendations made in their report, the Commission have felt themselves limited to the selection of one of two courses:

First. The creation of a Commission, independent of government control, with practically irresponsible authority;

Second. The maintenance of the railway committee of the privy council with such extension of its powers and requisite departmental machinery, to secure the proper execution of the law.

In considering the subject the Commission have the advantage of knowing the scope and operation of independent railway commissions in Great Britain and the United States. But in the former case they are met by the difficulty that the present Law requires important amendments which have not yet been considered, and which are known to excite much opposition and criticism. In the several States of the American Union very great diversity exists in the powers and character of these tribunals, for each of which methods peculiar advantages are claimed. It may be unhesitatingly stated that the Commission are unable to accept any of

these commissions as the model upon which the Canadian tribunal, should be framed. Apart, moreover, from the intrinsic defects that are found in them all, it is evident that they are unsuited to the condition under which the commerce of Canada is carried on, through their scope being restricted within too limited an area, and unfitted to deal with the foreign through traffic upon which the prosperity of Canada is so largely dependent.

The Interstate Commerce Act and the Commission established to give it effect are much more analogous to the circumstances of Canada, and the Commission would have felt their labors greatly lightened if the operation of this Law could be regarded as final and settled. It deals with questions precisely similar to our own, and its working has already proved of the greatest value in the present inquiry. But the Interstate Railway Commission has, in its initiatory judgments, found it necessary to partially suspend the operation of the most important section (4th section) of the Act, and has already indicated other important particulars in which it desires amendments to the Law. It has, however, confessedly been already productive of great good to the public and also to the railways themselves, whose apprehensions of injury from it have been in a great measure dispelled.

With respect to the machinery through which the Interstate Commerce Act is expected to work, your Commission have grave doubts whether it will be found applicable to the vast extent of territory over which it has jurisdiction. They are inclined to believe that in requiring the presence of even one Commissioner at all *enquêtes* it will be found impossible to meet the demands upon the Commission, and the necessity of making all original applications to the central authority at Washington will, they fear, lead to serious delay, in the case of such individual complaints as it is proposed to refer to the Canadian tribunal, amounts practically to a denial of justice.

Whether these opinions be justified by experience is, however, immaterial, as the Commission can not recommend the adoption of any system which is now on its trial and which, it is conceded, requires substantial amendment, none of the existing commissions having sufficiently extensive powers to deal effectively with the various matters which would come under their jurisdiction. It is undoubtedly the wiser policy to benefit by the experience of others rather than by our own.

The Commission desire to provide by immediate legislation for admitted evils, with the least possible disturbance to existing methods, only accepting such conclusions as have been tested and proved to be beneficial. They wish to avoid the hasty creation of any system of which experience in the United States, England, and Canada may soon require serious modification. They think it better to test the working of the proposed Law by temporary provision for its execution, and after full experience of the results of the Interstate Railway Commission and of our own legislation to consider whether such system should be made permanent.

Other considerations also weigh with your Commission in their conclusions. The political

constitution of Canada recognizes direct ministerial responsibility to Parliament, much more than in the United States, and therefore, as a railway tribunal is necessarily tentative, it seems to them undesirable to remove its operation, in its inception beyond the direct criticism and control of Parliament.

At the same time the Commission admit that serious objection may be taken to the selection of the railway committee of privy council as the general railway tribunal. The members can not leave their duties at Ottawa, and must therefore delegate to subordinates much very important work, though the Interstate Commission is open to the same objection.

They hold their office by a political tenure and are liable to sudden change, whereby the value of their experience is lost. They can scarcely be regarded by the public as so absolutely removed from personal or political bias as independent members of a permanent tribunal. They can not possibly give their exclusive attention to their railway duties, and in taking upon themselves the duties which would necessarily devolve upon them they would in fact be performing judicial functions. These and other reasons occur against the selection of the railway committee of the privy council as the railway tribunal; but it is believed they are outweighed by the considerations of general and ultimate advantage, through proceeding with extreme caution in dealing with subjects affecting the entire commerce and progress of the country; while a material practical advantage is secured by the fact that any required changes in the Law or in its application are secured through identifying the Government with its execution.

After the fullest discussion and most deliberate consideration the Commission desires to report as their final recommendation—

"That the powers of the railway committee of the privy council be enlarged so far as to enable them to administer the proposed Law, providing—

"First. That the committee shall itself hear and determine all disputes arising between railway companies, with power to appoint proper officers to take evidence locally.

"Second. That the committee shall itself decide all questions of classification of freight tariff and uniform railway returns.

"Third. That the committee shall have power to appoint officers in each Province, to hear and determine all complaints against railway companies, subject to power of reference by such officer of any point to the committee, and also subject to the right of appeal to the committee itself."

ENGLISH LEGISLATION.

EXTRACT FROM THE RAILWAYS CLAUSES CONSOLIDATION ACT. (1845.)

SEC. 90. And whereas it is expedient that the company should be enabled to vary the tolls upon the railways so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favoring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the
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hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any particular portions of the railway, as they shall think fit; provided that all such tolls be at all times charged equally to all persons, and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favor of or against any particular company or person travelling upon or using the railway.

AN ACT FOR THE BETTER REGULATION OF THE TRAFFIC ON RAILWAYS AND CANALS.

(JULY 10, 1854.)

[See 1 Interstate Commerce Reports, p. 844.]

EXTRACT FROM THE REGULATION OF RAILWAYS ACT (1868).

[See 1 Interstate Commerce Reports, p. 846.]

EXTRACTS FROM THE REGULATION OF RAILWAYS ACT, 1871.

Railway Statistics.

9. Every company shall annually prepare returns of their capital, traffic, and working expenditure for the last preceding financial year of the company in accordance with the forms contained in schedule one to this Act, and a copy of each return, signed by the chairman or deputy chairman of the directors of the company, and by the officer of the company responsible for the correctness of each return, or any part thereof, shall be forwarded by the company to the board of trade at the times following (that is to say):

If the company is an incorporated company, within fourteen days after the first ordinary half-yearly meeting of the company held in each year;

If the company is not an incorporated company, or fails to hold half-yearly meetings, not later than the thirty-first day of March in each year.

Any company which fails to forward the said return in accordance with the provisions of this section shall be liable to a penalty not exceeding five pounds for every day during which such default continues.

The board of trade, with the consent of a company, may alter the said forms as regards such company for the purpose of adapting them to the circumstances of such company or of better carrying into effect the objects of this section.

10. If any return which is required by this Act is false in any particular to the knowledge of any person who signs the same, such person shall be liable on conviction thereof on indictment to fine and imprisonment, or on summary conviction thereof to a penalty not exceeding fifty pounds.

THE REGULATION OF RAILWAYS ACT, 1873.

[See 1 Interstate Commerce Reports, p. 846.]

THE ENGLISH ACT OF AUGUST 10, 1888 (51 AND 52 VICTORIA, CHAPTER 25).

An Act for the better regulation of railway and canal traffic, and for other purposes.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Railway and Canal Traffic Act, 1888.

This Act shall be construed as one with the Regulation of Railways Act, 1873, and the Acts amending it; and those Acts and this Act may be cited together as the Railway and Canal Traffic Acts, 1873 and 1888.

PART I.—COURT AND PROCEDURE OF RAILWAY AND CANAL COMMISSIONERS.

Establishment of Railway and Canal Commissions.

2. On the expiration of the provisions of the Regulation of Railways Act, 1873, with respect to the commissioners therein mentioned, there shall be established a new commission, styled the railway and canal commission (in this Act referred to as the commissioners), and consisting of two appointed and three *ex officio* commissioners; and such commission shall be a court of record, and have an official seal, which shall be judicially noticed. The commissioners may act notwithstanding any vacancy in their body.

3. (1) The two appointed commissioners may be appointed by Her Majesty at any time after the passing of this Act and from time to time as vacancies occur.

(2) They shall be appointed on the recommendation of the president of the board of trade, and one of them shall be of experience in railway business.

(3) Section 5 of the Regulation of Railways Act, 1873, shall apply to each appointed commissioner.

(4) There shall be paid to each appointed commissioner such salary, not exceeding £3,000 a year, as the president of the board of trade may, with the concurrence of the treasury, determine.

(5) It shall be lawful for the Lord Chancellor, if he think fit, to remove for inability or misbehavior any appointed commissioner.

4. (1) Of the three *ex officio* commissioners of the railway and canal commission one shall be nominated for England, one for Scotland, and one for Ireland; and an *ex officio* commissioner shall not be required to attend out of the part of the United Kingdom for which he is nominated.

(2) The *ex officio* commissioner in each case shall be such judge of a superior court as (a) in England the Lord Chancellor, and (b) in Scotland the Lord President of the Court of Sessions, and (c) in Ireland the Lord Chancellor of Ireland may from time to time, by writing under his hand, assign, and such assignment shall be made for a period of not less than five years.

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(3) For the purpose of the attendance of the *ex officio* commissioners regulations shall be made from time to time by the Lord Chancellor, the Lord President of the Court of Session, and the Lord Chancellor of Ireland respectively, in communication with the *ex officio* commissioners for England, Scotland, or Ireland, as the case may be, as to the arrangements for securing their attendance, as to the times and place of sitting in each case, and otherwise for the convenient and speedy hearing thereof.

5. (1) Subject to the provisions of this Act, and to general rules under this Act, the commissioners may hold sittings in any part of the United Kingdom, in such place or places as may be most convenient for the determination of proceedings before them.

(2) The central office of the commissioners shall be in London, and the commissioners, when holding a public sitting in London, shall hold the same at the royal courts of justice, or at such other place as the Lord Chancellor may from time to time appoint.

(3) Not less than three commissioners shall attend at the hearing of any case, and the *ex officio* commissioner shall preside, and his opinion upon any question which in the opinion of the commissioners is a question of law shall prevail.

(4) Save as aforesaid, section 27 of the Regulation of Railways Act, 1873, shall apply, and any act may be done by any two commissioners.

(5) Every judge who may with his consent be assigned to hold the office of *ex officio* commissioner shall attend to hear any cases before the commission, which as *ex officio* commissioner he is required to hear, when and as soon as the cases are ready to be heard, or as soon thereafter as reasonably may be; and any such judge shall be required to perform any of the other duties of a judge of a superior court only when his attendance on the commission is not required.

(6) If and when any judge who may be assigned to hold the office of *ex officio* commissioner is temporarily unable to attend, the Lord Chancellor in England, the Lord President of the Court of Session in Scotland, and the Lord Chancellor in Ireland, may respectively nominate any judge of a superior court to sit as *ex officio* commissioner in place of the judge who is so temporarily unable to attend as aforesaid; and the judge so nominated shall, for the purpose of any case which he may hear, be an *ex officio* commissioner.

(7) If the president of the board of trade is satisfied either of the inability of an appointed commissioner to attend at the hearing of any case or of there being a vacancy in the office, and in either case of the necessity of a speedy hearing of the case, he may appoint a temporary commissioner to hear such case; and such commissioner, for all purposes connected with such case, shall, until the final determination thereof, have the same jurisdiction and powers as if he were an appointed commissioner. A temporary commissioner shall be paid such sum by the commissioner so unable to sit, or, if the office is vacant, out of the salary of the office, as the president of the board of trade may assign.

6. On an address from both Houses of Par-

liament representing that, regard being had to the duties imposed by this Act on the *ex officio* commissioners, the state of business of the High Court in England requires the appointment of an additional judge of that court, it shall be lawful for Her Majesty to appoint an additional judge of such court, and from time to time, on a like address but not otherwise, to fill any vacancy in such judgeship; and the law relating to the appointment and qualification of the judges of such superior court, to their duties and tenure of office, to their precedence, salary, and pension, and otherwise, shall apply to any judge so appointed under this section; and a judge so appointed under this section shall be attached to such division or branch of the court as Her Majesty may direct, subject to such power of transfer as may exist in the case of any other judge of such division or branch.

7. (1) Any of the following authorities, that is to say, (a) any of the following local authorities, namely, any harbor board, or conservancy authority, the common council of the City of London, any council of a city or borough, any representative county body which may be created by an Act passed in the present or any future session of Parliament, any justices in quarter sessions assembled, the commissioners of supply of any county in Scotland, the metropolitan board of works, or any urban sanitary authority not being a council as aforesaid, or any rural sanitary authority; or (b) any such association of traders or freighters, or chamber of commerce or agriculture as may obtain a certificate from the board of trade that it is, in the opinion of the board of trade, a proper body to make such complaint, may make to the commissioners any complaint which the commissioners have jurisdiction to determine, and may do so without proof that such authority is aggrieved by the matter complained of; and any of such authorities may appear in opposition to any complaint which the commissioners have jurisdiction to determine in any case where such authority, or the persons represented by them, appear to the commissioners to be likely to be affected by any determination of the commissioners upon such complaint.

(2) The board of trade may, if they think fit, require, as a condition of giving a certificate under this section, that security be given in such manner and to such amount as they think necessary, for any costs which the complainants may be ordered to pay or bear.

(3) Any certificate granted under this section shall, unless withdrawn, be in force for twelve months from the date on which it was given.

Jurisdiction.

8. There shall be transferred to and vested in the commissioners all the jurisdiction and powers which at the commencement of this Act were vested in, or capable of being exercised by, the railway commissioners, whether under the Regulation of Railways Act, 1873, or any other Act, or otherwise, and any reference to the railway commissioners in the Regulation of Railways Act, 1873, or in any other Act, or in any document, shall, from and after the commencement of this Act, be construed to refer to the railway and canal commission established by this Act.

9. Where any enactment in a special Act (a) contains provisions relating to traffic facilities, undue preference, or other matters mentioned in section two of the Railway and Canal Traffic Act, 1854, or (b) requires a company to which this part of this Act applies to provide any station, road, or other similar work for public accommodation, or (c) otherwise imposes on a company to which this part of this Act applies any obligation in favor of the public or any individual, or where any Act contains provisions relating to private branch railways or private sidings, the commissioners shall have the like jurisdiction to hear and determine a complaint of a contravention of the enactment as the commissioners have to hear and determine a complaint of a contravention of section two of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts.

10. Where any question or dispute arises, involving the legality of any toll, rate, or charge, or portion of a toll, rate, or charge, charged or sought to be charged for merchandise traffic by a company to which this part of this Act applies, the commissioners shall have jurisdiction to hear and determine the same, and to enforce payment of such toll, rate, or charge, or so much thereof as the commissioners decide to be legal.

11. Nothing in any agreement, whether made before or after the passing of this Act, which has not been confirmed by Act or by the board of trade, or by the commissioners under the Regulation of Railways Act, 1873, or this Act, shall render a company to which this part of this Act applies unable to afford, or shall authorize such company to refuse, such reasonable facilities for traffic as may in the opinion of the commissioners be required in the interest of the public, or shall prevent the commissioners from making or enforcing any order with respect to such facilities.

12. Where the commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which, but for this Act, such party would have had by reason of the matter of complaint.

Provided that such damages shall not be awarded unless complaint has been made to the commissioners within one year from the discovery by the party aggrieved of the matter complained of.

The commissioners may ascertain the amount of such damages either by trial before themselves, or by directing an inquiry to be taken before one or more of themselves or before some officer of their court.

13. In cases of complaint of undue preference no damages shall be awarded if the commissioners shall find that the rates complained of have, for the period during which such rates have been in operation, been duly published in the rate books of the railway company kept at their stations in accordance with section 14 of the Regulation of Railways Act, 1873, as amended by this Act, unless and until the party complaining shall have given written notice to

the railway company requiring them to abstain from or remedy the matter of complaint, and the railway company shall have failed, within a reasonable time to comply with such requirements in such a manner as the commissioners shall think reasonable.

14. The commissioners may order two or more companies to which this part of this Act applies to carry into effect an order of the commissioners, and to make mutual arrangements for that purpose, and may further order the companies, or in case of difference, any of them, to submit to the commissioners for approval a scheme for carrying into effect the order; and when the commissioners have finally approved the scheme, they may order each of the companies to do all that is necessary on the part and within the power of such company to carry into effect the scheme, and may determine the proportions in which the respective companies are to defray the expense of so doing, and may for the above purposes make, if they think fit, separate orders on any one or more of such companies.

Provided, That nothing in this section shall authorize the commissioners to require two companies to do anything which they would not have jurisdiction to require to be done if such two companies were a single company.

15. For the purposes of section 8 of the Regulation of Railways Act, 1873, and any other enactment relating to the reference of the railway commission of any difference between companies which under the provisions of any general or special Act is required or authorized to be referred to arbitration, the provisions of any agreement confirmed or authorized by any such Act shall be deemed to be provisions of such Act.

16. (1) Where the board of trade or the commissioners, in the exercise of any power given by any general or special Act, on application, order a company, to which this part of this Act applies, to provide a bridge, subway, or approach, or any work of a similar character, the board of trade or the commissioners, as the case may be, may require as a condition of making the order that an agreement to pay the whole or a portion of the expenses of complying with the order shall be entered into by the applicants or some of them, or such other persons as the board of trade or commissioners think fit; and any of the following local authorities, namely, any sanitary authority, highway board, surveyor of highways acting with the consent of the vestry of his parish, or any other authority having power to levy rates, shall have power, if such authority think fit, to enter into any such agreement as is sanctioned by the board of trade or commissioners for the purpose of the order.

(2) In such case any question respecting the persons by whom or the proportions in which the expenses of complying with the order are to be defrayed may, on the application of any party to the application, or on a certificate of the board of trade, be determined by the commissioners.

(3) In this section the expression "parish" shall have the same meaning as the same expression has in the Acts relating to highways; and the expression "the consent of the vestry of his parish" shall, in any place where there

is no vestry meeting, mean the consent of a meeting of inhabitants contributing to the highway rates, provided that the same notice shall have been given of such a meeting as would be required by law for the assembling of a meeting in vestry.

Appeals.

17. (1) No appeal shall lie from the commissioners upon a question of fact, or upon any question regarding the *locus standi* of a complainant.

(2) Save as otherwise provided by this Act, an appeal shall lie from the commissioners to a superior court of appeal.

(3) An appeal shall not be brought except in conformity with such rules of court as may from time to time be made in relation to such appeals by the authority having power to make rules of court for the superior court of appeal.

(4) On the hearing of an appeal the court of appeal may draw all such inferences as are not inconsistent with the facts expressly found, and are necessary for determining the question of law, and shall have all such powers for that purpose as if the appeal were an appeal from a judgment of a superior court, and may make any order which the commissioners could have made, and also any such further or other order as may be just, and the costs of and incidental to an appeal shall be in the discretion of the court of appeal; but no commissioner shall be liable to any costs by reason or in respect of any appeal.

(5) The decision of the superior court of appeal shall be final; *Provided*, That where there has been a difference of opinion between any two of such superior courts of appeal, any superior court of appeal in which a matter affected by such difference of opinion is pending may give leave to appeal to the House of Lords on such terms as to costs as such court shall determine.

(6) Save as provided by this Act, an order or proceeding of the commissioners shall not be questioned or reviewed, and shall not be restrained or removed by prohibition, injunction, *certiorari*, or otherwise, either at the instance of the Crown or otherwise.

Supplemental.

18. (1) For the purposes of this Act the commissioners shall have full jurisdiction to hear and determine all matters whether of law or of fact, and shall as respects the attendance and examination of witnesses, the production and inspection of documents, the enforcement of their orders, the entry on and inspection of property, and other matters necessary or proper for the due exercise of their jurisdiction under this Act, or otherwise for carrying this Act into effect, have all such powers, rights, and privileges as are vested in a superior court; *Provided*, That no person shall be punished for contempt of court, except with the consent of an *ex officio* commissioner.

(2) The commissioners may review and rescind or vary any order made by them; but, save as is by this Act provided, every decision or order of the commissioners shall be final.

19. The costs of and incidental to every proceeding before the commissioners shall be in the discretion of the commissioners, who may

order by whom and to whom the same are to be paid, and by whom the same are to be taxed and allowed.

20. (1) The commissioners may from time to time, with the approval of the Lord Chancellor and the president of the board of trade, make, rescind, and vary general rules for their procedure and practice under this Act, and generally for carrying into effect this part of this Act.

(2) All rules made under this section shall be laid before Parliament within three weeks after they are made, if Parliament is then sitting, and if Parliament is not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if they were enacted by this Act.

21. (1) There shall be attached to the railway and canal commission such officers, clerks, and messengers as the Lord Chancellor, with the consent of the treasury as to number, from time to time appoints.

(2) There shall be paid to each of such officers, clerks, and messengers, such salaries as the treasury from time to time determine.

22. The salaries of the appointed commissioners, and of all officers, clerks, and messengers attached to the railway and canal commission, and all the expenses of the said commission of and incidental to the carrying out of this Act, shall be paid out of moneys to be provided by Parliament.

23. This part of this Act shall apply to any railway company, and to any canal company, and to any railway and canal company.

PART II.—TRAFFIC.

24. (1) Notwithstanding any provision in any general or special Act, every railway company shall submit to the board of trade a revised classification of merchandise traffic, and a revised schedule of maximum rates and charges applicable thereto, proposed to be charged by such railway company, and shall fully state in such classification and schedule the nature and amounts of all terminal charges proposed to be authorized in respect of each class of traffic, and the circumstances under which such terminal charges are proposed to be made. In the determination of the terminal charges of any railway company regard shall be had only to the expenditure reasonably necessary to provide the accommodation in respect of which such charges are made, irrespective of the outlay which may have been actually incurred by the railway company in providing that accommodation.

(2) The classification and schedule shall be submitted within six months from the passing of this Act, or such further time as the board of trade may, in any particular case, permit, and shall be published in such manner as the board of trade may direct.

(3) The board of trade shall consider the classification and schedule, and any objections thereto, which may be lodged with them on or before the prescribed time and in the prescribed manner, and shall communicate with the railway company and the persons (if any) who have lodged objections, for the purpose of arranging the differences which may have arisen.

(4) If, after hearing all parties whom the

board of trade consider to be entitled to be heard before them respecting the classification and schedule, the board of trade come to an agreement with the railway company as to the classification and schedule, they shall embody the agreed classification and schedule in a provisional order, and shall make a report thereon, to be submitted to Parliament, containing such observations as they think fit in relation to the agreed classification and schedule.

(5) When any agreed classification and schedule have been embodied in a provisional order, the board of trade, as soon as they conveniently can after the making of the provisional order (of which the railway company shall be deemed to be the promoters), shall procure a bill to be introduced into either House of Parliament for an Act to confirm the provisional order, which shall be set out at length in the schedule to the bill.

(6) In any case in which a railway company fails within the time mentioned in this section to submit a classification and schedule to the board of trade, and also in every case in which a railway company has submitted to the board of trade a classification and schedule, and after hearing all parties whom the board of trade consider to be entitled to be heard before them, the board of trade are unable to come to an agreement with the railway company as to the railway company's classification and schedule, the board of trade shall determine the classification of traffic which, in the opinion of the board of trade, ought to be adopted by the railway company, and the schedule of maximum rates and charges, including all terminal charges proposed to be authorized applicable to such classification which would, in the opinion of the board of trade, be just and reasonable, and shall make a report, to be submitted to Parliament, containing such observations as they may think fit in relation to the said classification and schedule, and calling attention to the points therein on which differences which have arisen have not been arranged.

(7) After the commencement of the session of Parliament next after that in which the said report of the board of trade has been submitted to Parliament, the railway company may apply to the board of trade to submit to Parliament the question of the classification and schedule which ought to be adopted by the railway company, and the board of trade shall on such application, and in any case may, embody in a provisional order such classification and schedule as in the opinion of the board of trade ought to be adopted by the railway company, and procure a bill to be introduced into either House of Parliament for an Act to confirm the provisional order, which shall be set out at length in the schedule to the bill.

(8) If, while any bill to confirm a provisional order made by the board of trade under this section is pending in either House of Parliament, a petition is presented against the bill or any classification and schedule comprised therein, the bill, so far as it relates to the matter petitioned against, shall be referred to a select committee, or if the two Houses of Parliament think fit so to order, to a joint committee of such houses, and the petitioner shall be allowed to appear and oppose as in the case of a private bill.

(9) In preparing, revising, and settling the classifications and schedules of rates and charges the board of trade may consult and employ such skilled persons as they may deem necessary or desirable; and they may pay to such persons such remuneration as they may think fit and as the treasury may approve.

(10) The Act of Parliament confirming any provisional order made under this section shall be a public general Act, and the rates and charges mentioned in a provisional order as confirmed by such Act shall, from and after the Act coming into operation, be the rates and charges which the railway company shall be entitled to charge and make.

(11) At any time after the confirmation of any provisional order under this section any railway company may, and any person, upon giving not less than twenty-one days' notice to the railway company, may apply in the prescribed manner to the board of trade to amend any classification and schedule by adding thereto any articles, matters, or things; and the board of trade may hear and determine such application and classify and deal with the articles, matters, or things referred to therein in such manner as the board of trade shall think right. Every determination of the board of trade under this subsection shall forthwith be published in the London Gazette, and shall take effect as from the date of the publication thereof.

(12) Nothing in this section shall apply to any remuneration payable by the postmaster-general to any railway company for the conveyance of mails, letter bags, or parcels under any general or special Act relating to the conveyance of mails, or under the Post-Office (parcels) Act, 1832.

(13) Nothing in this section shall apply to any remuneration payable by the Secretary of State for War to any railway company for the conveyance of war office stores under the powers conferred by the Cheap Trains Act, 1883.

25. Whereas by section 2 of the Railway and Canal Traffic Act, 1854, it is enacted that every railway company and canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; and that no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, or shall subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and that every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway, or canal, or railway and canal communication, or which have the terminus station or wharf of the one near the terminus station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways or canals all the traffic arriving by the
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other, without any unreasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may by means of the railways and canals of the several companies be at all times afforded to the public in that behalf.

And whereas it is expedient to explain and amend the said enactment:

Be it therefore enacted, That subject as herein-after mentioned, the said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding, and delivering by every railway company and canal company and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company at through rates, tolls, or fares (in this Act referred to as through rates); and also the due and reasonable receiving, forwarding, and delivering, by every railway company and canal company and railway and canal company, at the request of any person interested in through traffic, of such traffic at through rates: *Provided*, That no application shall be made to the commissioners by such person until he has made a complaint to the board of trade under the provisions of this Act as to complaints to the board of trade of unreasonable charges, and the board of trade have heard the complaint in the manner herein provided.

Provided as follows:

(1) The company or person requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding company, stating both its amount and the route by which the traffic is proposed to be forwarded; and when a company gives such notice it shall also state the apportionment of the through rate. The proposed through rate may be per truck or per ton.

(2) Each forwarding company shall, within ten days, or such longer period as the commissioners may from time to time by general order prescribe, after the receipt of such notice, by written notice inform the company or persons requiring the traffic to be forwarded, whether they agree to the rate and route; and if they object to either, the grounds of the objection.

(3) If at the expiration of the prescribed period no such objection has been sent by any forwarding company, the rate shall come into operation at such expiration.

(4) If an objection to the rate or route has been sent within the prescribed period, the matter shall be referred to the commissioners for their decision.

(5) If an objection be made to the granting of the rate or to the route, the commissioners shall consider whether the granting of a rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly, or fix such other rate as may seem to the commissioners just and reasonable.

(6) Where, upon the application of a person requiring traffic to be forwarded, a through rate is agreed to by the forwarding companies,

or is made by order of the commissioners, the apportionment of such through rate, if not agreed upon between the forwarding companies, shall be determined by the commissioners.

(7) If the objection be only to the apportionment of the rate, the rate shall come into operation at the expiration of the prescribed period, but the decision of the commissioners, as to its apportionment, shall be retrospective; in any other case the operation of the rate shall be suspended until the decision is given.

(8) The commissioners, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or wording of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof.

(9) It shall not be lawful for the commissioners in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route.

Where a railway company or canal company use, maintain, or work, or are party to an arrangement for using, maintaining, or working, steam vessels for the purpose of carrying on a communication between any towns or ports, the provisions of this section shall extend to such steam vessels, and to the traffic carried thereby.

When any company, upon written notice being given as aforesaid, refuses or neglects without reason to agree to the proposed through rates, or to the route, or to the apportionment, the commissioners, if an order is made by them upon an application for through rates, may order the respondent company or companies to pay such costs to the applicants as they think fit.

26. Subject to the provisions in the last preceding section contained, the commissioners shall have full power to decide that any proposed through rate is just and reasonable, notwithstanding that a less amount may be allotted to any forwarding company out of such through rate than the maximum rate such company is entitled to charge, and to allow and apportion such through rate accordingly.

27. (1) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders, or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

(2) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable in addition to any other considerations af-

fecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant; provided that no railway company shall make, nor shall the court or the commissioners sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise in respect of the same or similar services.

(3) The court or the commissioners shall have power to direct that no higher charge shall be made to any person for services in respect of merchandise carried over a less distance than is made to any other person for similar services in respect of the like description and quantity of merchandise carried over a greater distance on the same line of railway.

28. The provisions of section 2 of the Railway and Canal Traffic Act, 1854, and of section 14 of the Regulation of Railways Act, 1873, and of any enactments amending and extending those enactments, shall apply to traffic by sea in any vessels belonging to or chartered or worked by any railway company, or in which any railway company procures merchandise to be carried, in the same manner and to the like extent as they apply to the land traffic of a railway company.

29. (1) Notwithstanding any provision in any general or special Act, it shall be lawful for any railway company, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from any place on their railway, to group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and to charge a uniform rate or uniform rates of carriage, for merchandise to and from all places comprised in the group from and to any point of destination or departure.

(2) Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference.

(3) Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section 2 of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the commissioners, and the commissioners may, after hearing the parties interested and any of the authorities mentioned in section 7 of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference. Any persons aggrieved, and any of the authorities mentioned in section 7 of this Act, may, at any time after the making of any order under this section, apply to the commissioners to vary or rescind the order, and the commissioners, after hearing all parties who are interested, may make an order accordingly.

30. Any port or harbor authority or dock company which shall have reason to believe that any railway company is by its rates or

otherwise placing their port, harbor, or dock at an undue disadvantage as compared with any other port, harbor, or dock to or from which traffic is or may be carried by means of the lines of the said railway company, either alone or in conjunction with those of other railway companies, may make complaint thereof to the commissioners, who shall have the like jurisdiction to hear and determine the subject matter of such complaint as they have to hear and determine a complaint of a contravention of section 2 of the Railway and Canal Traffic Act, 1854, as amended by subsequent Acts.

31. (1) Whenever any person receiving or sending or desiring to send goods by any railway is of opinion that the railway company is charging him an unfair or an unreasonable rate of charge, or is in any other respect treating him in an oppressive or unreasonable manner, such person may complain to the board of trade.

(2) The board of trade, if they think that there is reasonable ground for the complaint, may thereupon call upon the railway company for an explanation, and endeavor to settle amicably the differences between the complainant and the railway company.

(3) For the purposes aforesaid, the board of trade may appoint either one of their own officers or any other competent person to communicate with the complainant and the railway company, and to receive and consider such explanations and communications as may be made in reference to the complaint; and the board of trade may pay to such last mentioned person such remuneration as they may think fit, and as may be approved by the treasury.

(4) The board of trade shall from time to time submit to Parliament reports of the complaints made to them under the provisions of this section, and the results of the proceedings taken in relation to such complaints together with such observations thereon as the board of trade shall think fit.

(5) A complaint under this section may be made to the board of trade by any of the authorities mentioned in section 7 of this Act, in any case in which, in the opinion of any of such authorities, they or any traders or persons in their district are being charged unfair or unreasonable rates by a railway company; and all the provisions of this section shall apply to a complaint so made as if the same had been made by a person entitled to make a complaint under this section.

32. (1) The returns required of a railway company under section 9 of the Railways Regulation Act, 1871, shall include such statements as the board of trade may from time to time prescribe, and the forms referred to in that section may from time to time be altered by the board of trade in such manner as they think expedient for giving effect to this section, and the said section 9 of the Railways Regulation Act, 1871, shall apply accordingly.

(2) The board of trade may from time to time alter the times fixed by the said Act or by the Railways Regulation Act (returns of signal arrangements, workings, etc.), 1873, for the forwarding of any of the returns required by the said Act or this Act.

33. (1) The book, tables, or other docu-

ment in use for the time being containing the general classification of merchandise carried on the railway of any company, shall, during all reasonable hours, be open to the inspection of any person without the payment of any fee at every station at which merchandise is received for conveyance, or where merchandise is received at some other place than a station then at the station nearest such place; and the said book, tables, or other document as revised from time to time shall be kept on sale at the principal office of the company at a price not exceeding 1 shilling.

(2) Printed copies of the classification of merchandise traffic, and schedule of maximum tolls, rates, and charges of every railway company authorized as provided by this Act, shall be kept for sale by the railway company at such places and at such reasonable price as the board of trade may by any general or special order prescribe.

(3) The company shall within one week after application in writing made to the secretary of any railway company by any person interested in the carriage of any merchandise which has been or is intended to be carried over the railway of such company, render an account to the person so applying in which the charge made or claimed by the company for the carriage of such merchandise shall be divided; and the charge for conveyance over the railway shall be distinguished from the terminal charges (if any), and from the dock charges (if any), and if any terminal charge or dock charge is included in such account the nature and detail of the terminal expenses or dock charges in respect of which it is made shall be specified.

(4) Every railway company shall publish at every station at which merchandise is received for conveyance, or where merchandise is received at some other place than a station then at the station nearest to such place, a notice, in such form as may be from time to time prescribed by the board of trade, to the effect that such book, tables, and document touching the classification of merchandise and the rates as they are required by this section and section 13 of the Regulation of Railways Act, 1873, to keep at that station, are open to public inspection, and that information as to any charge can be obtained by application to the secretary or other officer at the address stated in such notice.

(5) Where a railway company carries merchandise partly by land and partly by sea, all the books, tables, and documents, touching the rates of charge of the railway company, which are kept by the railway company at any port in the United Kingdom used by the vessels which carry the sea traffic of the railway company, shall, besides containing all the rates charged for the sea traffic, state what proportion of any through rate is appropriated to conveyance by sea, distinguishing such proportion from that which is appropriated to the conveyance by land on either side of the sea.

(6) Where a railway company intend to make any increase in the tolls, rates, or charges published in the books required to be kept by the company for public inspection, under section 14 of the Regulation of Railways Act, 1873, or this Act, they shall give by publication in such manner as the board of trade may prescribe at

least fourteen days' notice of such intended increase, stating in such notice the date on which the altered rate or charge is to take effect; and no such increase in the published tolls, rates, or charges of the railway company shall have effect unless and until the fourteen days' notice required under this section has been given.

(7) Any company failing to comply with the provisions of this section shall, for each offense, and in the case of a continuing offense for every day during which the offense continues, be liable, on summary conviction, to a penalty not exceeding £5.

34. When traffic is received or delivered at any place on any railway other than a station within the meaning of section 14 of the Regulation of Railways Act, 1873, the railway company on whose line such place is, shall keep at the station nearest such place a book or books showing every rate for the time being charged for the carriage of traffic other than passengers and their luggage, from such place to any place to which they book, including any rates charged under any special contract, and stating the distance from that place of every station, wharf, siding, or place to which such rate is charged.

Every such book shall, during all reasonable hours, be open to the inspection of any person without the payment of a fee.

35. (1) The board of trade may, from time to time, make, rescind, and vary rules with respect to the following matters: (a) The form and manner in which classifications and schedules under this part of this Act are to be prepared and submitted to the board of trade and to Parliament, and the publication, advertisement, and settlement (by the board of trade) of such classifications and schedules, and of provisional orders. (b) All proceedings before the board of trade under this part of this Act. (c) The fees to be paid in respect of such proceedings; and (d) any matter authorized by this Act to be prescribed.

(2) Any rules made by the board of trade in pursuance of this section shall be laid before Parliament within three weeks after they are made, if Parliament be then sitting, and if Parliament be not then sitting, within three weeks after the beginning of the then next session of Parliament, and shall be judicially noticed, and shall have effect as if they were enacted by this Act.

PART III.—CANAL

(The part of the Act relating to canals, not being of special interest to the United States, is omitted.)

PART IV.—MISCELLANEOUS.

(Below are given such sections or parts of sections as would be of particular interest outside the United Kingdom.)

47. So much of the Regulation of Railways Act, 1873, as limits the time during which that Act shall continue in force shall, save so far as it relates to the appointment of the commission, be repealed, and the said Act, save as aforesaid, shall be perpetual.

50. In any proceedings under this Act any party may appear before the commissioners.

either by himself in person or by counsel or solicitor.

55. In this Act, unless the context otherwise requires—

Terms defined by the Regulation of Railways Act, 1873, have the meanings thereby assigned to them.

The term "undue preference" includes an undue preference, or an undue or unreasonable prejudice or disadvantage, in any respect, in favor of or against any person or particular class of persons, or any particular description of traffic.

The term "terminal charges" includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes, and other similar matters, and of any services rendered thereat.

The term "merchandise" includes goods, cattle, live stock, and animals of all descriptions.

The term "trader" includes any person sending, receiving, or desiring to send merchandise by railway or canal.

The term "home," in relation to merchandise, includes the United Kingdom, the Channel Islands, and the Isle of Man.

56. This Act shall come into operation on the first day of January, one thousand eight hundred and eighty-nine, which day is in this Act referred to as the commencement of this Act: Provided that at any time after the passing of this Act any appointment and rules may be made, and other things done for the purpose of bringing this Act into operation at such commencement.

57. Subject to general rules, to be made under this Act, all proceedings which at the commencement of this Act, under the Regulation of Railways Act, 1873, and Acts amending it, or under any other Acts, are pending before the railway commissioners, shall be transferred to the railway and canal commission under this Act, and may thereupon be continued and concluded in all respects as if such proceedings had been originally instituted before that commission.

58. Every action or proceeding which might have been brought before the railroad commissioners if this Act had been in force at the time when such action or proceeding was begun and is at the commencement of this Act pending before any superior court, may, upon the application of either party, be transferred by any judge of such superior court to the railway and canal commissioners under this Act, and may thereupon be continued and concluded in all respects as if such action or proceeding had been originally instituted before that commission: Provided that no such transfer nor anything herein contained, shall vary or affect the right or liabilities of any party to such action or proceeding.

APPENDIX B.

STATEMENT OF POINTS DECIDED BY THE COMMISSION DURING THE YEAR.

[This Appendix (referred to in the Report, on page 253, *ante*.) contains statements of the points decided in the following cases respectively, in most instances in the same form as

stated in the head notes to such cases in these reports; therefore, to avoid repetition, the statements contained in this appendix are here given only when they differ from the head notes to be found in this volume or in Volume I of these reports, at the pages given below respectively.]

W. O. Harwell et al. Committee on Transportation of the Board of Trade of Opelika, Ala. v. Columbus & Western R. Co. and the Western Railway of Alabama. [1 Inters. Com. Rep. 631.]

The mere fact that a point is situated upon a navigable stream, held not sufficient of itself to justify the lesser charge for a longer haul to such a point.

Competition by water, to be sufficient to justify an exception under section 4 of the Act, should be actual, of controlling force, and in respect to traffic important in amount.

Discrimination under section 2, and prejudice and advantage under section 3, when water competition is brought forward as a justification, require the same measure of proof.

Parties affected are entitled to be notified in case a change in rates is asked. No order correcting the unjust discrimination now made, for want of proper parties and distinct allegations. Amendments allowed, and revision of tariffs recommended to defendants.

Through rates and through bills of lading given on other commodities, and to other points similarly situated, should be given to Opelika on cotton, no excuse being shown for refusing same.

William H. Council v. Western & Atlantic R. Co. [1 Inters. Com. Rep. 638.]

The Commission will not go into the question of money damages when the claim presented is in its nature an action of trespass, for the reason that defendant is constitutionally entitled to a trial by jury in such case.

The Commission is not authorized to award the counsel and attorney's fees, which may be given by a court under the eighth section of the Act.

Colored people may properly be assigned separate cars on equal terms. Such a separation of the races does not create undue prejudice or unjust preference.

Complainant, a colored man, paid the same fare as other first class passengers, and it was only fair dealing and common honesty that he should have the security and convenience of travel for which his money had been taken.

Colored people who buy first class tickets must be furnished with accommodations equally safe and comfortable with other first class passengers. The Commission finds that the car furnished complainant was only second class in comforts for travel, and that he was thereby subjected to undue prejudice and unreasonable disadvantage, in violation of the Act to Regulate Commerce.

Thomas J. Reynolds v. Western New York & Pennsylvania R. Co. [1 Inters. Com. Rep. 685.]

A road being in the hands of a receiver, a complaint was instituted against the company owning it, and in the complaint the receiver—
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ship was mentioned, but the company was stated as having come into possession of the road, and the receiver was erroneously called the president of the company. The petition was served on him, and an answer was filed by the company. Under the circumstances it was held proper to allow the petitioner to amend his complaint so as to show the existence of the receivership.

Re Express Companies. [1 Inters. Com. Rep. 677.]

The mere fact that a common carrier does other business besides the transportation of passengers or property, or performs a further service than that of transportation in respect to the articles carried, *held*, not sufficient to exclude the carrier from the operation of the Act, so far as applicable to its business.

The Act to Regulate Commerce is highly remedial in purpose and scope, and should receive a liberal construction, with the object of making the beneficial result desired by Congress operative to the greatest available extent.

The relation of express companies to interstate commerce considered, with the extent and method of their participation therein. The bringing them within the provisions of the Act found practicable, and on some accounts desirable.

Express business, conducted as a branch of the business of the railroad company, *held*, to be subject to the Act.

Express business, conducted by an independent organization, acquiring transportation rights by contract, *held*, not to be described in the Act with sufficient precision to warrant the Commission in taking jurisdiction thereof.

Riddle, Dean & Co. v. Baltimore & Ohio R. Co. [1 Inters. Com. Rep. 701.]

In deciding upon applications for the amendment of complaints the Commission acts upon the principles recognized in courts of justice.

An amendment which proposes to substitute for the original cause of complaint something quite distinct and different will not be allowed. If the party desires to make a new case he should do so by a new complaint.

Riddle, Dean & Co. v. Pittsburgh & Lake Erie R. Co. [1 Inters. Com. Rep. 688.]

Where according to its usual experience a railroad company has sufficient equipment to meet the demands upon it and to move without unreasonable delay the freights offered, but by reason of unusual circumstances for which the company is not in fault, freights have accumulated to an exceptional extent, and are then offered in extraordinary quantities, the company is not chargeable with any violation of law because of its proving unable to respond at once to all calls, and to furnish cars as rapidly as shippers demand them.

Nor does it violate any law by refusing to allow its cars to be sent off its line to distant points when the business offered on its own line keeps them fully occupied.

Where by reason of extraordinary circumstances a railroad company can not promptly meet all calls for cars, it should furnish them

ratably and fairly to all shippers, in proportion to the freights offered by them respectively, until the emergency has passed, and it is again enabled to move promptly all the freights tendered.

Upon the facts in this case the charge of unjust discrimination, as between shippers and also between different classes of traffic, is held not made out.

Thomas J. Reynolds v. Western New York & Pennsylvania R. Co. and G. Clinton Gardner, Receiver of Buffalo, New York & Philadelphia R. Co. [1 Inters. Com. Rep. 685.]

Classification of railroad ties should correspond with that of other rough lumber. Raising of same from sixth to fifth class unjustifiable.

Rates established by a common carrier in order to keep upon its line material for which the road has use, or to keep the price low for its own advantage, can not be justified.

Producer of railroad material is entitled to sell it when he wishes, in the best available market. Common carriers are forbidden to attempt to prevent this by applying disproportionate or unreasonable rates.

Special classification of lumber should be extended to railroad ties at the points in question.

B. S. Crews et al., Committee of Chamber of Commerce of Danville, Va. v. Richmond & Danville R. Co.

[Same as head notes, 1 Inters. Com. Rep. 703.]

William H. Heard v. Georgia R. Co.

[Same as head notes, 1 Inters. Com. Rep. 719.]

Boston Chamber of Commerce v. Lake Shore & Michigan Southern R. Co. New York Central & Hudson River R. Co. and Boston & Albany R. Co.

Same v. Lake Shore & Michigan Southern R. Co.

Same v. New York Central & Hudson River R. Co.

[Same as head notes, 1 Inters. Com. Rep. 754.]

James Pyle & Sons v. East Tennessee, Virginia & Georgia R. Co.

[Same as head notes, 1 Inters. Com. Rep. 767.]

W. B. Farrar & Co. v. East Tennessee, Virginia & Georgia R. Co. et al.

[Same as head notes, 1 Inters. Com. Rep. 764.]

Riddle, Dean & Co. v. Pittsburgh & Lake Erie R. Co.

[Same as head notes, 1 Inters. Com. Rep. 773.]

John D. Heck and L. J. A. Petree v. East Tennessee, Virginia & Georgia R. Co. et al.

[Same as head notes, 1 Inters. Com. Rep. 775.]

George Rice v. Louisville & Nashville R. Co. Same v. St. Louis, Iron Mountain & Southern R. Co.

Same v. Mobile & Ohio R. Co.

Same v. Cincinnati, New Orleans & Texas Pacific R. Co.

Same v. Cincinnati, New Orleans & Texas Pacific R. Co. and Alabama Great Southern R. Co.

Same v. Mississippi & Tennessee R. Co.

Same v. Newport News & Mississippi Valley R. Co. and Louisville, New Orleans & Texas R. Co.

Same v. Newport News & Mississippi Valley Co. and Illinois Central R. Co.

Same v. Illinois Central R. Co.

[Same as head notes, 1 Inters. Com. Rep. 722.]

Riddle, Dean & Co. v. New York, Lake Erie & Western R. Co. and Pittsburgh & Lake Erie R. Co. [1 Inters. Com. Rep. 787.]

Contracts between railroad companies for the advantageous transaction of business at a given point involve corresponding obligations to the public.

Regular patrons are not entitled to preference in the use of equipment of common carriers; the public must be justly and equally served.

Obligation of common carriers to transport freight arises upon tender of the same for transportation in the usual way, without any special agreement; compensation for the service is secured by a lien upon the goods except when payment in advance is made.

Selection of either goods or customers is forbidden to common carriers; less desirable traffic which is ordinarily the subject for transportation and not dangerous to handle, must be accepted upon reasonable terms, as well as that which is more desirable.

It is not a valid excuse for refusal to furnish a fair allotment of a certain class of cars that they can be more profitably employed, and can supply the wants of a larger number of shippers upon another portion of the line.

Undue preference found to have been given by defendants, to the prejudice of complainants, upon the facts stated.

Riddle, Dean & Co. v. Baltimore & Ohio R. Co.

[Same as head notes, 1 Inters. Com. Rep. 778.]

Re Tariffs of Columbus & Western Railway.

[Same as head notes, ante, 11.]

La Crosse Manufacturers & Jobbers Union v. Chicago, Milwaukee & St. Paul R. Co. et al.

[Same as head notes, ante, 9.]

In the Matter of Underbilling. [1 Inters. Com. Rep. 813.]

Underbilling, a device by which a shipper pays for the transportation of a less quantity of freight than is actually carried, and thereby obtains a reduced rate upon the gross shipment, is forbidden by the Act to Regulate Commerce.

Unjust discrimination results from underbilling, in that the favored shipper pays a less sum than is charged others for the same service.

Common carriers are bound to exact equality in their service of the public.

Organized action by carriers to prevent underbilling commended; their duty to put an end to the practice insisted upon.

Carriers should be held, and in turn should hold every agent, responsible for the shipment of goods at exact weights and correctly classified.

Commissions paid to soliciting agents when divided with shippers effect a breach of the Law.

Shippers should be required to extend to carriers the same honesty expected in other commercial transactions.

Preferences obtained by underbilling explained, and remedies suggested.

Legislation recommended imposing a moderate penalty upon shippers who willfully and fraudulently obtain reduced rates of transportation for their property.

John H. Martin et al v. Southern Pacific Co. et al. [Ante, 1.]

Mixed car loads of freight are treated in different ways under the classifications employed in different parts of the country, resulting in much confusion and annoyance to shippers, especially upon traffic passing from one section to another. The immediate adoption of a uniform and reasonable rule urgently recommended.

Classification of dried fruits and raisins, both California products, in different classes, taking different rates of freight, works an injustice to shippers. In all matters of classification clearness and simplicity should be aimed at, and irregularities and inconsistencies should be eliminated.

Rates obtained by combination, which produce a lower rate than the tariff calls for are unjust, because they enable an intelligent shipper to obtain an advantage over one who has less information, and they are illegal because they show two rates to the same point over the same line, at the same time. The tariff rates should not exceed the combination rates in any case.

Violation of the fourth section of the Act can be accomplished by differences in classification as well by differences in tariff rates.

Canadian competition at the present time does not justify a higher charge from San Francisco to Denver than to Kansas City, it having been withdrawn at the latter point, and the Canadian road now working upon an agreement as to rates with the roads in the United States at all points where it formerly competed.

The great distance of Denver from the Missouri River of itself denotes an impropriety in the charges to that point which exceed those to Kansas City.

Re Louisville & Nashville Railroad Company, 1 Inters. Com. Rep. 31 [1 Inters. Com. Rep. 278], affirmed; and in accordance with the principles there laid down, the conclusion follows that the greater charge for the shorter haul complained of in the present case can not now be justified.

The Commission prefers to permit the carriers to work out for themselves all tariff details, and accords a reasonable time for that purpose.

Euclid Martin et al., Constituting Freight Bureau of Omaha Board of Trade, v. Chicago, Burlington & Quincy R. Co. et al.
[Same as head notes, ante, 32.]

Business Men's Association of the State of Minnesota v. Chicago, St. Paul Minneapolis & Omaha R. Co.

[Same as head notes, ante, 41.]

Business Men's Association of the State of Minnesota v. Chicago & Northwestern R. Co.

[Same as head notes, ante, 48.]

William C. Scofield et al. v. Lake Shore & Michigan Southern R. Co.

[Same as head notes, ante, 67.]

Frank L. Hurlburt v. Lake Shore & Michigan Southern R. Co.

[Same as head notes, ante, 81.]

John W. S. Brady and George T. Parkhurst, partners, trading under the firm name of J. J. Parkhurst & Co. v. Pennsylvania R. Co. et al.; and John Henry Nicolai, trading as "Eagle Oil Works," v. Pennsylvania R. Co. et al.

[Same as head notes, ante, 78.]

New Jersey Fruit Exchange v. Central R. Co. of New Jersey et al.

[Same as head notes, ante, 84.]

Lincoln Board of Trade v. Burlington & Missouri River R. Co. in Nebraska et al. [Ante, 95.]

Municipal subscriptions or gratuities do not affect the question of undue preference under section 3 of the Act to Regulate Commerce.

Disparity in existing rates to Lincoln and to Omaha found to correspond so closely with the difference in distance that no change is required upon that ground.

Principle that the ratio of rates should decrease with increase of distance conceded, but modifying conditions often exist; some of them stated; as applied to the facts in this case no change in rates required.

Lincoln is not naturally entitled to the same rates from Chicago as Omaha, and if such rates were conceded Omaha would probably have a valid ground of complaint.

Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co.

[Same as head notes, ante, 102.]

Lincoln Board of Trade v. Union Pacific R. Co. et al.

[Same as head notes, ante, 101.]

Lincoln Board of Trade v. Missouri Pacific R. Co. [Ante, 98.]

Distance by shortest route is properly to be considered in determining the propriety of rates by a longer competing line.

Rates from Saint Louis to Omaha a little higher than those charged to Lincoln, which is a trifle less distance upon a branch line, sustained under the peculiar circumstances of the case.

Consideration should be had of consequences which might follow a modification of the principle upon which the rates complained of are constructed.

The general plan upon which rates are constructed from Chicago and Saint Louis to Mis-

souri River points and interior Nebraska points approved, no better system being as yet suggested. Difficulties which might result from throwing this system into confusion stated.

The operation of the fourth section of the Act controls the extent to which Missouri River rates extend into the interior of Nebraska and Kansas; Lincoln and other towns lying west of that line must accept their geographical situation and its consequences.

Delaware State Grange of Patrons of Husbandry v. New York, Philadelphia & Norfolk R. Co. et al.

[Same as head notes, *ante*, 187.]

In the Matter of Chicago, St. Paul & Kansas City R. Co. [Ante, 137.]

A railroad company which, for cases not apparently affected by water competition or by the competition of carriers not subject to the Act to Regulate Commerce, had issued rate sheets which in many cases made for the transportation of like freights the greater charge for the shorter haul on the same line in the same direction, the shorter being included in the longer distance, was called upon to justify such rate sheets at a public hearing.

Notice ordered to be published of such hearing, that competing carriers and the public generally might have opportunity to attend and be heard.

The showing by respondent that a competitor for business between the termini of its line makes charges for the transportation of freight which are below what are reasonable and just to the carrier itself, does not alone make out the dissimilar circumstances and conditions entitling the respondent to make charges for the transportation of freights from one terminus to an intermediate station which are greater than those made for the transportation of like freights from the same terminus to the other.

The provision in the first section of the Act to Regulate Commerce, that "All charges made for any service rendered, or to be rendered, in the transportation of passengers or property, or in connection therewith, or for the receiving, delivering, storage, or handling of such property shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful," does not render rates that are unreasonably low illegal in a sense that will authorize the Commission to prohibit their being made.

The Commission has no power to order rates to be increased, upon the ground that they are so low that persistence in making them would be ruinous.

Congress, in the provision above recited regarding rates, was legislating for the protection of the general public, and not for the protection of carriers against the unreasonable action of their own officers, or against excessive competition. The Act to Regulate Commerce assumes that the carriers, in their power to make rates, have ample remedy to protect against rates which are unreasonably low.

A leading purpose of the Act to Regulate Commerce is to prevent the giving of unjust preferences and advantages, as between localities, in railroad transportation. This purpose would be defeated if any one carrier by

making unreasonably low rates to any locality, would thereby entitle all other carriers competing with it to make on their lines greater charges upon the shorter hauls to other stations than were made over the same line in the same direction to the locality thus favored.

Nathaniel W. Howell et al. v. New York, Lake Erie & Western R. Co. et al. [Ante, 162.]

A question of reasonable rates can not be properly decided without full knowledge of all the facts concerning the particular traffic in question and its relations to the other traffic of the carrier. Some of the elements stated which are necessary and proper to be considered.

Proof that certain rates are very profitable to the road, and that they are higher than the rates charged on certain other somewhat similar commodities, is not of itself a sufficient ground for determining either that such rates are unjust, or what rates would be just and reasonable for the traffic in question.

Case retained for further showing, upon the question of the reasonableness of the rates charged for transportation of milk and cream from producing points to Jersey City.

Grouped rates not peculiar to milk traffic. Other instances stated and distinguished.

Transportation of milk an exceedingly peculiar kind of traffic. Time of the first importance. Arrangements stated by means of which the delivery of a regular daily supply to all consumers in large cities is accomplished. The elements of extra expense are substantially the same upon milk transported from every part of the line of road over which the special milk train runs.

Grouping of milk rates over large extent of territory not shown to injuriously affect the producers who complain; their product is not reduced in value, nor is any part of it left unsold, while the requirements of consumers demand a steadily increasing area of supply.

Prejudice and advantage become undue and unreasonable when the results are such as to effect some tangible injury to the complaining party. Without some proof of damage resulting to complainants, an advantage in rates as related to distance is not necessarily undue or unreasonable, no substantial difference in expense appearing to exist.

The existing arrangement by which the same rate is charged for the transportation of milk from all points reached by the regular daily milk trains of the defendant roads found to be not illegal, and on the whole to be the best system that can be devised for the general good of all interested parties.

A considerable additional expense, such as is involved in the collection of milk beyond the end of the route of the milk train, is a fact in consideration of which a somewhat higher rate would be just, and is perhaps necessary, in order to properly equalize the proportionate privileges of the traffic.

Spartanburg Board of Trade v. Richmond & Danville R. Co. et al.

[Same as head notes, *ante*, 193.]

C. H. Griffie v. Burlington & Missouri River R. Co. in Nebraska, and also as Lessee of Atchison & Nebraska Railway. [Ante, 194.]

The offense under section 2 of the Act to Regulate Commerce of giving free transportation to an individual consists in the charging, demanding, collecting, or receiving by the carrier from some other person or persons a compensation for a like service when none is contemporaneously charged or received from the person thus transported free.

Where a free pass was given to a discharged employé of the company on the assumption that he might still be regarded as an employé, but it affirmatively appeared that it was never used, and that it expired in the hands of the party to whom it was issued by a limitation contained on its face, and was produced before the Commission as an unused instrument in a proceeding in which a complaint of its issue was made, *held*, that the facts did not show that a breach of the third section of the Act had been committed, no free transportation whatever having been had, and the party being entitled to none according to the terms of the instrument as it then was.

Detroit Board of Trade et al. v. Grand Trunk Railway of Canada et al.

[Same as head notes, *ante*, 199.]

Re Tariffs of the Trans-Continental Lines.

[Same as head notes, *ante*, 203.]

James C. Savery & Co., Doing Business under the Name of the American Emigrant Company, v. New York Central & Hudson River R. Co. et al.

[Same as head notes, *ante*, 210.]

James F. Slater v. Northern Pacific R. Co.

[Same as head notes, *ante*, 243.]

Re Relative Tank and Barrel Rates on Oil.

[Same as head notes, *ante*, 245.]

New Orleans Cotton Exchange v. Cincinnati, New Orleans & Texas Pacific R. Co. et al.

[Same as head notes, *ante*, 289.]

APPENDIX C.

[This Appendix (referred to in the Report, on page 253, *ante*), consists of extracts from the docket and records of the Commission, showing complaints pending during the year under section 13 of the Act to Regulate Commerce, and disposition or present condition of each.]

APPENDIX D.

[This Appendix (referred to in the Report, on page 257, *ante*), contains rules of practice, circulars, and general orders of the Commission, and statement of expenditures. The Rules of Practice are the same as those given in 1 Interstate Commerce Reports, Appendix I, p. 841, as changed by the amendment given in Appendix II, p. 843, of that Volume.]

[Circular as to Schedules of Passenger Rates issued by Associations of Roads.]

2 INTER S.

INTERSTATE COMMERCE COMMISSION,
Washington, December 19, 1887.

DEAR SIR: At present there is no uniform method on the part of the railroads for filing with the Commission joint passenger rates which are compiled under agreement of committees or associations. In this connection the Commission ruled, on June 15th last, as follows:

"In the case of schedules of passenger rates issued by a committee representing a group of roads, the Commission desires a written statement from each corporation to the effect that it is a member of the association which the committee represents, and that tariff schedules filed by the committee are to be treated as if filed by such corporation. In case there is a written agreement under which the association works, a copy thereof should also be filed. Upon receipt of the foregoing, as evidence of the authority of the committee, schedules of the tariffs and documents issued relating to changes in passenger rates, etc., will be received by the Commission and credited to each road in the association as if filed by such road, respectively. A letter of transmittal, stating contents, should accompany each inclosure."

To further perfect the plan which it was hoped the foregoing ruling would establish, you are now requested to comply with the following:

First. To advise this office of the names of the committees or associations of which your company is a member; and also of the names of the commissioners or compilers to whom authority and instructions have been given to file tariffs, etc., with the Interstate Commerce Commission for your company, and the names and character of the tariffs so covered;

Second. To instruct the commissioner or compiler for such committee or association to file with this office one copy of the contract, agreement, or arrangement under which action is taken for the establishment of joint passenger rates;

Third. To instruct the commissioner or compiler of such committees or associations to file with this office all schedules of passenger rates which may be issued by him for your company separately, or jointly with other roads.

Under a compliance with this arrangement, it will not be necessary for each company to file such tariffs as are filed by the commissioners or compilers.

Credit for such filing will be given to each road from which advice has been received of the authority given representatives of committees or associations.

For the Commission,

Very Truly Yours,
C. C. McCAIN, Auditor.

[Circular No. 6, in reference to filing tariffs by intra-state roads which interchange traffic with connection to or from points outside the State.—See *ante*, 9.]

[Order as to Publication of Joint Tariffs.—See 1 Interstate Commerce Reports, 598.]

[Order as to Publication of Export Tariffs.—See *ante*, 9.]

[The remainder of this Appendix consists of an order dated Oct. 22, 1888, for a hearing in reference to tariffs and classifications of carriers belonging to the Southern Railway & Steamship Association, and of statements of appropriations for and expenditures by the Commission.]

APPENDIX E.

[This Appendix (referred to in the Report, on page 269, *ante*.) consists of documents and correspondence relating to the subject of classification, among which are the following:]

Report on Classification adopted at the conference held July 19 and 20, 1888 [referred to on page 269, *ante*].

The committee, consisting of representatives of the trunk lines of the Central Traffic Association and of the organizations extending westward from Chicago and Saint Louis, appointed to prepare for submission a classification which should govern in the interchange of all freight traffic, excepting that destined to and from the Pacific coast, at its last meeting, held in New York, July 19 and 20, 1888, unanimously—

Resolved, That this committee, while recognizing the desirability of a uniform classification, report that after patient and prolonged conferences held for the purpose of formulating such a classification, it is unable at this time to agree upon one which it can recommend for adoption.

Among the reasons which led to the foregoing conclusions may be stated the following:

When the joint conference committee was appointed in September last it was believed the time had come for the adoption of one classification which should govern on all freight traffic interchanged between eastern and western railroads. The disparities which prevailed in the classifications used respectively east and west of the Mississippi River had been brought to the notice of various authorities—state and commercial—and they in turn had drawn the attention thereto of the Interstate Commerce Commission. The last named body, it was thought, would be obliged to move in the direction of greater uniformity in freight classification; and rather than by waiting invite such action, those who spoke for the railroad companies advised that steps be taken to at least remove the more glaring differences which existed between the classifications of the eastern and the western roads. Moreover, the progress of events had pointed plainly in the direction of uniformity. Previous to the adoption of the Interstate Law there were numerous classifications in effect in the territory served by the trunk lines and their affiliated roads. With a zeal and pertinacity unprecedented, a committee representing the lines just described had, a few weeks before the Interstate Law became effective, addressed themselves resolutely to the task of consolidating into one the various classifications which long had been recognized between the Mississippi River and the Atlantic seaboard, thus creating one classification adapted to the requirements of the traffic in the most populous district of the country.

2 INTER S.

Not only were there numerous local classifications thus to be taken up, but the rates and the classifications were not the same eastward bound as they were westward bound on the traffic interchanged between the East and the West. Westward bound there were but five regular classes, while eastward bound there were thirteen. To make the rates applicable in either direction and embrace the numerous commodities within six classes was, therefore, a great undertaking; but, although many were skeptical regarding the outcome, patiently and persistently it was carried to a successful completion. The trunk lines having thus adapted to their local and through freight traffic in either direction one classification, known now as the official, it was urged that the way had been paved for the march toward still further uniformity. With that view your committee was appointed, and, in the hope of achieving ultimate success, the work was begun.

Six conferences were held, in addition to the one at which this report was agreed upon, each extending over a period of several days. Soon it became apparent that radical differences existed in the requirements and conditions of the sections east and west of the Mississippi River, respectively. The former desired not to increase the difference between the less than car lot and the car lot rates on the same commodities, and to preserve as nearly as possible the relations they had established between the several classes, while the latter urged that, on account of the cost of operating and the comparatively small tonnage in the sparsely settled West, they could not afford to add to the number of less than car lot classes, nor could they profitably handle and foster their traffic without exercising greater latitude than was proposed in the making of rates and the differences between the same. Hence, they desired that eight classes be adopted, "with the understanding that all less than car lots be included in the first four classes, thus limiting the remaining four classes to articles carried in car lots.

Such a proposition, while manifestly in the interest of the western lines, because adapted to their circumstances and essential to their profitable operation, could not consistently be accepted by the trunk lines. For years the latter had operated without any difference in merchandise rates westward between car lots and less; therefore, when they consented to the adoption of six classes and the recognition of numerous car lots, as shown in the official classification, they had gone quite as far as, it was believed, they could with safety go, in view of the long established custom prevailing in this respect throughout the territory between the seaboard and the Mississippi River. The result was, at this point, a difference in views between eastern and western members, which could not well be reconciled; and the work subsequently done by the committee, in proposing to rate less than car lot articles below fourth class was in most, if not all, cases effected by a majority vote—the East having eight and the West seven members of the committee.

Notwithstanding this difference, lines leading to the Missouri River were disposed to proceed with the work, and if possible adopt

one classification to govern between the Atlantic seaboard and the Missouri River points, Saint Paul and Minneapolis. Resolutions looking to that end were at one time adopted by Western and Northwestern lines, but before the suggestions made could be carried out, events took another turn.

From causes not necessary now to be enumerated the Western roads became involved in a wide spread and disastrous rate war, during which those in civil authority intimated they might be obliged to prescribe for the roads schedules approximating the charges which, at times, had, by the carriers, been voluntarily made. Accordingly, when the Iowa Commissioners promulgated a schedule of rates for the roads in that State which, by the companies interested, was considered ruinously low, the authorities in Nebraska and Minnesota gave notice of their desire to follow the example set. Thus the Western roads were confronted with reductions which, in no event, could they expect wholly to escape. Through tariffs to Missouri River points had already been greatly reduced, and local rates in Iowa, Minnesota, Nebraska and Kansas were certain to reach a level not anticipated by the most despondent when the work of your committee was begun. The effect of those reductions upon the revenues of the Western roads was viewed by the managers with alarm; and as they had been informed the adoption of the classification outlined by your committee would involve them in further reductions, they were understood to shrink from assuming an additional loss, which they could just as well avoid.

Besides, the question of practicability had not been fully considered when it was proposed to carry a union classification as far as the Missouri River. Lines leading from Chicago and Saint Louis own, operate, or control several thousand miles of road west of the Missouri River. If they should attempt to use one classification to and another west of the line just described it would oblige them to divide their systems at that point, inasmuch as through tariffs could not be issued in simple form from Chicago, Saint Louis, and points common therewith, as they now are, to the multiplicity of stations west of the Missouri River, unless one classification should govern throughout. Otherwise they would be compelled to print commodity tariffs to the many common points on their own lines, and those of their connections, west of the Missouri River. This, it was evident, could not readily be done.

Meantime, the position thus taken was confirmed by the action of roads interested in the transcontinental and other traffic. Those lines met early in June, and at once set about formulating freight tariffs, subject to the Western classification. This involved a vast amount of labor, inasmuch as the various articles enumerated had to be carefully scanned, and a considerable number, requiring special treatment were placed in commodity lists. With those exceptions, it was agreed that the Western should supersede the Pacific Coast classification on business from Mississippi River points and Chicago destined to the Pacific Coast. At the same time an award, by one chosen to determine certain disputed questions pertaining to El Paso and other traffic, decreed that the

Western classification should hereafter govern on freight destined to El Paso, Eagle Pass, and the Republic of Mexico, and tariffs were issued accordingly.

Shortly before, the Texas connections of the Fort Worth & Denver City Railroad had consented to adopt the Western classification on business carried to and from Colorado and Utah. Furthermore, the Texas lines signified their willingness to unite with the Western roads in the adoption of a joint classification. Hence, it was presumed that within a brief time there would practically be but one classification in use in the territory west of Chicago and the Mississippi River. The impression was that in thus securing uniformity in the territory west of that reached by the trunk lines they would possibly be accomplishing as much as did the latter when they consolidated into one the many classifications which previously governed in the district between the Atlantic and the Mississippi, north of the Ohio River.

The divergent views hereinbefore described as held by your committee have been honestly entertained, and the conclusions reached, both on the part of the East and the West, are such as the varying circumstances and conditions of each section seem to make necessary. It remains for your committee to express their sincere regret that, after so much earnest toil, their expectations of being able at this time to submit for your approval a joint classification are doomed to disappointment.

Extract from a letter from J. W. Midgley, Chairman, dated Chicago, November 9, 1888 [referred to on page 269, *ante*].

In order to give you some idea of the variety of classifications under which one road was obliged to work during the first part of 1883, permit me to make extracts as follows from some of the letters received.

The Wabash Railway Company had in effect classifications as follows:

| | Classes. |
|-----------------------------------|----------|
| Middle and Western States | 6 |
| Southern Railway and Steamship... | 18 |
| Mississippi Valley | 5 |
| Revised Western | 9 |
| Trunk line, east bound | 13 |
| Trunk line, west bound | 5 |
| Texas | 8 |
| Pacific coast, east bound | 9 |
| Pacific coast, west bound | (*) |

The Chicago & Alton Railroad had three classifications in use: the Illinois State, Missouri Local, and Western classifications. The first named applied between all stations in Illinois, and had nine classes, namely: 1st, 2d, 3d, 4th, 5th, A, B, C, and D. The Missouri classification applied on business between stations in Missouri, and had twelve classes, namely: 1st, 2d, 3d, 4th, 5th, D, E, F, G, H, I, J, and special. The Western classifications applied on traffic carried between stations in Illinois and Missouri, and had nine classes, namely: 1st, 2d, 3d, 4th, 5th, A, B, C, D, and E. The same company had in effect on transcontinental business the two Pacific Coast classifications east and west bound.

The Saint Louis and San Francisco used the Western, Missouri State, and Pacific Coast, and afterward the Joint Texas classification.

*Rates were shown after each article; also the same rule was observed in the Mexican classification.

The Milwaukee, Lake Shore and Western classification revised to October 1, 1886, on all local business, also on all business between points on their line and Milwaukee and Chicago. The only other classification they were using January 1, 1887, was the revised Western, which applies on business between Chicago and Milwaukee and Ashland and Duluth; also between points on the Southern Division of their road called the Fox River territory, and points on the west of the Mississippi River including Saint Paul.

The Chicago, Milwaukee & Saint Paul Railway used the Wisconsin classification on business between points in Wisconsin and the Illinois Commissioners' classification locally in Illinois; while on business from Chicago to Milwaukee originating at the seaboard they used the Trunk Line classification and on all other traffic the Western classification.

The Kansas City, Fort Scott & Memphis Railroad used three classifications on interstate business. The Western applied between points on their line west of and including Memphis. The Southern Railway and Steamship applied between points on the line east of Memphis, and the Joint Texas applied from all points on the line both east and west of Memphis to all points in Texas and all points in Arkansas, excepting those situated on their own line proper. They also applied the Southern Railway and Steamship classification on business from Missouri River territory, and points on their line to what is known as the Mississippi Valley territory, including New Orleans, Vicksburg, Mobile, Meridian, Jackson, Yazoo City, Greenville, Huntington, Baton Rouge, Port Hickey, and Port Hudson. At various times they issued through rates from New York and the Atlantic seaboard to points in Arkansas based on the Trunk Line or the official classification. That company is still using the same classifications as above with the exception that the Western has been substituted for the Joint Texas. This, they inform me, will also be made to apply to all points in Arkansas as soon as a meeting can be arranged between the Arkansas lines, which it is expected will be done at an early day. The Kansas City, Fort Scott and Memphis also used the Missouri State and the Mississippi State classifications between points in those States.

The Kansas City, Saint Joseph & Council Bluffs Railroad used the Western, Middle and Western States and Southern Railway and Steamship Association and the Joint Texas classification.

The Hannibal & Saint Joseph used the Western, Middle and Western States and Southern Railway and Steamship and Pacific Coast west bound.

APPENDIX F.

[This Appendix (referred to in the Report, on page 279, *ante*), is in reference to the Government-Aided Railroad and Telegraph Lines. It contains (1) the Act of Congress of August 7, 1888, and the circular of the Commission in reference thereto, given *ante*, 208; (2) a list of carriers subject to the Act; (3) references to Acts in the United States Statutes at Large in reference to INTER S.

ence to railroads and telegraph lines aided by government subsidies or grants of right of way; (4) a list of telegraph companies which have accepted the provisions by the Act of July 24, 1866, and of Title 65 of the Revised Statutes.]

APPENDIX G.

[This Appendix (referred to in the Report, on page 283 *et seq.*, *ante*), contains the Form of Annual Report called for by the Commission, for the year ending June 30, 1888, exemplified by the Report of the Northern Pacific Railroad Company for that year,—together with instructions of the Commission for the guidance of carriers in making annual reports.]

APPENDIX H.

REPORT OF HENRY C. ADAMS, STATISTICIAN, PRELIMINARY TO A REPORT TO THE INTERSTATE COMMERCE COMMISSION ON THE SUBJECT OF RAILWAY STATISTICS IN THE UNITED STATES FOR THE YEAR ENDING JUNE 30, 1888.

[Referred to in the Report, on page 287, *ante*.]

It is eminently appropriate, as introductory to the first report from this branch of the Commission's service, to speak briefly of the importance of accurate and comprehensive statistics on railway affairs. For if it can be shown that the service rendered by common carriers may be thereby improved, the public will surely indorse statistical investigation; if it should be discovered that investments in railway property may proceed with greater confidence because of authentic and uniform accounts, investors will welcome the organization of a bureau for the publication of such accounts; or finally, should it appear that railway administration may become more efficient and economical as the result of extended study and painstaking comparison, they upon whose shoulders rests the responsibility of administration must feel an interest in the success of such study. It follows, then, if the facts assumed can be made clear, that the public, investors, and conservative railway managements will gladly render such assistance as lies in their power to the success of the enterprise now set on foot. And surely when one considers the prodigious task of bringing the facts pertaining to railway operation into systematic form, so that their meaning will stand clearly on the surface, he will recognize how essential is the willing co-operation of all who have it in their power to render assistance. It is then pertinent to inquire at the outset respecting the importance of railway statistics.

The importance of statistics on railway matters may be the most clearly presented through a discussion of three definite questions:

First. How do they stand related to problems of public economy?

Second. What bearing do they have upon technical and scientific questions of railway equipment and railway management?

Third. What assistance may be rendered by them in the solution of that vexed question

which Congress has placed to so large an extent in the hands of the Interstate Commerce Commission?

I.—Relation of railway statistics to questions of public economy.

It is the aim of statistics to draw a true picture of a given set of facts for a definite period of time, by presenting those facts in detail according to some accepted theory of classification. Nothing is to be set aside because it appears of little moment, nothing is to be distorted because it does not conform to some preconceived idea; but permitting each and every fact to stand on its own merits, all are to be so grouped and massed as to disclose what is true of the subject studied. Railway statistics form no exception to this general statement. Their only purpose is to draw a true picture of the existing railway system.

Later in this report a few words are said respecting the condition of railway statistics in the United States, but for the present it is sufficient to remark that no one has yet attempted, or at least no one has yet succeeded in making, a satisfactory exhibit of the American railway system. Some facts may be easily learned, others of equal importance have as yet found for themselves no avenue of expression. This is certainly remarkable when one appreciates the magnitude of the railway industry. The length of line on June 30, 1888, was 152,000 miles, and the property based upon it did not fall far short of \$9,000,000,000. The gross earnings on this property for the year preceding was nearly \$930,000,000. Passenger mileage reached the enormous figure of ten and one-half billions, while ton mileage of freight exceeded sixty billions. The business of traffic by rail expends in operations \$600,000,000 annually. An industry of such magnitude must of its own merit arrest public attention; but when it is recognized that every other industry in the land is dependent for its highest success upon the way in which the railways are conducted, the absence of trustworthy and comprehensive statistics on railway affairs is indeed occasion for surprise.

But it is not alone the magnitude of this business which gives emphasis to the public importance of railway statistics; the fact that a new industrial power has been introduced into modern life by the development of railways is of equal significance. It is no exaggeration to say that through this power society has been revolutionized. The business life of men at the present day bears less likeness to that of 1825 than does the life of the latter date bear to that of the age of Elizabeth. The explanation of this rapid change is simple. In the earlier period time and distance localized business; in these days time and distance have been overcome by the application of steam to inland commerce, and as a consequence business intercourse knows no boundaries.

It is thus a new power with which the statistics of railways deals, and a power that has already created a new society. And it is a significant fact that most of the public questions now claiming the attention of thinking men are shown by analysis to spring from the efforts of society to adjust itself to new methods in commerce and in trade. It is a narrow con-

ception to regard the railway problem as an isolated problem. The social and political influence of railways is far reaching, and every ray of light which statistical investigation can throw upon the workings of the new power which railways have brought into society must be of direct advantage in the solution of any public problem, political or social.

The far reaching influence of railways in the domain of politics is well presented by a quotation from a well known writer* on railways, in which he shows that even fundamental questions of government can not be determined without taking into the account this new industrial force:

Meanwhile the influence of this railroad power upon the politics of America and the political theories at the base of party organizations has been very strongly defined and little considered. Paradoxical as it sounds, it has actually made that which was mistaken, right, and that which was dangerous, safe. The year 1830 was a year of political revolution in America; the friends of a strong central government went out of power, and a party hostile in theory to all concentration of governmental functions came in. It can now hardly admit of a doubt that both parties to that bitter and memorable struggle were right, and it is equally true that both were wrong. Both, however, were made right or wrong by one element which entered into the practical solution of the questions agitated with decisive consequences—an element wholly unanticipated by either side—the element of improved locomotion.

It may now with safety be premised that a strong central government was a political necessity for the United States of a time anterior to 1830; that in this respect Hamilton was right and Jefferson was wrong. It may also, with equal safety, be asserted that a strong central government constitutes a continually increasing political danger for the United States of the period subsequent to 1830; that the school of Hamilton is wrong, and the school of Jefferson is right. An equally thoughtful and observant man would thus have been a Hamiltonian up to 1830, and a Jeffersonian subsequent to that date.

* * * * *

The inventions of Robert Fulton and George Stephenson settled, in the minds of all thinking men, those great questions of internal policy for the United States Government which were so fiercely contested in the first cabinet of Washington; and the way in which they settled them was by altering every condition of the problem. The destinies of Nations are, perhaps, very much more frequently decided in the workshops of mechanics than in the councils of princes.

This quotation is not inserted because of the politics it contains, but as the shortest method of impressing the fact that improved methods of locomotion exert a decided influence even upon the political thought of the day. Whatever one may believe as to centralized government for the United States, his position must be defended by arguments that fit the times. The discussions of early statesmen can not be easily adjusted to modern conditions.

The influence of railways in the domain of social life is no less significant than in political affairs. The movement of population in modern times finds no parallel in the history of the past; the overcrowding of commercial and manufacturing centers has forced the question of municipal administration into prominence; the changes observed in methods of farming threaten in this country the development of an agrarian problem; the tendency towards uniformity of price in the staples of life, while it narrows the margin of speculation, yet increases

*Chapters in *Erie and Other Essays*, Charles Francis Adams.

the influence of the speculator. These results, as well as others that might be mentioned, are the inevitable consequence of the adoption of new methods of commerce.

But it does not lie in the province of this preliminary report to enter very far into a consideration of such questions. Sufficient has been said to show that the importance of railway statistics is not confined within the narrow limits of technical interests. This thought may, however, be impressed more strongly by one or two illustrations of the bearing of railway statistics to questions of public economy.

The constant recurrence of abnormal business activity, followed by business prostration, is regarded by all as evidence of maladjustment in business relations. Many theories have been put forth to explain this lack of stability in commercial affairs, but as yet none has succeeded in gaining for itself common acceptance. Probably there is no one cause adequate to explain so prodigious a fact. But on one point there seems to be some degree of harmonious opinion, and that is that a close connection exists between the building of railroads and the manner of their administrative control on the one hand, and commercial depression and business prostration on the other. Indeed, so firmly has this conviction lodged itself in the minds of men that in some States of the Union it has been found necessary to provide by law for the exercise of public control over the investment of capital in new railway ventures, by establishing a board of commissioners, without whose approval no new line of railway may be constructed under general laws.

Accepting for the moment the premises upon which such legislation rests, it must be evident that it can only be successful when directed in the light of detailed information on all matters pertaining to the subject. And in the investigation of no single subject will so many pertinent facts be disclosed as in the statistical investigation of the railway system itself. Here surely is a problem of public economy that depends directly upon railway statistics.

Or, again; it is a matter of public interest that all parts of a great country be evenly developed. And since railways are the most important single instrument in the development of industrial life, it follows that a wise national policy will endeavor to attain an equitable distribution of railway facilities. This does not mean that railway mileage ought, in a sound system, to be in proportion to territory, or that it should be distributed on a *per capita* basis; but that, taking into account the peculiar industry in which the people of the various sections are engaged, equivalent facilities of transportation should be provided.

Under no other conditions can there arise that competitive intercourse between various industries distributed in various parts of a country by which equivalent returns may be gained by labor and capital; and until the state of affairs thus suggested is in some way realized, one may not expect the disappearance of sectional prejudice in the discussion of even trivial public questions. The even development of national progress, and its importance in the attainment of the most perfect national life, is a subject upon which the American mind has not yet seriously dwelt; but it is be-

lieved that this people has come to a point in their progress in which it can no longer be safely disregarded. When, however, this subject comes to engage the attention of publicists and statesmen the need of accurate information will at once be felt, and from no other source can such important information be gained as from statistical investigation into the facts and movements of internal commerce.

II.—*Relation of railway statistics to technical and scientific questions of railway equipment and management.*

This heading has been inserted, rather for the sake of making the argument for comprehensive statistics complete than because it can receive at this time adequate discussion. There are a few railway companies in the United States which maintain an extensive system of statistical accounts with regard to what may be termed the physical basis of the railway industry. Matters pertaining to motive power, economy of machinery, the "life" of the various items that go to make up equipment and structure, are all entered in books and duly accounted for. It goes without saying that such roads are the first to adopt improved methods, and from men employed about the shops of such roads the larger part of new inventions are to be expected. But unfortunately many railway companies in this country do not attempt anything of the nature of statistical book keeping sufficiently extended to lead to successful results. This may doubtless be easily explained, but whatever the explanation, it is none the less unfortunate. Statistics of the sort now considered must be comprehensive if they are to attain their highest usefulness, for there are many questions that can not be decided unless the facts respecting them are returned for all the conditions under which those facts appear. It is hoped, by means of this department which the Interstate Commerce Commission has organized, that the difficulties here suggested may be overcome.

With regard to the class of questions to be made the subject of such statistical investigation it is sufficient to say that whatever brings into view the relative efficiency or economy of different theories of management or different sorts of equipment may very properly be included. There are also problems related to accounting that can not be determined except on the basis of comprehensive comparison. The scientific importance of statistics for the solution of such problems will be appreciated most by those who know the most of the details of railway affairs.

III.—*Relation of railway statistics to the work intrusted to the Interstate Commerce Commission.*

In the first annual report of the Interstate Commerce Commission will be found a statement of the reasons why Congress deemed it necessary to pass a law for the regulation of internal commerce. These reasons need not now be presented a second time. The creation of a Federal Commission clothed with certain definite powers was the method chosen by Congress, after long and earnest deliberation, for attempting the solution of what is commonly known as the railway problem. The question

in hand then reduces itself to this: Of what assistance are railway statistics in the solution of this problem?

The connection thus suggested will be the most clearly apprehended by looking at the matter from a general point of view and afterwards in the light of the peculiar task imposed by Congress upon the Interstate Commerce Commission.

The controversy which has now for some years been going on is in reality a controversy in which three separate interests are represented. The first is that of the public, for whose convenience facilities of transportation are provided. The claim which the public makes is that the service of the roads should be as perfect as possible; that rates should be not only just in themselves, but equitable as between competing centers and competing persons; and lastly, that rates should be stable. The investor is interested in safe investments, but it is not necessary to keep this interest in mind as separate from the others mentioned. Whatever is conducive to stable administration in railway affairs must in the long run be advantageous to the *bona fide* investor in this species of property. For the present purpose, therefore, if not indeed for all purposes, the interest of the investor and the public may be regarded as identical.

The other party to the controversy is the railway manager, charged with the operation of this vast property. He must secure and retain the legitimate quota of business for his road, pay running expenses and fixed charges, and hold continually in view the accumulation of dividends; and this, it should be remembered, must be done in the presence of fierce competition between the various managements of the several lines that bid for the same traffic. The result is familiar to those conversant with railway affairs. In the heat of competitive warfare between these lines it frequently happens that stockholders suffer loss and the just claims of the public are disregarded. It is of course not intended to admit that there is any fundamental divergence of interest between railways and the public. In the long run their interests are manifestly the same; but when it comes to the actual dealings of the railways with the public, the fundamental interest is often lost sight of in the struggle for immediate advantage.

The public knows nothing of the intricacies of railway management, and it is seemingly out of the power of the railway manager to give much attention to the interests of the public. In this manner bad feeling is engendered between the parties, and what should be a question of inquiry has come to be a question of controversy.

Of what assistance can the statistics of railways be in the settlement of such a controversy? The clearest answer to this question will be a few words respecting public controversies in general. A most fruitful source of that sort of public dispute which verges on social agitation is ignorance on the part of each disputant of what the other is talking about; and it may be assumed that in the majority of cases the feeling of hostility engendered by such disputation will disappear as soon as discussion proceeds upon the basis of the same set of facts. Nor is

it too much to say that, until such a condition for discussion can be created, the agitator will continue to render the just settlement of any controversy impossible.

These remarks are especially pertinent to the public controversy over the proper management of the railways. As a candid man reads the claims first on one side and then on the other he is constrained to admit that for the most part the conclusion of each disputant follows logically from the premises assumed. The mistakes which men make do not so frequently lie in their reasoning as in the assumptions upon which that reasoning rests. In all probability it was a recognition of this truth which, when stated independently of any particular question, must be admitted by all, that led Congress to insert in the Law for regulating internal commerce the twentieth section, calling for statistics. As ordinarily stated, the purpose of this section was to provide for the collection of data for the guidance of further legislation; but it is more than likely that, if the facts pertaining to railroads be properly collected, massed and interpreted, the demand for a very considerable increase of legislation which would otherwise be necessary would disappear. Manifestly, it is to the interest of conservative railroad managers to render all possible assistance to that part of the Commission's service charged with the collecting of railway statistics.

But there is another way in which reliable information on railway matters will tend to the solution of the problem in hand, so far, at least, as the railways and the public are concerned. Most of modern social controversies turn upon what men believe to be just and right, and this one now under discussion is no exception. Tariff schedules, it is claimed, should be made in a spirit of fairness. Rates charged should be just. For years this has been urged by those who have spoken for the public, and of late railroad lawyers have urged the same before the courts. But what is a fair rate? Now, it is not intended to point out the necessity of reliable data for making of tariff schedules. The thought that seeks expression does not lie so plainly on the surface. It is not enough for the settlement of a question of public controversy that the rules adopted for the guidance of business should of themselves be just; some way must also be provided of showing that they are just. For until this is done unreasonable complaints will not cease, and in consequence reasonable complaints can not receive candid consideration on the part of those who have it in their power to institute reforms.

If it be true, as is so frequently urged, that the railway system is now managed with a proper regard to the rights of the public, its managers are all men most directly interested in an accurate and complete exhibit of that system. It is as yet too soon to say how this branch of the service of the Interstate Commerce Commission will be received after its purposes are better understood; but it is sincerely hoped that this office may be relieved in the future from the difficulties arising from inadequate returns.

But, passing from such general considerations, what is the significance of railway statistics in the light of the peculiar task imposed by

Congress on the Interstate Commerce Commission? To perceive this it will be necessary to recognize the principle upon which Congress relied for solving the railway problem when it established the Commission. Without going into particulars, it seems to have been admitted that the ordinary rules of common law were not adequate to the control of commercial affairs under modern conditions.

This was clearly presented in the first report of the Commission in the following language:

The common law still remained operative, but there were many reasons why it was inadequate for the purposes of complete regulation. One very obvious reason was that the new method of land transportation was wholly unknown to the common law, and was so different from those under which common-law rules had grown up that doubts and differences of opinion as to the extent to which those rules could be made applicable were inevitable. A highway of which the ownership is in private citizens or corporations who permit no other vehicles but their own to run upon it bears obviously but faint resemblance to the common highway upon which every man may walk or ride or drive his wagon or his carriage. If we undertake to apply to the one the rules which have grown up in regulation of the others, there must necessarily be a considerable period in which the state of the law will, in many important particulars, be uncertain; and while that continues to be the case, those who have the power to act and who must necessarily act by rule and according to some established system will for all practical purposes make the law, because the rule and the system will be of their establishment.

Such, to a considerable extent, has been the fact regarding the business of transporting persons and property by rail.

Those who have controlled the railroads have not only made rules for the government of their own corporate affairs, but very largely also they have determined at pleasure what should be the terms of their contract relations with others, and others have acquiesced, though oftentimes unwillingly, because they could not with confidence affirm that the law would not compel it and a test of the question would be difficult and expensive. The carriers of the country were thus enabled to determine in great measure what rules should govern the transportation of persons and property; rules which intimately concerned the commercial, industrial, and social life of the people. [I. Inters. Com. Rep. 652.]

It thus appears that the common law was inadequate for controlling this new power by which industrial relations had been revolutionized. It is equally true that the experience of England and of the American States, so far as they tried by means of statute law to prescribe traffic schedules and rules for administration, had not been satisfactory. Meantime the railroads were largely free from all control or subject to rules of their own making. Manifestly the one thing needed was to bring to bear upon the railway industry those principles of equity and justice which characterize the common law by framing for this new business new rules in harmony with those principles.

Such was the purpose of Congress in creating a Commission for the control of Interstate Commerce. The Commission was designed to proceed in a quasi judicial capacity, hearing complaints and rendering opinions, and by means of its opinions rendered in specific cases, to build up a body of rules to which the railway system of the country must conform. Now the importance of complete and comprehensive data for the satisfactory performance of such a task is manifest. A court of equity can only proceed in safety when it has at hand all the facts in the case, especially when each

and every case decided concerns the commercial, industrial and social life of the people. But it is not for the statement of so manifest a truism that these remarks have been made, but rather to call attention to the fact that the plan upon which Congress has chosen to rely for the solution of the railroad problem cannot succeed except in the presence of an enlightened public opinion. The Commission, by means of opinions rendered in specific cases, is building up a body of rules to which railway administration must conform; but if this body of principles is to work its best results it must rest on an intelligent appreciation of what the Commission is doing. This means that the general facts pertaining to transportation must be presented in such a manner as to be understood by men of ordinary intelligence. This is indeed a difficult task, but it is one that, in the presence of public curiosity on all railway matters, may be done. But the point to be remembered is this: The real solution of any great social problem is the creation of an intelligent public opinion regarding it. It is this thought that suggests the most important relation which statistical inquiry bears to the task imposed upon the Interstate Commerce Commission.

Railway Statistics in the United States.

It was intended that this preliminary report should contain in detail a statement of the legal requirements, federal and state, respecting railway accounts and reports; but the time allotted for its preparation has not been adequate to formulate such a statement. It will, however, serve the present purpose to know that the absence of statistical information on railway matters is not chargeable to any neglect on the part of those who make the laws. Three bureaus are now in existence, established by federal law, among whose duties is the collection and publication of facts relating to internal commerce. Twenty-five States have created railway commissions or bureaus whose duties conform to those usually assigned to such commissions, and in all cases power is granted to inquire into the affairs of the roads lying within their territorial jurisdiction. In three States, there are taxing commissions whose prerogatives with respect to railway accounts are of the same sort, though not as extended as those of railway commissions; while in other States other officials, as in Pennsylvania the Secretary of Internal Affairs, are charged with similar duties.

It does not then seem to be the intention of the various legislative bodies that corporate management of internal commerce should be hid from public scrutiny. Any shortcoming in this respect must be due either to disregard of law on the part of the corporations or to some inability inherent in the situation of those who undertake to carry the law into effect, or to the fact that the laws making it the duty of bureaus to collect statistics have not in all cases conferred powers adequate to perform the duties assigned.

So far as the railways are concerned, the efforts of this office to gather information have, for the most part, been met in a spirit of courtesy and co-operation; but at the same time it must be said that a few railway officials have evinced a disregard of letters and circulars sent

which must be corrected in the future if the statistical branch of the Commission's service is to attain marked success.

The statistical work of many of the state commissions is, within the domain in which they may legally act, of a high order. But the incumbents of these offices would be the first to recognize the limitations imposed upon them by virtue of the fact that they are state officials.

The enactment by Congress of the Law to Regulate Commerce has for the first time in the course of legislation in this country made provision for a bureau of railway statistics with the right of demanding information from the railroads, and at the same time empowered to press its investigations irrespective of state boundaries. And when one recognizes how the larger part of all traffic is interstate, he must perceive that the enactment of the Law referred to permits a new departure for investigation into the business of inland transportation. It thus appears that in matters of investigation, as well as in other important particulars, the Law creating the Interstate Commerce Commission must be regarded as complementary to the various state laws creating state commissions; and it is sincerely hoped that unity of aim in this respect may lead to unity of action so far as unity of action is conducive to the general purpose all have in view.

Returning now to the third point mentioned above as explaining the unsatisfactory condition of railway statistics, it need only be said that Congress has conferred ample authority upon the Interstate Commerce Commission for obtaining all necessary information from the common carriers. In many respects this Law marked a new departure in the solution of the railway problem, but in no one particular is this more clearly seen than in the fact thus brought into view.

But to provide by law for the collection of statistical information is merely a first step toward the accomplishment of the desired end; many obstacles, some of which may be remedied by law, while others lie outside the influence of law, confront him who undertakes the task. Thus the first difficulty encountered lies in the fact that there are about as many systems of accounts in the United States as there are railway managements. This probably explains the apparently unnecessary misunderstanding of plain questions put to their accounting departments. The state commissions have for the most part evaded this difficulty by giving in detail the returns of each road exactly as each road submitted them. This, however, is an evasion, and not a solution. It is not so much the purpose of statistics to furnish detailed information with regard to particular classes of facts as to mass those details in such a manner that their meaning as a whole may be readily perceived. Statistics do not reach their highest usefulness until by classification they lead to interpretation. But classification is impossible until some degree of uniformity is brought about in the manner in which the railroads keep their accounts.

The importance of some degree of uniformity in accounts was recognized by Congress when it passed the Law to Regulate Commerce. In that section of the Law on which the statistical

work of the Commission rests, it is provided that "The said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept."

What steps the Commission may wisely take under the discretion granted by this clause of the Act it is not undertaken here to say. It may, however, be suggested that were it possible to enlist co-operation of the various state commissions, this object in which all are equally interested might be easily accomplished. The first step to be taken in this direction is the adoption of a fiscal year that shall be uniform for all the railways of the country. Other measures for perfecting uniform accounts might then be more easily taken.

Quite a number of railways have of their own accord introduced changes into their methods of accounting, so as to conform to the blanks issued by this office. It is gratifying, for example, to read a sentence like the following, which introduces the annual report of the Central Railroad & Banking Company of Georgia to its stockholders:

In order to make the annual reports to the stockholders conform to those required by the Interstate Commerce Commission and to the fiscal year now being generally adopted by railroad companies in the United States, and also to allow the preparation of the report before the beginning of the busy season in the fall, your board of directors have changed the date of closing the fiscal year of the company from August 31 to June 30, of each year.

There is, however, a difficulty more fundamental than the one just referred to. One frequently hears the expression "railway system of the United States," but the truth is that no such thing as a railway system exists in the United States, if by that expression is meant some fairly uniform set of relations between the various railway corporations that have business dealings with each other. This fact, when viewed in the light of the history of railway consolidation as it has proceeded in this country, is no occasion for surprise, but it is none the less a source of great perplexity to him who undertakes to present railway operations in systematic form. The facts which have presented themselves in this office during the last three months have with great difficulty been reduced to systematic form. Thus it is not uncommon for an operating company to lease part of its own roadway to a line which it itself leases, and keep no separate account of earnings of such line, and in some instances subleasing is carried yet further.

In many cases a parent company gains control of a subsidiary line by purchase of a majority of stock, which, as soon as purchased, is lost to all accountings. A bank, or a warehouse, or a terminal company, or a coal company, or a lumber company, may extend operations by virtue of purchase or guaranties until the original business comes to be the subsidiary one, while auditors declare their inability to separate accounts. The extension of proprietary companies, some organized, as it

is claimed, for purposes of better administration, others to limit financial responsibility of an established company for new ventures, and others, it is confidently believed, for no other purpose than to act as a center for stock speculation, introduces further complexity into accounts of internal commerce. Independent bridge companies, and depot companies also, whose property must in fairness be regarded as part of the railway system, since their earnings are paid out of earnings of transportation, suggest another difficulty with which the statistician meets. And if to all this is added the complication introduced by the existence of fast freight lines, express companies, and sleeping car and drawing room car companies, some idea is obtained of the obstacles encountered in any attempt to present the facts of inland commerce according to some systematic plan which shall at the same time be comprehensive.

It is not in the spirit of criticism that the confusion existing in railway adjustments is brought to notice, although it is quite possible in some instances that intricate arrangements are deliberately chosen by railway managers who do not wish their operations to be understood by the stockholders or by the public. But abandoning this thought and admitting that the general absence of uniformity in railway affairs in the United States is the inevitable result of the development of a new business in a rapidly growing country, the facts thus set forth indicate in a clear manner not only the magnitude but the nature of the work imposed on this branch of the Commission's service. This is the point to be noticed at the present time.

By the twentieth section of the Act creating the Interstate Commerce Commission it is prescribed that the annual reports required of the railroads—

Shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment; number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss, and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet.

It would, perhaps, be unwarranted from the experience of this office during the short period of its existence to say that facts respecting any of the items mentioned by the Law can not be obtained; but it is highly probable that on one or two points it will be necessary to rest satisfied with information that is not absolutely conclusive. Is it, for example, possible to discover "the cost and value of the carrier's property, franchises and equipment"? The papers giving evidence may have been destroyed, or as more frequently occurs, in the fierce struggle of rival management for control of territory by the adoption of small lines already built, the records of the original companies have been lost, the consolidated companies caring nothing for records, except such as prove their equal right to the property absorbed. But of greater significance is the fact that, in many instances, the books of railway corporations do not go beyond

settlements with construction companies; that is to say, the investigation demanded by Congress is pushed back into the realm of vest pocket book keeping and a conveniently failing memory.

Satisfactory and conclusive information on the cost of railways in the United States can not be obtained. But it may always be assumed in interpreting a law that the law makers did not design to impose any tasks which from the nature of the case are impossible; and when the text of a law seems to require duties too difficult, it is right to ask respecting the purposes of the Legislature, so as to conform to the intention of the Act if not to its letter. And in this particular instance, as also in case of other lines of investigation required by the twentieth section of the Act to Regulate Commerce, it was manifestly the desire of Congress to assure it a trustworthy estimate of the relation existing between the present worth of railroad property and its cost to those who are proprietors of it. It was felt that the estimate of social agitators on the one hand, and of men interested in the present status of the property on the other, might be far from the truth. It was also felt that no investigation which published conclusions only, without disclosing the methods by which those conclusions were obtained, could ever gain the confidence of the public or serve as the basis of further legislation. Under such circumstances the need of an estimate by competent authority, free from outside influences, and clothed with ample power for the investigation was recognized as imperative. Such without doubt was the purpose of Congress in demanding information respecting the "cost and value of the carrier's property, franchises and equipment." This office therefore is placed under the legal obligation of making inquiry into the "cost and value" of railway property.

It does not seem appropriate to enter very far at this time into a discussion of the proper method for proceeding in such an investigation. The exact meaning to be given to the words "cost," "value," "construction," and "franchise" must be determined after the investigation is under way and not at the outset. But of one fact there can be no question. As preliminary to such an investigation the corporate history of railways in the United States must be written. The steps by which great corporations have arisen to their present power must be made clear. The process of consolidation and the contracts entered into to consummate consolidation must be laid bare. Every charter for the construction of new lines, every law on the authority of which action has been taken, every court decree respecting insolvent roads, must be made to contribute all pertinent information. Indeed the facts locked in the minds of railway presidents or corporation attorneys ought to be brought to light for the most perfect conclusions. On no other basis than the corporate history of the railways, thus comprehensive, can the task imposed by Congress be satisfactorily performed. And not only is such a study preliminary to a proper estimate of the relations existing between the cost of railway property and its present worth, but it is also essential to the highest means of the organization of railway statistics in general. It is indeed the foundation of all safe investigations.

Whether or not this office shall enter upon the investigation outlined above is for the Commission to determine. In European countries there would be no hesitation. Indeed, in the most of these the work here suggested has been already performed. In France, for example, there has been published, under the direction of the Minister of Public Works, what may be termed a systematized index of the growth of the railway system, which takes notice not only of the physical characteristics of the lines, but of the laws, concessions and decrees under which they were built. There is in this manner provided a foundation for statistical inquiry. As compared with this, the position of one who in the United States undertakes statistical investigation is perplexing in the extreme. For this reason, as well as for the intrinsic worth of such a record were it well performed, it seems that the Commission could well afford to sanction the work proposed.

Explanation of Statistical Tables and Presentation of Their Summaries.

In the text of the Commissioner's Report* will be found a statement of action taken relative to the annual report from carriers required by the twentieth section of the Act to Regulate Commerce. From that statement may be learned the nature and scope of the questions asked of the carriers, the care exercised in drafting the blank form sent them, and the general aim which directed the work throughout. Or should one desire more detailed information, he will find in Appendix G a reprint of the form in full and of the accompanying instructions, with the answers returned by the Northern Pacific Railroad Company. It does not then appear necessary to speak further on this phase of the subject, and we may turn at once to consider the use that has been made of such returns as the carriers have filed in this office.

Six tables have been prepared in connection with this report, summaries of which are incorporated below. They are as follows:

Table I.—Classification of railways and mileage for the year ending June 30, 1888.

Table II.—Amount of railway capital at the close of the year ending June 30, 1888.

Table III.—Earnings and income for the year ending June 30, 1888.

(a) Earnings from operation.

(b) Earnings of property owned but not operated.

Table IV.—General expenditure for the year ending June 30, 1888.

(a) Operating expenses.

(b) Fixed charges.

(c) Summary of operating expenses and fixed charges.

Table V.—Payments on railway capital during the year ending June 30, 1888.

Table VI.—Gross income accruing to railway corporations and application of same for the year ending June 30, 1888.

It requires but a glance at these headings to perceive that the purpose of the tables is to present in logical sequence a definite set of facts. In the first table, which is appended below, there is attempted a classification of railway corporations and a description of the legal

relations in which they stand to each other. This is followed by a statement of the mileage operated, including trackage, and of the mileage owned by operating or by subsidiary companies. In this manner there is presented the legal basis and what may be termed the physical basis of internal commerce in the United States.

The second table is devoted to showing the amount of capital invested in the railway industry, counting as railway capital all forms of property which draw earnings from this business. Here will be found the amount of stock outstanding at the date of the report, all forms of funded debt for the security of which railway plant or railway income is mortgaged, and the floating capital necessary to keep fixed investments in a profitable state of activity. From this table there may be learned the amount invested in the business of inland traffic, or what may be termed the property basis of the railway industry.

The third table explains itself. It shows (a) earnings from operation, and (b) earnings from property owned but not directly operated. The most important item under this second heading is the income to lessors paid by lessees, the lessee usually being the operating corporation. But it also includes the income to operating corporations from stocks and bonds of other corporations owned, from subleases or grants of trackage rights, and from property incidentally profitable. It is thus seen that this table is intended to exhibit the total income to railway corporations, with the single exception of income which springs from the sale of securities or arising from the decrease of assets.

The fourth table shows general expenditure incidental to the operation of the railway industry. It follows the usual method of classification, assigning expenditures to operating expenses and fixed charges. This is called the usual method of classification, and it is such in all discussions on questions of rates or railway economy; but it is worthy of note that a few of the reports filed in this office include interest, rentals and taxes in operating expenses, leaving practically nothing assignable to fixed charges. Possibly in certain cases there may be adequate reasons for thus uniting these two items; but it is certainly in the interest of railway statistics as a whole that operating expenses and fixed charges be kept separate, and it is sincerely hoped that future reports from the carriers will conform to the plan here indicated. Under the summary with which this table concludes will be found certain deductions which, when compared with the deductions printed in Table III, are both interesting and instructive. These will receive attention when those tables are considered in detail.

The fifth table, which exhibits payments on railway capital, is the only one that brings into prominence the relations of the operating company to the individual owning the property. It shows the dividends on stock and the interest on bonds. The facts disclosed are most interesting when taken in connection with the second table, which shows the proportion of railway capital existing as stocks and bonds.

In the final table will be found an exhibit of the gross income to railway corporations and a

* *Ante*. 281 et seq. [Ed.]

statement of the manner in which that income is used. Its purpose is to show the financial operations of the roads. The importance of this table will be readily recognized, and consequently calls for no remark in this connection.

From this rapid survey one may learn the class of facts with which the forthcoming report proposes to deal, but for a complete understanding of those facts as well as for learning the lessons which they seem to teach, it will be necessary to review the several tables more in detail.

TABLE I.—CLASSIFICATION OF RAILWAYS AND MILEAGE FOR THE YEAR ENDING JUNE 30, 1888.

This is the only table presented which depends for its importance upon the completeness of its data; and since, on account of many obstructions incident to the organization of a new work, it was found impossible to secure prompt returns from all the roads in time for the present preliminary report, this office has made use of Poor's Manual of Railroads for 1888, and of the Engineering News Atlas of Railway Construction, so far as that was necessary, to supplement its own facts. It is intended to embrace in this table the names of all railway corporations in the United States, whether they represent operating roads or roads merged into a comprehensive operating system, provided they maintain a legal existence for purposes of accounting or for other reasons. It is observed that this number reaches the large figure of 1,421. The list is published subject to revision and correction.

Some of the reports received at this office were in such bad shape, making such an incomplete and confused presentation of facts, that it was found necessary to exclude them from the tables. The total number of reports made use of at this time in compiling the statistical tables is 700; the reports filed cover the operations of 1,014 enumerated roads, representing a mileage of 120,000. And it should be distinctly noted that all the summaries and deductions presented at the present time are upon the basis of this mileage.

The use to be made of the first table, as also the information it gives, is shown by reproducing the headings of the columns it contains. These are as follows:

- (1) Name of carrier in full.
- (2) Abbreviated name of road.
- (3) Date of filing report.
- (4) Road, how operated.
- (5) Length of line operated.
- (6) Length of line owned.
- (7) Remarks.

In the first column of the table will be found a classified list of all the railways in the United States. The names given are intended to be the legal names of the corporations. If they are incorrect, it is due to error in the office where the reports of the carriers were made out. In this column all operating roads should appear in their alphabetical order, while the subsidiary roads are grouped under the road to which they are leased or by which they are otherwise controlled. It is not always easy to describe in a few words the relation that exists between a

subsidiary road and the road in connection with which it is operated; the fourth column of the table is designed to show in a general way the manner in which operations are conducted. In case inaccuracies are found in any part of the table, the statistician would be obliged for prompt information thereof, in order that the lists may be revised for future use.

The third column, which gives the date at which carriers filed their report in this office, was inserted partly as a matter of record. It is, however, significant from one point of view, for it shows what companies have not complied with the request of the Commission to send reports. It seemed best to publish this information, so that all who care to do so may learn by glancing at the table, which corporations have interested themselves in this endeavor to create in the United States a bureau of railway statistics, and upon what corporations the responsibility of incompleteness in the returns for the present year must rest. In many instances a single return filed by an operating company shows results of operations upon several subsidiary roads, which have not as yet filed their proper financial report.

The total railway mileage of the United States on June 30, 1888, was 152,781, of which 2,312 miles were constructed during the six months preceding. It may be necessary on careful revisal to alter these figures in some slight degree, but, for all practical purposes, they may be accepted as substantially correct. A peculiar interest attaches to the distribution of railway mileage, and it is the purpose of the following summary to show the length of line existing in each of the States and Territories on June 30, 1888, and the length of line constructed during the eighteen months previous to that date. The figures pertaining to construction, it is proper to state, were taken in part from the Atlas of Railway Construction, published by the Engineering News. The summary that follows shows also what proportion of total mileage and of line constructed during the period mentioned may be found in the several States and Territories that together make up the Union, and apportion both mileage and construction to the States on the basis of square miles of territory. [See summary next page.]

Such questions as arise in connection with the territorial distribution of railway facilities, suggested by this summary, will for the present be passed over, although a glance at the figures shows that such a discussion would be full of interest. With regard to new mileage two facts are worthy of notice: In the first place, it will be observed that comparatively few strictly parallel lines have been built during the period covered by the figures presented. This is a significant fact, and so far as it goes, shows railway construction to have added to the real wealth of the community. In the second place, the location of the new lines is a matter of importance. The Southern States show an unusual degree of enterprise in the matter of railway construction; and when the amount of line in this section of the country is compared with that of other portions of the Union, as shown in the column giving percentages, this form of enterprise may be heartily commended.

Summary of railway mileage in the United States by States and Territories.

| State or Territory. | Total mileage on June 30, 1888. | Proportion to total mileage. | Proportion to square mile of territory. | Line constructed between January 1, 1887, and January 1, 1888. | Line constructed between January 1, 1888, and June 30, 1888. | Proportion of new line constructed (18 months) to total mileage. |
|----------------------|---------------------------------|------------------------------|---|--|--|--|
| | | <i>Per cent.</i> | <i>Per cent.</i> | | | <i>Per cent.</i> |
| Alabama | 2,599.70 | 1.70 | 4.96 | 464.27 | 158.00 | 23.94 |
| Arkansas | 1,883.21 | 1.23 | 3.50 | 137.63 | 79.00 | 11.50 |
| California | 4,462.20 | 2.92 | 2.82 | 375.97 | 197.20 | 12.84 |
| Colorado | 3,016.52 | 1.97 | 2.90 | 863.74 | 3.00 | 23.73 |
| Connecticut | 1,009.98 | .66 | 20.24 | 18.00 | | 1.78 |
| Delaware | 254.14 | .17 | 12.40 | | | |
| Florida | 1,961.29 | 1.28 | 3.34 | 216.20 | 34.80 | 12.80 |
| Georgia | 3,987.21 | 2.61 | 6.70 | 244.80 | 250.00 | 12.41 |
| Illinois | 16,171.92 | 10.58 | 28.55 | 365.75 | 120.00 | 3.00 |
| Indiana | 5,971.58 | 3.91 | 16.43 | 83.91 | 10.00 | 1.57 |
| Iowa | 3,496.77 | 2.29 | 6.24 | 369.00 | | 10.55 |
| Kansas | 8,507.33 | 5.57 | 10.36 | 2,101.66 | 103.00 | 25.92 |
| Kentucky | 2,994.52 | 1.96 | 7.41 | 198.20 | 156.00 | 11.83 |
| Louisiana | 1,778.37 | 1.16 | 3.65 | 62.00 | 24.00 | 4.84 |
| Maine | 1,239.74 | .81 | 3.75 | 19.27 | | 1.55 |
| Maryland | 1,351.60 | .88 | 11.07 | 4.00 | 1.00 | .37 |
| Massachusetts | 2,533.40 | 1.66 | 30.47 | 64.86 | 2.00 | 2.64 |
| Michigan | 5,100.13 | 3.34 | 8.66 | 783.25 | 88.00 | 17.08 |
| Minnesota | 8,473.29 | 5.54 | 10.16 | 122.36 | 26.50 | 1.76 |
| Mississippi | 723.67 | .47 | 15.46 | 89.00 | 15.00 | 14.37 |
| Missouri | 7,981.08 | 5.22 | 11.50 | 554.08 | 162.50 | 8.98 |
| Nebraska | 4,107.14 | 2.69 | 5.34 | 1,133.10 | 79.00 | 29.51 |
| Nevada | 515.45 | .34 | .47 | | | |
| New Hampshire | 888.18 | .58 | 9.55 | 20.00 | | 2.25 |
| New Jersey | 1,912.77 | 1.25 | 24.47 | 15.79 | 6.00 | 1.14 |
| New York | 7,572.25 | 4.95 | 15.40 | 78.36 | 20.00 | 1.30 |
| North Carolina | 2,089.37 | 1.37 | 4.00 | 165.05 | 110.50 | 13.19 |
| Ohio | 9,614.39 | 6.29 | 23.41 | 146.77 | 44.00 | 1.98 |
| Oregon | 1,571.00 | 1.03 | 1.64 | 52.10 | 52.00 | 6.63 |
| Pennsylvania | 7,618.20 | 4.98 | 16.85 | 116.99 | 19.50 | 1.79 |
| Rhode Island | 149.82 | .10 | 11.99 | | | |
| South Carolina | 1,957.00 | 1.28 | 6.40 | 83.80 | 18.00 | 5.20 |
| Tennessee | 3,043.89 | 1.99 | 7.24 | 45.00 | 128.20 | 5.69 |
| Texas | 7,105.54 | 4.65 | 2.67 | 852.77 | 71.50 | 13.01 |
| Vermont | 864.86 | .57 | 9.04 | 4.00 | | .46 |
| Virginia | 3,124.87 | 2.04 | 7.36 | 54.53 | 23.60 | 2.50 |
| West Virginia | 768.40 | .50 | 3.10 | 72.04 | | 9.38 |
| Wisconsin | 7,748.28 | 5.07 | 13.83 | 371.46 | 28.00 | 5.16 |
| Alaska | | | | | | |
| Arizona | 609.25 | .40 | .54 | 70.95 | | 11.65 |
| Dakota | 1,082.45 | .71 | .73 | 792.25 | | 7.32 |
| District of Columbia | 29.87 | .02 | 42.67 | | | |
| Idaho | 63.50 | .04 | .07 | 39.50 | | 62.21 |
| Indian Ter. | 456.20 | .30 | .71 | 408.20 | 48.00 | 100.00 |
| Montana | 697.89 | .46 | .48 | 616.04 | 66.00 | 97.73 |
| New Mexico | 1,338.67 | .91 | 1.09 | 220.41 | 147.70 | 27.50 |
| Utah | 1,307.98 | .85 | 1.54 | 5.85 | | .45 |
| Washington | 212.90 | .14 | .31 | 75.00 | 20.00 | .45 |
| Wyoming | 833.30 | .56 | .87 | 110.09 | | 12.90 |
| Total | 152,781.00 | 100. | | 12,688.00 | 2,312.00 | |

But the greatest activity in railway construction lies in that territory west of the Missouri River, which, until within a comparatively few years, has not been favorably regarded by those who control large capital. It is not said that too much line has been built in this section of the country, but it will hardly be denied, in view of the financial difficulties into which some of the corporations interested have fallen, that railway construction has passed beyond the immediate needs of the locality mentioned. The explanation of this fact is simple. There has been repeated in Dakota, Nebraska, Kansas, Montana and Colorado the old story of competition between rival corporations for the control of new territory, and in other Western States new lines are now competing for traffic between important cities. The policy of railway management of which this is the result is not here brought into question; but it is believed that one who appreciates the situation as exposed in the above summary will not be inclined to hold legislation responsible for the financial difficulties of certain corporations.

TABLE II.—AMOUNT OF RAILWAY CAPITAL AT THE CLOSE OF THE YEAR ENDING JUNE 30, 1888.

It is the purpose of this table to show how much property exists in the United States that draws its revenue from railway management, and to assign that property to the various forms in which it exists. It includes stocks, bonds, and floating indebtedness of all sorts.

The scope of the table and the information it is intended to convey will be clearly seen from the following analysis:

Analysis of Table II.

1. Amount of stocks issued and outstanding.
Amount per mile of line.
Proportion to total railway capital.
Proportion existing as common stock.
Proportion existing as preferred stock.
2. Amount of bonded debt issued and outstanding.
Amount per mile of line.
Proportion to total railway capital.

3. Other forms of indebtedness.

Amount per mile of line.

Proportion to total railway capital.

Designation of indebtedness:

(a) Car-trust obligations.

(b) Bills, audited accounts, wages, and traffic balances payable on June 30, 1878.

(c) Receivers' certificates and miscellaneous.

4. Total railway capital.

Amount per mile of line.

In one respect the language adopted in this table is a little different from that which railway accountants use in presenting their reports to stockholders. Railway accountants class bonds as an incumbrance on the road and take no account of floating debt as capital. From the standpoint of stockholders interested in what determines the market value of stocks, or dividends on stocks, there is no objection to this plan; but from the standpoint of the public this is far from satisfactory. A marked difference exists between keeping books for a railway corporation and keeping books for the public; and it is the latter rather than the former task which is imposed upon a bureau of railway statistics. But there is ample precedent for classifying railway bonds as railway capital. English statisticians make their returns in conformity to this idea, and all who treat of railway problems from the point of view of public economy are accustomed to this use of the word. And, indeed, when it is recognized that many railways have been built from the proceeds of bonds rather than from the proceeds of stock, and that railway managements regard bonds as a perpetual incumbrance, it must be admitted that the situation is truly represented by including them under the head of railway capital.

Perhaps it will not be so readily admitted that floating indebtedness, independently of assets on hand to meet that indebtedness, should be classed as railway capital; but the purpose of this classification may be easily understood. Stocks and bonds together make up that part of railway capital classed as fixed investments; but it is a well known law of industrial economy that fixed investments cannot be productive except through the assistance of circulating capital. In what form does railway circulating capital exist, and what shall be the measure of the amount employed? Manifestly it exists in the forms of loans and bills payable, audited vouchers and accounts, wages and salaries due, and the like; and its measure is the average liability incurred in the course of business. Consequently in Table II, under the head of "Other forms of indebtedness," is included current liabilities existing on June 30, 1888; and these liabilities are assumed to fairly represent the circulating capital which is necessary to keep the fixed capital in a profitable state of activity.

It may be asked, Why not accept the other side of the balance sheet, namely: the assets, as representing circulating railway capital? This might be done were it not for one fact. It must be remembered that the object of the table is to include in railway capital all property which is devoted to the prosecution of the

business of carriers. Now, for the most part, an examination of the reports filed by the carriers shows that assets and liabilities do not vary greatly, so far as their amounts are concerned. In other words, debts accruing are substantially provided for by the accumulation of cash assets to meet them when due. So far, however, as there is a failure to balance, the tendency seems to be towards a growth of liabilities rather than an increase of assets. This is not necessarily evidence of bad financial management; it may result naturally from the rapid expansion of business. But whatever the explanation, the result is that the floating debt tends to increase and continues to increase until, being funded, it becomes a part of the permanent railway capital. Now, were we to accept assets instead of liabilities as the measure of circulating capital, the balance in favor of liabilities, which represents property devoted to the railway industry, would, for the time being, be excluded from the account. The result would be that the total of railway capital estimated in this manner would be less than the amount actually in existence. This is the reason why it seemed best to adopt liabilities rather than assets as the measure of circulating capital.

It is true that in this manner there is some danger of doing injustice to individual corporations whose assets exceed their liabilities, and whose accounts therefore show no balance of indebtedness. To guard against such a misreading of the figures it should be noticed that it is not intended in this table to present the financial standing of the individual roads. That information may be gained from Table VI, according to the plan of the forthcoming report.

Assuming the theory of classification to be understood, What are the facts disclosed by this second table? These are presented in the following summary:

Summary of railway capital (120,000 miles of line represented).

| Railway capital. | Amount outstanding. | Per cent of total capital. | Per mile of road |
|--|---------------------|----------------------------|------------------|
| Common stock..... | \$2,918,687,049 | 41.84 | \$24,322.39 |
| Preferred stock..... | 471,985,862 | 6.76 | 3,933.22 |
| Funded debt..... | 3,384,930,213 | 48.52 | 28,207.75 |
| Floating debt plus current liabilities | 200,668,032 | 2.88 | 1,672.23 |
| Total..... | 6,976,271,156 | 100. | 58,135.59 |

The first point of interest suggested by the above summary pertains to the respective proportions of railway capital that exist as stock and bonds. On this point the summary shows that of the total, 48.60 per cent is assignable to stock and 48.52 per cent to funded debt, leaving 2.88 per cent in the form of current liabilities. The significance of the facts thus disclosed will be readily seen if the peculiar nature of each form of property is held in mind. In the inception of this business stock represented the ownership of the original projectors of the enterprise. It is the voting property, and control over it gives control over the road. In theory the inception of a railway enterprise begins with the issue of stock, and upon the

basis of the property created out of the proceeds of its sale, bonds are issued with which to complete an enterprise set on foot.

In many cases roads have been constructed in conformity to this theory, and there are instances, as shown from the returns made to this office, in which important roads have been built without the use of bonds, and which today are not mortgaged. But this theory does not conform to the general history of railway construction in the United States, when regarded as a whole; nor is it supported by the figures that appear in the summary. The truth is quite the reverse of the theory. Railroads are almost universally built on borrowed capital, and the amount of stock that is issued, in the majority of cases, represents the difference between the actual cost of the undertaking and the confidence of the public—expressed by the amount of bonds it is willing to absorb—in the ultimate success of the venture. This thought is presented, perhaps too strongly, yet well presented, in the words of a well known writer on technical questions pertaining to railway affairs. He says:

The same general law obtains, and always has obtained throughout the world, that such properties (as railways) are always built on borrowed money up to the limit of what is regarded as their positive and certain minimum value. The risk only—the dubious margin which is dependent upon sagacity, skill and good management—is assumed and held by the company proper who control and manage the property.*

It may then be said that, as a rule, stock represents the speculative interest in railway management, while bonds represent actual proprietorship, and measure in a rough manner the estimate by the public of the minimum or certain value of the road.

Whether or not it is a sign of healthful activity that bonds should tend to overbalance stock, or what the movement in the future is likely to be in this respect, are questions that for the present must be passed by, but one point in this connection seems worthy a moment's notice. Stocks are properly termed the *entrepreneur* property—that is to say, the property of the manager. A control over a majority of the shares issued gives control over management; or translating these statements into the figures presented in the summary above, the ownership of \$1,695,336,556, or 24.30 per cent. of the total railway capital, may give complete direction over \$6,976,271,156 of railway capital, or 120,000 miles of operated line. This is a fact frequently presented by publicists, but it is one which never loses its significance as giving character to the American railway system.

With regard to circulating capital, a word only will be said. It appears that the circulating capital is only 2.88 per cent of the total investment. As compared with almost any other business this is remarkably small, but the variation is easily explained; for, in the first place, the fixed investments of the railway industry are of such a sort that they last a long time. The life of steel rails, for example, has not yet been accurately determined. Bridges, stations, and roadways, by proper repairs, last for a long series of years. On this account, the

value of property that must be kept on the books as fixed investments greatly outbalances that which must be kept on hand to meet current liabilities. But the chief explanation of the fact mentioned lies in the peculiar nature of the traffic business. So far as passengers are concerned, pay is always taken for service before the service is rendered; while for freight carried the cash is usually demanded upon delivery of goods; on the other hand, all expenses are usually settled monthly. It is not necessary, therefore, to keep on hand as large a bank balance relative to the total of business, as is the case where business is carried on upon a credit basis, or by discount of commercial paper.

Perhaps the most significant fact disclosed by Table II pertains to the amount of capital per mile of line, but no discussion of this question will be presented in the present report; the amount will be somewhat increased by more complete returns of capitalization from subsidiary roads; and not only are the conclusions under this head open to some question, but there are many correlated facts not at hand, without which a discussion of the amount of capital per mile of line must be unsatisfactory. It is hoped to present this matter in a more perfect form in a subsequent report.

TABLE III.—EARNINGS AND INCOME FOR THE YEAR ENDING JUNE 30, 1888.

As previously stated, this table exhibits all revenue accruing to railway corporations, exclusive of that arising from sale of securities or decrease of assets. The analysis of income to which it conforms is suggested by the various items it includes. These items are as follows:

- A. Earnings from operation:
 - (a) Passenger revenue.
 - Revenue per passenger per mile.
 - (b) For carrying the mail.
 - (c) For carrying express matter.
 1. Total passenger earnings:
 - Passenger earnings per train mile.
 - Proportion to total traffic earnings.
 - (a) Freight revenue.
 - Revenue per ton per mile.
 - (b) Stock yards.
 - (c) Elevators.
 2. Total freight earnings, including miscellaneous:
 - Freight earnings per train mile.
 - Proportion to total traffic earnings.
 3. Total traffic earnings, including miscellaneous:
 - Total traffic earnings per train mile.
 - Proportion to total income.
- B. Income from property owned but not operated:
 - (a) Dividends on stocks owned.
 - (b) Interest on bonds owned.
 - (c) Rentals on plant owned.
 4. Total income from property owned.
 - Proportion to total income.
 5. Total earnings and income.

It appears from the above that Table III conforms to the usual methods of classifying operating earnings, and only departs from ordinary custom in placing by the side of such earnings

*The Economic Theory of Railway Location, p. 31.
2 INTER S.

income from permanent investments in property not operated. For the railway manager whose interest centers in operating earnings and operating expenses, that part of the table which deals with income from stocks and bonds owned or from rentals is of slight importance. But for the public, as indeed for any one who wishes to gain a comprehensive view of railway affairs, all items included in the revenue of railways must be brought under one heading. The interest of the public centers in the question of rates for service rendered, and as fixed charges must be added to operating expenses before the question of rates or of dividends can be considered, so for the same reason income from fixed investments must be added to operating income. The final summary of this table gives total earnings and income; that is to say, the several amounts in this summary of the table show all the money received by the corporations named, exclusive only of the proceeds of new securities or of decreased assets.

There is some question as to the propriety of including the express business under passenger service. On many roads there are special express trains which carry no passengers, and which seem more nearly allied to a fast freight service than to passenger service. But as long as the item of revenue from express is kept distinct from passenger revenue, and since the assignment of the express business to passenger service is adopted by most of the roads, it seems best, for the present at least, to conform to general custom. It is only necessary in judging of the cost of carrying passengers to make some allowance for the rapidly increasing incomes to railroads from expressage.

Below is given a general summary of the facts embodied in detail in Table III. A presentation of deductions will be reserved until after consideration of Table IV.

Summary of earnings and income (120,000 miles of line represented).

| Sources. | Gross amount. | Proportion to total revenue from operation. | Proportion to total income. |
|---------------------------------------|---------------|---|-----------------------------|
| Passenger service.. | \$235,963,341 | <i>Per cent.</i> | <i>Per cent.</i> |
| Freight service..... | 544,858,663 | 29.46 | 27.20 |
| Other revenue from operation | 20,076,842 | 68.03 | 62.81 |
| | | 2.51 | 2.31 |
| Total revenue from operation | 800,898,846 | 100. | ----- |
| Income from other sources..... | 66,575,580 | ----- | 7.68 |
| Total income (excluding credits sold) | 867,474,426 | ----- | 100. |

TABLE IV.—GENERAL EXPENSES FOR THE YEAR ENDING JUNE 30, 1888.

As the previous table considered all forms of ordinary income, so this table includes all expenditures except such as are incurred for extension of line or betterment of property. The classification to which it conforms is shown in the following analysis:

Analysis of Table IV.

A.—Expenditures chargeable to operation:

1. Maintenance of way and structures.
2. INTER S.

- Proportion to total operating expenses.
- Proportion assigned to—
 - (a) Passenger service.
 - (b) Freight service.
2. Maintenance of equipment.
 - Proportion to total operating expenses.
 - Proportion assigned to—
 - (a) Passenger service.
 - (b) Freight service.
3. Conducting transportation.
 - Proportion to total operating expenses..
 - Proportion assigned to—
 - (a) Passenger service.
 - (b) Freight service.
4. General expenses.
 - Proportion to total operating expenses.
 - Proportion assigned to—
 - (a) Passenger service.
 - (b) Freight service.
5. Summary of operating expenses.
 - Proportion assigned to—
 - (a) Passenger service.
 - (b) Freight service.
 - Proportion of operating expenses to operating income.
- B.—Expenditure assignable to fixed charges:
 - Total amount assignable as—
 - Interest on bonds.
 - Rentals paid.
 - Taxes paid.
 - Miscellaneous.
- C.—Summary and deductions:
 1. Total operating expenses and fixed charges..
 - Deductions:
 - (a) Proportion assignable to operation.
 - (b) Proportion assignable to fixed charges..
 - (c) Cost of carrying one passenger one mile.
 - (d) Cost of running passenger train one mile.
 - (e) Cost of carrying one ton of freight one mile.
 - (f) Cost of running freight train one mile.
 - (g) Average cost per train mile of all trains earning revenue.

There are two questions of importance suggested by this analysis. The first pertains to the classification of expenses under the four heads, maintenance of way and structures, maintenance of equipment, conducting transportation, and general expenses; the second question pertains to the apportionment of expenses between the passenger and freight service. With regard to the first of these questions, as stated in the Commission's report on page 67 [*ante*, 286], "The distribution into four general classes was determined upon as the most scientific and satisfactory of the various systems in use; while the subordinate heads under each class are so arranged as to require no important change from what is known as 'the classification of operating expenses,' which was agreed upon by a convention of state commissioners at Saratoga June 10, 1879, and which has been quite generally adopted in actual use." And certainly where one looks into this classification it appears simple, adequate, and workable; and it is a pleasure to add that many roads that have not previously done so are now adjusting their accounts to its requirements.

The question which arises in connection with apportionment of expenses between passenger and freight service is one that can not be determined with such confidence. One point only respecting it lies beyond the limit of reasonable controversy, and that is that such apportionment must in some manner be made. Not only is this demanded in the interest of comparative statistics, but it is of great importance for an intelligent judgment on relative freight and passenger charges. But when the proper rule for making the apportionment of expenses comes to be considered, it is necessary, in the presence of the many and conflicting theories entertained by competent railway accountants, to proceed with great caution.

The rule adopted by the Commission, as contained in its book of instructions for the guidance of carriers in making their annual reports, is as follows:

All expenses which are naturally chargeable to either freight or passenger traffic should be entered in their respective columns; expenses which are not naturally chargeable to either traffic should be apportioned on a mileage basis, making the division as between freight and passenger traffic in the proportion which the freight and passenger train mileage bears to the total mileage of trains earning revenue.

With few exceptions this rule has been followed by the carriers in making their reports, and the results exhibited in the table show the manner of its working. There is of course no difference of opinion, so far as the expenses "naturally chargeable to either freight or passenger traffic" is concerned. The difficulty arises in connection with such expenses as can not be so apportioned. For example, how can it be determined what proportion of the costs of maintaining a roadbed in good order is chargeable to freight revenue?

The confusion that exists on this subject may be the best indicated by stating the various theories respecting it. According to the rule given above, expenses which from their nature can not be easily assigned are to be apportioned on the basis of train mileage. This is thought to allow more nearly than any other arbitrary rule for the varying elements of velocity and weight. If freight trains are heavier than passenger trains the latter are ordinarily run at higher speed; and, as is well known, the "pound" of a train on the rails is measured by its momentum or the resultant of velocity multiplied by weight. Curves, grades, temperature and other factors which vary with physical characteristics of the road or with the locality in which it is built, may be regarded as constant so far as freight and passenger service is concerned.

But this rule of apportionment fails to gain acceptance by many accountants who have had large experience in railway affairs. Some claim that an apportionment fair to all branches of the railway service is impossible. They who maintain this position assume that operating expenses should be taken as a whole, and they conceive the whole duty of the manager to have been performed if at the close of the fiscal year there remains a satisfactory margin of earnings. It is urged by others that the only solution of the problem is to determine the ratio of apportionment for those items of expense that can be readily traced to passenger

and freight service, and then to adopt this ratio for apportioning the other items. This position is less satisfactory than the one previously stated, for it gives the appearance of a solution when in reality it is but an evasion of the problem. There are other accountants who use car mileage as the true basis of apportionment; others substitute for this engine mileage; still others declare that mileage has nothing to do with the question, and that weight of trains alone should be considered. In German and Swiss statistics the number of axles in a train serves as the basis of most comparative and proportional computations, and it is possible that further study would reveal yet other theories.

In the presence of such divergency of opinion as is portrayed above, it is certainly well to refrain from hasty judgment. The question is one to be determined by careful investigation and comparative study. But in reading the letters of the several railway officers who have favored the Commission with arguments upon this subject, one thought has presented itself that may prove the source of fruitful inquiry. It happens that the several accountants who hold the theories referred to are officers of roads that differ widely in their physical characteristics, as also in the nature of the competition to which their business must conform. In one case the roadbed is straight and over a level country, in another there are sharp curves and heavy grades; one road is obliged to depend for supremacy upon fast trains; another, running through country sparsely settled, can run its trains according to requirements of economy; the average temperature and humidity, also, which must affect somewhat the wear and tear of way, is different for the several roads. Now it is possible that divergence of opinion as to the proper method of apportioning expenses between freight and passenger service is due to the varying conditions under which the problem has been considered; and if this be true it is of course impossible to discover any single rule to satisfy the problem. This can only be determined by applying the several rules under different conditions, and comparing the results. Such a method of procedure would be scientific and must lead to trustworthy results. It is proposed in this office to undertake such an investigation.

The following is a summary of Table IV:

[See next page.]

These facts do not call for comment after the explanation by which the summary was preceded. Accepting the theory of classification and apportionment, their import may be easily grasped. But in connection with Table III and Table IV there are a few deductions which, when placed side by side, will be found interesting and instructive. In the tables themselves the results that follow will be given in detail for each road:

Comparative summary of results to be deduced from Table III and Table IV.

Revenue per passenger per mile.

Average cost of carrying one passenger one mile.

Revenue per ton of freight per mile.

[SUMMARY OF TABLE IV.]
Summary of expenditures. (120,000 miles of line represented).

| Source of expenditure. | Amount. | Proportion to total operating expenses. | | Proportion to total expenditures. | | Proportion assignable to— | |
|---|---------------|---|-----------|-----------------------------------|-----------|---------------------------|------------------|
| | | Per cent. | Per cent. | Per cent. | Per cent. | Passenger service. | Freight service. |
| Maintenance of way and structures. | \$118,199,339 | 29.83 | 13.16 | 13.16 | 13.16 | 36.34 | 33.86 |
| Maintenance of equipment. | 87,898,308 | 17.89 | 11.82 | 11.82 | 11.82 | 33.08 | 70.92 |
| Conducting transportation. | 249,728,694 | 48.13 | 33.68 | 33.68 | 33.68 | 31.87 | 68.13 |
| General operating expenses. | 54,058,914 | 10.65 | 7.35 | 7.35 | 7.35 | 36.80 | 61.14 |
| Total operating expenses. | 507,706,345 | 100. | | | | | |
| Fixed charges. | 229,338,165 | | 31.11 | 31.11 | 31.11 | 34.21 | 65.79 |
| Total expenditures (excluding betterments). | 737,134,510 | | | | 100. | | |

* Approximate figures.

Average cost of carrying one ton of freight one mile.

Revenue per train mile, passenger trains.

Average cost of running a passenger train one mile.

Revenue per train mile, freight trains.

Average cost of running a freight train one mile.

Percentage of operating expenses to operating income.

There is, of course, some danger of misinterpreting, or rather of misapplying, such figures as the above summary will lead to when presented. They are to be accepted as averages, and not as a standard. It lies in the theory of averages to eliminate everything that is peculiar; he, therefore, who makes use of an average for any particular problem must modify the standard so far as that is necessary to allow for what is peculiar in the conditions considered. So far as the above deductions are concerned it is quite likely that the United States is too vast in extent, and presents too great variety in the conditions under which railway traffic is carried on, to admit of a defensible standard for the entire country. It is likely that it will be found necessary to group the railways according to some plan that will give general conformity and fixed items of cost and expense for each group. It will be seen

that the problem of setting forth trustworthy statistics is not a light one.

TABLE V.—PAYMENTS ON RAILWAY CAPITAL FOR THE YEAR ENDING JUNE 30, 1888.

From this table may be learned the dividends paid on stock and the interest paid on bonds. In the column devoted to total payments there is included miscellaneous interest payments. The idea of the table is such a familiar one that it does not seem necessary to enter into any explanation of the form in which it is presented. The facts disclosed or the summary of the table may be learned from the following classification of stock and bonds on the basis of the rates of dividends or of interest paid:

| Rate per cent. | Amount of | | Per cent. of total stock. | Amount of | | Per cent. of total bonds. |
|----------------|-----------------|-----------|---------------------------|---------------|-----------|---------------------------|
| | stock. | of stock. | | bonds. | of bonds. | |
| Nothing paid | \$1,775,574,953 | 52.37 | | \$680,945,810 | 20.12 | |
| Under 1 | 70,226,546 | 2.34 | | | .09 | |
| 1 to 2 | 148,660,394 | 4.38 | | 3,000,000 | | |
| 2 to 3 | 128,354,325 | 3.73 | | | .59 | |
| 3 to 4 | 216,781,970 | 6.30 | | 19,817,506 | 9.98 | |
| 4 to 5 | 320,468,161 | 9.45 | | 337,684,315 | 10.00 | |
| 5 to 6 | 250,985,662 | 7.40 | | 573,277,423 | 16.93 | |
| 6 to 7 | 329,123,281 | 9.71 | | 1,101,301,842 | 32.53 | |
| 7 to 8 | 62,570,200 | 1.83 | | 629,244,317 | 18.33 | |
| 8 to 9 | 3,049,510 | .09 | | 40,822,000 | 1.38 | |
| 9 to 10 | 7,421,900 | .21 | | | .05 | |
| 10 to 11 | 3,570,900 | .11 | | *1,745,000 | | |
| 11 and above. | | | | | | |
| Total | 3,380,672,911 | 100. | | 3,384,930,213 | 100. | |

*10 per cent.

Classification of stocks and bonds according to rate of dividend or of interest.

There are quite a number of questions suggested by such an exhibit as the above. What is the meaning of that large block of stock paying no dividends? An answer to this question calls for a more extended analysis than can be indulged in, in this preliminary report. What interpretation is to be put on the actual rates of interest paid on bonds? These facts all have a meaning, just as analogous facts pertaining to government indebtedness have a meaning. Indeed it is remarkable, when one looks at the bonded indebtedness from the point of view of the public, how close are the analogies between principles of public finance and the principles of a sound railway economy. There is here opened up a field of investigation altogether too broad for a preliminary report.

TABLE VI.—GROSS INCOME AND APPLICATION OF THE SAME FOR THE YEAR ENDING JUNE 30, 1888.

The scope of this table is shown in the following analysis:

Analysis of Table VI.

A. Gross income to railway corporations:

1. Operation.
2. Bonds or stocks owned.

3. Other property owned.
4. Sale of securities.
5. Sale of land or other assets.
- B. Application of gross income:
 1. Operation.
 2. Fixed charges.
 3. Permanent improvements.
 4. Financial betterments.
 5. Dividends.
- C. Balance, showing movement in floating debt or in assets.

This table may be regarded as the culmination of the plan that runs through the previous tables. Its aim is to show the total income for the year, the several sources from which that income is derived, and the manner in which it is used. From the figures presented one may determine the degree of success which has attended the year's operations, for, since total income is set over against total expenditure, the balance will show either an increase or a decrease in assets or an increase or decrease in floating debt.

Independently of a previous analysis of railway capital, earnings, and expenditures an exhibit of this sort would be of little significance; but coming as it does after such an analysis, so that the items here mentioned may be traced back to the service which occasions expenditure and gives rise to income, the facts it discloses are of great importance. For one thing they will tend to allay the suspicions of the public with regard to all corporations that are equitably managed.

This table also has a direct bearing on the vexed question of overcapitalization, when that question is regarded not so much in retrospect as in view of future railway expansion. In Table III, which treats of earnings and income; by earnings is meant earnings from operation, and by income is meant income from previous investments; and in Table IV, which treats of expenditures, only those expenditures are considered which are contingent on the operation of property as it exists. But in this table—Table VI—the word income is extended to include all moneys derived from the sale of new securities or the disposal of lands or other property as well as moneys received from operation and investment; while on the side of expenditures is included all permanent improvements or betterments of any sort.

The meaning of permanent improvements is

sufficiently clear, but possibly the word betterments may not be understood. As the word is here employed it is intended to include such items as reduction of the indebtedness, either funded or floating (whether this be done directly or by payments to a sinking fund), investment in securities of any sort, and increase of cash assets; indeed any financial transaction by which the standing of the corporation is in any way bettered. It appears, then, that the purpose of the table is to balance the extension of property against the extension of debt. Recurring now to the question in hand, it is well known that a fruitful source of overcapitalization is the custom of creating debt for the purchase of equipment and making no provision for the extinction of the debt at the time the equipment shall have been worn out. New stock must then be issued to purchase new equipment, while the old debt yet remains as an incumbrance on the property.

If, now, statistical inquiry into railway matters can show the average life of various sorts of equipment, and if, by means of some such annual balance as that suggested by the sixth table in this report, a failure to make provision for deterioration of the movable property is disclosed, the mere publication of such a fact will do much towards closing this avenue of overcapitalization. In matters of this sort the American statistician has much to learn from the statistician of Germany. Among the most interesting of the questions investigated by German railway statistics is the one that pertains to the rate of deterioration in railway equipment.

The thoughts expressed above are but two of the many that suggest themselves when considering the significance of this last table of the report. Others may be presented when the details of the table shall be given in the completed report.

Respectfully submitted.

Henry C. Adams,
Statistician.

December 1, 1888.

[This report is followed by Table I, referred to therein—being a detailed statement (as to 1,418 railroads) of name of road in full, abbreviated name, date of filing report, how road operated, length of line operated, length of line owned, and remarks as to gauge and the "system" in which included.]

INTERSTATE COMMERCE REPORTS, VOL. II.

APPENDIX II.

AN ACT TO REGULATE COMMERCE.

(As amended March 2, 1889.)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this Act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States, to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country; *Provided, however,* That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons

for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this Act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this Act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this Act.

Sec. 5. That it shall be unlawful for any

common carrier subject to the provisions of this Act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

Sec. 6. (*Amended.*) That every common carrier subject to the provisions of this Act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.

Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection. Reductions in such published rates, fares, or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given.

And when any such common carrier shall

have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedules of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this Act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given, to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published.

No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time.

The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged, and

may change the form from time to time as shall be found expedient.

If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this Act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this Act, until such common carrier shall have complied with the aforesaid provisions of this section of this Act.

Sec. 7. That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed, or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act.

Sec. 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done, or permit to be done any act, matter, or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

Sec. 9. That any person or persons claiming to be damaged by any common carrier subject

to the provisions of this Act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this Act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 10. (*Amended.*) That any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person, acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this Act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this Act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this Act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this Act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any District Court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment in the discretion of the court.

Any common carrier subject to the provisions of this Act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of

a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this Act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding five thousand dollars or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this Act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person or such officer or agent of such corporation or company shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding five thousand dollars, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom.

Sec. 11. That a Commission is hereby created and established to be known as the Interstate Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this Act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a

vacancy shall be appointed only for the unexpired time of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this Act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Sec. 12. (*Amended*) That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this Act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this Act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and in case of disobedience to a subpoena, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

Sec. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon, a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such Commissioner or Commission, and may institute any inquiry on its motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

Sec. 14. (*Amended.*) That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports.

Sec. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this Act, or of any law cog-

nizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Sec. 16. (*Amended.*) That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this Act, not founded upon a controversy requiring a trial by jury, as provided by the Seventh Amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the findings of fact in the report of said Commission shall be *prima facie* evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case

of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money, not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining or into court, to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree *in personam* in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the Seventh Amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty, nor more than forty days from the time said order is made, and it shall

be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of two thousand dollars or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case. For the purposes of this Act excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

Sec. 17. (*Amended.*) That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person, or by attorney. Every vote and official Act of the Commission shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

Sec. 18. (*Amended.*) That each Commissioner shall receive an annual salary of seven thousand five hundred dollars, payable in the same manner as the judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of three thousand five hundred dollars, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employes as it may find necessary to the proper performance of its duties. Until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and

milage that are paid witnesses in the Courts of the United States.

All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation, or upon official business in any other places than in the City of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission.

Sec. 19. That the principal office of the Commission shall be in the City of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this Act.

Sec. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual report shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same, the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipments; the number of employés and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe (if in the opinion of the Commission, it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this Act, shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Sec. 21. (*Amended.*) That the Commission shall, on or before the first day of December in each year, make a report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in

the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

Sec. 22. (*Amended.*) That nothing in this Act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, state, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation, or the issuance of milage, excursion, or commutation passenger tickets; nothing in this Act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Orphan Homes including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes; nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers and employés, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employés, and nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this Act.

(*New section.*) That the Circuit and District Courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the Act to which this is a supplement and all Acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this Act or the Act to which it is a supplement.

INTERSTATE COMMERCE REPORTS, VOL. II.

APPENDIX III.

At a meeting of the INTERSTATE COMMERCE COMMISSION held at its office in the City of Washington on the eighth day of March, 1889.

Present: ALL THE COMMISSIONERS.

The subject of the publication of joint tariffs being under consideration, the following preamble and order were unanimously adopted, and directed to be sent to all railroad companies subject to the Act to regulate commerce:

WHEREAS, by Section 6 of the Act to regulate commerce, as amended March 2, 1889, advances and reductions in joint tariffs can only take effect after notice has been given to the Commission as defined by circular issued March 7, 1889, *and whereas*, The same section also authorizes the Commission to direct when joint tariffs shall be made public and to prescribe the measure of publicity to be given to the same, and further authorizes the Commission to make public proposed advances and reductions in joint tariffs in such manner as may be deemed practicable, and to prescribe the measure of publicity to be given to advances or reductions in joint tariffs,

It is ORDERED as follows:

All advances and reductions in joint rates, fares and charges shown upon joint tariffs established by common carriers subject to the provisions of the Act to regulate commerce shall be made public.

Every such advance or reduction shall be so published by plainly printing the same in large type, two copies of which shall be posted for the use of the public in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation under such schedules, in such form that they shall be accessible to the public and can be conveniently inspected. Such schedules shall be so posted ten days prior to the taking effect of any such advance and three days prior to the taking effect of any such reduction in joint rates, fares and charges.

A true copy

Edw. A. Moseley,
Secretary.

INTERSTATE COMMERCE REPORTS.

THE INTERSTATE COMMERCE COMMISSION:

HON. THOMAS M. COOLEY, of Michigan, *Chairman.*

HON. WILLIAM R. MORRISON,
OF ILLINOIS.

HON. ALDACE F. WALKER,
OF VERMONT.

HON. AUGUSTUS SCHOONMAKER,
OF NEW YORK.

HON. WALTER L. BRAGG,
OF ALABAMA.

EDWARD A. MOSELEY, Esq., *Secretary.*

John H. MARTIN *et al.*

v.

SOUTHERN PACIFIC CO., Central Pacific
R. Co., and Union Pacific R. Co.

(No. 83.)

1. The evils arising from the lack of uniformity in the existing rules in reference to **rates on mixed car load shipments** commented on, and the immediate adoption by the railroads of the country, of some **uniform classification rule** which shall definitely control the question of such shipments, recommended.
2. The **difference in classification** adopted by the "western classification" (which applies to business from the Pacific coast to all points west of the Missouri River), between "**raisins**" and "**dried fruits**", by which a higher car load rate is imposed on raisins than on other dried fruits, while by the "Pacific coast east bound classification" (which applies to business over the same roads from the Pacific coast to points on the Missouri River and east thereof), such distinction is not imposed—is, in connection with the different rules of the two classifications as to mixed car loads, an unreasonable discrimination.
3. An intermediate **local rate** should never exceed the through rate to the terminus of the line plus the local rate back to the intermediate point.
4. The **use by carriers of different freight classifications**, the effect of which is to increase the revenue from local traffic as compared with that obtained from through traffic, is as much a **violation of section 4** of the Act (the long and short haul provision) as would be the imposition of a higher tariff upon the same class in the same classification.
5. In the absence of competition from Canadian railways (which are not subject to the Act), the circumstances and conditions of the **traffic from San Francisco to Denver** are not so materially different from those of the traffic from San Francisco to the Missouri River as to

justify the transcontinental roads subject to the Act, in charging a greater sum for the shorter distance.

(Tried Dec. 16, 1887—Report filed May 17, 1888.)

COMPLAINT alleging discrimination in charges from San Francisco against Denver and in favor of Missouri River points, etc. (See Complaint, 1 Inters. Com. Rep. 596).

Messrs. Patterson & Thomas and J. R. Doolittle, for complainants.

Messrs. McDonald, Bright & Fay and Charles H. Tweed, for the Southern Pacific Company.

Messrs. A. J. Poppleton, Shellabarger & Wilson and John S. Blair, for the Union Pacific Railway Company.

Mr. Charles H. Tweed, for the Central Pacific Railway Company.

REPORT AND OPINION OF THE COMMISSION.

Walker, *Commissioner*:

The complainants are wholesale grocers doing business at Denver, Colorado. Their complaint alleges that a much greater sum is charged for transportation of freight from San Francisco to Denver over the defendants' lines than is charged to Kansas City, 600 miles further east, and that the charge to Kansas City, added to the charge on the same articles from Kansas City back to Denver, makes a less rate than the charge from San Francisco to Denver direct.

The answer of the Central Pacific Railway Company disclaims any participation in the traffic in question, its road being under lease. The answers of the Southern Pacific Company and the Union Pacific Railway Company claim that the higher charge for the shorter haul from San Francisco to Denver than to Kansas City, is justified by the competitive circumstances and conditions attending the longer traffic, and deny that the rates are less from San Francisco to Kansas City and thence back to Denver than from San Francisco to Denver direct.

The commodities in respect to which the complaint was made are dried fruits and raisins produced in California. The facts which are found from the evidence are as follows:

In July, 1887, John H. Martin, one of the complainants, was in San Francisco, and there

purchased 6,400 pounds of dried fruits and 14,525 pounds of raisins. After making inquiries of the agent of the Union Pacific Railway Company at that point, and of others, in respect to freight rates, he forwarded said articles, on August 2, over the lines of the defendants, via Ogden and Cheyenne, consigned to his firm in Denver. The consignment aggregated 20,925 pounds, or a little more than the minimum car load shipment, which, on the lines in question, is 20,000 pounds. No rate had been definitely agreed upon in advance of the shipment, and the firm was charged at the rate of \$2.30 per hundred on the dried fruits, and \$2.65 per 100 pounds on the raisins, aggregating \$532.11 freight, which was paid on receipt of the goods at Denver on August 9.

The charges so collected were assessed under the western classification, which was then in force upon the business in question, and which called for a third class rate on dried fruits and a second class rate on raisins, in less than car load shipments. The same classification placed the same articles in car load lots, dried fruits in the fourth class, and raisins in the third class, the rates on which respectively were \$1.95 and \$2.30.

Complainants in the previous winter had received a car load consignment of similar goods, from San Francisco to Denver, at the rate of \$1.30 per hundred. They protested vigorously in respect to the charge collected on August 9, of \$532.11; the former rate would have been but \$272.03.

First—Mixed car loads. It is obvious that the first question arising under these facts relates to what is known as "mixed car load lots," where two or more articles, each having a car load rate, are united to form a single car load in the same consignment.

Upon this subject the western classification contains the following provision:

"No two or more articles having a car load rate shall be shipped in mixed car loads at the car load rate, unless so provided for in the classification."

The same classification, under the heading "Dried Fruit," contains the following:

"Note.—All dried fruit taking the same classification in L. C. L. and in C. L. may be taken in mixed C. L. at the C. L. rate."

Dried fruits and raisins under this note were not entitled to be taken in mixed car loads at the car load rate, because their classification was not the same. The charge exacted was in precise conformity to the requirements of the tariff and classification then in force.

The Interstate Commerce Commission, in connection with an informal complaint concerning the charges upon a certain shipment of wine and brandy in a single car from the Pacific coast, had meanwhile taken up the subject of mixed car loads, in correspondence with the General Traffic Manager of the Southern Pacific Company; in the course of which the fact was developed that the rule of the western classification, above noted, was very different from the rule of the Pacific coast east bound through freight classification, which was and is used upon business from the Pacific coast to points on the Missouri River and beyond. Rule 12 of the latter classification reads as follows:

"Articles taking different rates.—Car loads. Following articles of a kind, as grouped, may take rates to which each class is entitled on its own weight. Example: 12,000 pounds of beans and 8,000 pounds of peas will take car load rate for each article. Shipment must bear one mark and be to one consignee:

"Alcohol, high wines, pure spirits, whisky, bitters, brandy, and wine (California), ale, beer, and porter; beans and peas; bones, hoofs, and horns; borax and borax pulverized; brimstone and sulphur; flour and mill stuffs; fruit, vegetables, meat and fish canned, and fruit preserved, and sauces in glass or wood; fruit, and vegetables of all kinds (green); fruit dried, and raisins; leather of all kinds; macaroni and vermicelli; tea and tea dust."

This correspondence finally resulted in the application to business governed by the western classification of the rule in respect to mixed car loads found in said Pacific coast east bound classification, upon said transcontinental line.

Applying the present rule to the shipment in question, and the charge would have been:

| | |
|--|----------|
| Dried fruits, class 4, 1.95, 6,400 lbs. | \$124 80 |
| Raisins, class 3, 2.30, 14,525 lbs. | 334 07 |
| Total | \$458 87 |

A new edition of the western classification has since been issued, which contains no change in respect to this subject. It appears, therefore, that under the western classification, which is in use by more than sixty different roads, two different rules are employed in reference to mixed car loads—one, the rule appearing in the classification itself, and the other the rule recently adopted as aforesaid upon the defendant and other transcontinental roads.

The manner in which this subject has been treated by the different railroads of the country has led to great confusion, which will continue until a common principle is established.

Official classification No. 3, used on the roads east of the Mississippi and north of the Ohio, sometimes called the trunk line classification, provides as follows:

"Rule 8 (A). When a number of different articles in packages of the same class are shipped at one time by one shipper to one consignee at one point of delivery, in full car loads, they shall be taken at the rate per hundred pounds for such class in car loads. If the articles are of more than one class, the car load rate and minimum car load weight for the article in the highest class shall be charged on all the articles that make up the car load."

In the classification of the Southern Railway & Steamship Association a rule reads thus:

"'Car load rates' applies to one shipment to one consignee of one article of freight to secure reduced rates where provided for by the classification."

The Texas classification, on the other hand, enumerates thirty-four different groups of articles under the following note:

"The following articles as described and named below may be loaded in the same car, and on which car load rates for their class will apply."

The Pacific coast west bound classification provides that—

"On mixed car loads the less than car load rates will apply."

While the Southern Pacific Company, in respect to local tariffs on its Pacific system, has amended Rule 7 of the western classification as follows:

"Mixed car loads of articles, for each of which a car load rate is named, may take the highest car load rate named on any of the articles in the lot, if for one consignee by one shipper."

It is apparent that in every case of a shipment of a mixed car load of goods the shipper must possess and must carefully study the classifications in use throughout the whole route covered by the way bill in order to ascertain what the proper charge should be or whether he has been overcharged in the transaction. A shipment starting under one rule and passing into a Territory where a different rule is in force is liable to have the rate increased unless the station agent at the initial point is thoroughly conversant with all the classifications; and, on the other hand, such a shipment is liable to be charged through to the destination upon the less than car load basis, while entitled to considerable reduction under other classifications before the destination is reached.

The aggregate amount of shipments in mixed car load lots upon all the lines in the country is considerable. The inconsistencies in the treatment of such shipments by different carriers under different classifications, and frequently by the same carrier, where different classifications are used for different destinations, have been a source of constant annoyance to the community, and have constituted one of the little things, the multiplication of which has tended to create and intensify a feeling of irritation on the part of the public against railroads and their managers. It is excessively annoying for a shipper who has made up a car load lot in the expectation of receiving a car load rate to find that a few more dollars are exacted because the rule in force upon some connecting road prohibits the car load rate in case more than one kind of articles is embraced in the shipment, although no substantial increased expense to the carriers is involved; and it is still more annoying to find that a rate apparently shown by the tariff sheets of the carrier at the shipping point is not sufficient to obtain the delivery of the goods at destination; or, on the other hand, that he might have obtained a lower rate if he had been fully apprised of the diversities prevailing in different sections or in respect to different consignments.

This whole matter is in a state of elaborate and unjustifiable confusion. It should be taken up at once by the various traffic managers and associations controlling classification in different parts of the country and a common rule immediately established. Such a rule, in order to be satisfactory and just, should be precisely fair as between the shipper and the carrier, easily comprehended in its terms, reasonable in its nature, and applicable throughout every shipment without change.

The carriers of the whole country are interested and would be entitled to be heard, either generally or through their associations, before

the Commission could safely make such an order as would meet the case; at the present time, therefore, the Commission only recommends the immediate adoption of some uniform classification rule which shall definitely control the question of mixed car load shipments.

Second—Different classification of raisins and dried fruit.—Continuing the statement of facts in reference to the case in hand, it should be further noted that a comparison of the classifications shows that in the western classification, in force on business from the Pacific coast to all points west of the Missouri River, raisins are classed higher than dried fruits, while in the Pacific coast east bound classification, in force on business from the Pacific coast to the Missouri River and common points, St. Louis and common points, Chicago and common points, New York and common points, etc., California raisins in car load lots are found in the same class with dried fruits in car loads.

These diversities involved the subject in confusion, as understood by complainants and presented in their proofs. It is a source of infinite misunderstanding that classifications so widely different as the two last above named should be employed on business from the same points, in the same direction, over the same lines. Separate tariffs are issued for the business conducted under these classifications, the tariff subject to the western classification reading "Joint through tariff between San Francisco, Sacramento," and other Pacific coast points, "and all points on the Union Pacific system east of Ogden in Utah, Wyoming, Nebraska, Kansas; and all points on the Denver, Pacific & Kansas Division in Colorado; and all points on the St. Joseph & Grand Island Railroad."

Any person having in his hands this tariff would understand that it was applicable as well to Omaha, Atchison, Leavenworth, and Kansas City, as to Denver, but in fact another tariff is used on the business from the same Pacific points to points on the Missouri River, which is subject to the Pacific coast east bound classification; and this is true although the Pacific coast east bound classification contains upon its face a statement of the roads which employ it "in connection with the eastern lines," apparently excluding the idea that it is used on business to the eastern terminals of the roads in question.

It is not surprising, under these circumstances, that complainants failed to obtain an accurate understanding of the rates to Missouri River points for comparison with the rates to Denver.

In the western classification dried fruits are rated L. C. L. class 3, C. L. class 4; while in the Pacific coast east bound classification the same articles are rated L. C. L. class 5, C. L. class 7. Raisins, in the western classification, stand L. C. L. class 2, C. L. class 3; while in the Pacific coast east bound classification they stand L. C. L. class 4, C. L. class 7.

One effect of applying the western classification to this article is to impose a car load rate on raisins higher than is charged on dried fruits. In the Pacific coast east bound classification raisins in car loads are in the same class with dried fruits in car loads. In less

than car loads the classification of raisins is higher than that of dried fruits in both cases.

It appears from the evidence that the value of California raisins is quite uniformly less than the value of the article sold as California dried fruits. Complainants testify that no distinction in classification between California raisins and dried fruit was enforced on shipments to Denver previous to April 5, 1887. No reason is apparent why the dried fruits of California should not be construed to embrace raisins, except the fact that the classification has the word "raisins" in another place. This interpretation would have entitled the complainants to a car load rate in class 4 of \$1.95 on 20,925 pounds—\$408.03.

These irregularities and inconsistencies are not reasonable. In all matters of classification the influence of the Commission will be cast in the direction of clearness and simplicity. Instead of seeking for reasons justifying the existing confusion, persistent efforts should be made to efface it. It is of little consequence how such complications arose. The present question is, What is now reasonable and just in view of the principles established in the Act to Regulate Commerce? Whatever is not so should be corrected as speedily as is practicable.

In the present case the rating of the same kind of commodities in different classes works an injustice which needs only to be stated to be seen. Dried grapes are certainly dried fruit, equally with dried peaches, plums, or apricots; their value, as above shown, is less; and the word "raisins" in the western classification (very likely in the first instance applied to the shipments west from Chicago of the imported "raisins" of Europe), has the effect here to impose a burden which is not supported upon any reason adduced in the proofs, and which the east bound classification for through business, deliberately adopted by the same carriers, does not impose.

Third—Intermediate rates exceeding rates to terminus and return.—Returning again to the complainants' statement of complaint, they allege that the rates from San Francisco to Denver are greater than the rates from San Francisco to the Missouri River and back again to Denver, by means of which discrimination they aver that they have been driven out of the market in the vicinity of their own home. They introduced evidence in support of this allegation which they evidently believed to be true. This evidence need not be stated in detail, for the reason that it was founded upon a natural confusion growing out of the application of different classifications to the rates in the tariff sheets. It is sufficient to say that the Commission does not find the fact to be as alleged; but, on the contrary, it appears from a careful examination of all the tariffs, classifications, rules and circulars in force upon the lines in question that in no case does the rate charged to or from any local station now exceed the rate which would be made by adding the rate to or from the nearest terminal point to the local from such terminal point to the station in question.

It is proper to add that this subject also is one which was taken up by the Commission

on its own motion in June, 1887. As the rate sheets were then applied by the defendants, cases existed of the nature here in question. The Commission brought an example of this kind to the attention of the officials of the roads and inquired whether there was any valid reason why a general rule should not be established in cases where the charge for the long haul is less than the charge for the short haul, providing that the local rate should never exceed the through rate with the local back from the terminus. The traffic managers of the roads in question gave assurances that a general rule of this nature should be established, and expressed their entire willingness to unite therein, and this result has been effected by the issuance of directions to agents making the principle imperative. The language of the circular issued by the Union Pacific Railway Company is as follows:

"To agents: Announce to shippers that through rates between your station and Pacific coast common points will in no case exceed the current rates between such Pacific coast common points and the Missouri River plus the local rate between your station and the Missouri River."

In the correspondence respecting this matter, which was considerable, and which resulted in very material reductions from the original tariff rates at points between Denver and the Missouri River and between Elko and San Francisco, the Commission was exceedingly careful to disclaim the expression of any opinion upon the question of whether a greater sum could in any case be properly charged for a shorter distance than for a longer upon the transcontinental lines.

The purpose in view was simply the immediate correction of a glaring injustice which enabled an intelligent shipper by a combination of rates to obtain an advantage over one who had less information, but who relied upon the published tariff alone; thus practically making two different rates at the same time to and from the same point in direct contravention of the Act to Regulate Commerce. This was so obviously illegal that the Commission has insisted upon its correction forthwith, not only upon the defendant roads, but wherever it was found to exist, without reference to the underlying question of whether the rates so obtained could be justified under the rule of the fourth section and pending a more careful examination of the general subject which the Commission has had in hand.

Fourth—Section 4 of the Act—Long and short haul clause.—The remaining question in the case, and one which is of very grave importance, is the consideration of whether a tariff of rates from San Francisco to Denver, higher than the rates charged at the same time from San Francisco to Kansas City, is justifiable under the fourth section of the Act to Regulate Commerce. Upon this question the Commission has as yet expressed no opinion whatever, except as the subject is incidentally discussed in the opinion filed June 15, 1887, in the matter of the application of the Louisville & Nashville Railroad Company for relief under section 4 of the Act to Regulate Commerce. [See 1 Inters. Com. Rep. 278.]

The rates in force from the Pacific Coast August 9, 1887, were as follows:

| Dried fruit bananas | TO MISSOURI RIVER. | | | | TO DENVER. | | | |
|------------------------|--------------------|-------|--------|-------|------------|-------|--------|-------|
| | L. C. L. | | C. L. | | L. C. L. | | C. L. | |
| | Class. | Rate. | Class. | Rate. | Class. | Rate. | Class. | Rate. |
| 5 | | 1.40 | 7 | 1.65 | 3 | 2.30 | 4 | 1.95 |
| 4 | | 1.50 | 7 | 1.65 | 2 | 2.65 | 3 | 2.30 |

It is obvious that the question presented in this naked form involves the entire subject of relative rates as between shorter and longer hauls on all the transcontinental lines; it was so presented by the parties and must be so considered by the Commission.

A brief historical statement is necessary to an understanding of the subject. Ever since the opening of the first transcontinental line it has been customary to make higher rates at intermediate points than at the terminals, the through business having been treated as competitive and the long distance rates being subject to considerable fluctuation. The competition, which at the outset, on the traffic from the Pacific to the Atlantic coast, was with the Pacific Mail Steamship Company via Panama and with clipper ships around Cape Horn, was afterwards more active among the various railroads themselves as they were successively constructed. But while each road entered into this competition in making rates for through traffic, they also quite consistently maintained, each for itself, the local rates to points served only by its own line. The opening of the Union Pacific Railway, the Southern Pacific Railway, the Atchison, Topeka & Santa Fé, and the Denver & Rio Grande to Ogden, successively afforded new routes from the Pacific coast to the City of Denver, and competition was entered into among these lines for business to that point and other common points in its vicinity, as well as to the more distant points on the Missouri River and beyond. The result was that for some two years or more prior to the enactment of the Act to Regulate Commerce the rates from San Francisco to Denver

were placed on a competitive basis by all the lines; for example, dried fruits and raisins were carried for \$1.30 per hundred, as stated above; the rates named upon the tariff sheets were treated as merely nominal rates, from which rebates were allowed and drawbacks given as seemed necessary to obtain the business. A transcontinental association was at one time formed among the various lines with the object, among other things, of maintaining rates upon a uniform and more profitable basis, but it was not successful, and it finally went to pieces in February, 1886. From that time forward what is known as a "war of rates" was carried on among the various transcontinental lines in respect to all competitive business. This was conducted with considerable bitterness and involved the continual use of secret rates, rebates, drawbacks, underbilling, and devices of various kinds by which business was taken from one to another as opportunity offered.

An effort was made to put an end to this confusion in the fall of 1886, but without any very substantial success, and the "war" continued until about the time of the taking effect of the Act to Regulate Commerce. The rates which were made on long distance business during this period were very low, and, to a considerable extent, unremunerative. There can be no doubt that a great deal of business was hauled at an absolute loss to the carriers; in fact it appears that very little regard was paid to the price obtained, tonnage being the object principally aimed at in respect to competitive freight.

Meanwhile the rates at intermediate points did not participate in these reductions, and the complaint was, in many instances, undoubtedly just, that shippers to and from the local stations were obliged in some measure to compensate the carrier for loss sustained on business carried by their doors at greatly lower rates for longer distances.

Under the influence of the passage of the Act to Regulate Commerce, approved February 4, 1887, the transcontinental lines consulted with one another and agreed upon a general system upon which their tariffs should be constructed in compliance with the provisions of the new law. The opinion was entertained by the managers of some of the roads that section 4 of the Act did not prohibit a greater charge for a shorter distance over the same line, in the same direction, when the circumstances and conditions were dissimilar, and that the competitive circumstances controlling the business of the long distance traffic were such as to constitute dissimilar circumstances and conditions under the language of the section. This view did not universally obtain, the managers of some of the lines being unwilling to take the responsibility of so construing the section, and tariffs were prepared, published, and issued on April 5, 1887, contemporaneously with the taking effect of the law, under which the language of section 4 was literally applied upon all transcontinental business. Under these tariffs, which were all *subject to the western classification*, the rates to Missouri River common points, St. Paul, Minneapolis, Galveston, and Houston were as follows:

| Class— | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|--------|------|------|------|------|------|------|------|------|------|------|
| | 4.00 | 3.50 | 3.00 | 2.50 | 2.25 | 2.10 | 1.75 | 1.40 | 1.10 | 1.00 |

The rates to Mississippi River common points, Chicago common points, and New York common points were progressively higher than the above. The rates named above for Missouri River common points were applied for about 350 miles west of the river, from which point they gradually decreased to Denver. The Denver rates were as follows:

| Class— | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|--------|------|------|------|------|------|------|------|-----|-----|-----|
| | 3.00 | 2.65 | 2.30 | 1.95 | 1.70 | 1.50 | 1.20 | .95 | .85 | .80 |

And were applied from Denver to a point near Green River, over 300 miles west from Cheyenne. From Green River the rates again diminished very gradually to the Pacific coast.

The result of the enforcement of the aforesaid previously unknown rates from the Pacific to the Missouri River and points beyond, was what the carriers expected and perhaps desired. The tariff for this long distance business was regarded by shippers as prohibitory. Shipments ceased and the Interstate Commerce Commission was at once importuned, by telegrams, letters, and petitions, from a large variety of business interests on the Pacific slope, to interfere for their relief. Applications were also filed by the carriers with the Commission for relief upon this traffic from the operation of the fourth section under what was understood to be the power conferred in the proviso attached to the aforesaid section. These matters were brought to the attention of the Commission immediately after its organization, in connection with many other similar applications from other portions of the country. The course pursued by the Commission is stated in its first annual report. [1 Inters. Com. Rep. 661]. For the reasons and upon the considerations therein set forth, "The Commission, after having made sufficient investigation into the facts of each case to satisfy itself that a *prima facie* case for its intervention existed, made orders for relief under the fourth section where such relief was believed to be most imperative. These orders were temporary in their terms;" and were expressed to be in force for a given number of days, "until the Commission can make a complete examination of the matters alleged."

An order of this nature was made on the application of the Southern Pacific Company, dated April 23, 1887, by which said Company was relieved from the operation of section 4 of said Act for a period not greater than seventy-five days, upon the following traffic, to wit:

"1. Between San Francisco, Sacramento, Stockton, Marysville, San José, Oakland, Los Angeles, and San Diego, in California; Portland and Astoria, in Oregon; Tacoma, in Washington Territory; Victoria, in British Columbia, and El Paso, in Texas, on the one hand, and New York, Boston, Philadelphia, Baltimore, Newport News, Richmond, and all points commonly rated with them or either of them, on the other hand.

"2. Between the same western points and Chicago, St. Louis, Memphis, New Orleans, and points east thereof.

"3. Between the same western points and El Paso, Galveston, and Houston, in Texas, and points on the Missouri River and east thereof."

This order was subject to the restriction that the rates at intermediate stations should not be raised from the rates in force prior to April 20.

Similar orders were made upon the application of the other transcontinental lines, limited in like manner to traffic between the Pacific coast on the one hand and the Missouri River and points beyond on the other. All of said orders expired early in July, 1887.

The subject of the application of the fourth section to the business of the transcontinental lines was quite fully investigated by the Commission, in connection with their general examination of the short haul question during the ninety days first ensuing its organization.

Immediately upon the issuing of the aforesaid temporary order the defendant carriers announced a tariff to take effect April 27, 1887, under the *Pacific coast east bound classification*, which established a line of rates from \$3.50 on the first class to eighty-five cents on the ninth from San Francisco to the Missouri River. These rates, on May 25, 1887, were further materially reduced, and as so established remained in force on August 1, to wit:

| Class— | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
|--------|------|------|------|------|------|------|------|-----|-----|
| | 2.80 | 2.24 | 1.75 | 1.50 | 1.40 | 1.23 | 1.05 | .88 | .70 |

Meanwhile no substantial change was made during the year 1887, in respect to the tariffs established April 5 for all intermediate points between the Pacific coast and the Missouri River; the only important modification being that which was effected under the circulars mentioned above which operated to give shippers residing in the vicinity of the Missouri River and of the Pacific coast the benefit upon direct shipments of the right which they had to ship to the terminal and return over the same ground.

The reduction to the rate which was established for through business on April 27 was made by the carriers, with full knowledge of all existing water competition, the facts concerning which were laid before the Commission at that time with great detail. In justification of the subsequent reduction on through business which took effect May 25, 1887, the carriers pointed to the competition of the Canadian Pacific Railway, which was practically a new factor in the situation, and which became energetic and active in the spring of 1887, contemporaneously with the taking effect of the Act to Regulate Commerce. A new line was thus opened, running for 1600 miles or more through a foreign country, which competed on the streets of San Francisco for business from the Pacific coast to the Missouri River, Chicago, New York, and Boston. This competition was so managed as to make itself felt successively upon one commodity and another, and at various points, forming a continual menace to the through business of the transcontinental lines in both directions, without undertaking the carriage of any very considerable amount of tonnage except at the outset, when large consignments of sugar were shipped east for a few weeks over the Canadian line.

A steamer of the Pacific Coast Steamship Company left San Francisco weekly for Vancouver, where its freight was loaded upon the cars of the Canadian Pacific Company and taken east across the mountains to be delivered

via St. Paul, or via more eastern routes, according to its destination. The rates of freight established for each sailing of these steamers have been regularly filed with the Commission; and the Commission has also obtained accurate information respecting the amount and destination of all goods shipped in each steamer sailing from San Francisco to Vancouver between April first and December 31, 1887. The shipments of May 13 and May 21 were each a little over 1,000 tons; the average of the thirty-four remaining shipments was about 150 tons each. The goods carried by this route to strictly Missouri River points were, 944 tons of refined sugar (900 tons of which were carried on May 13), seven car loads of beans, two car loads of dried fruit, four car loads of canned fruit, and one car load of bags. These articles were taken at rates lower than the rates in force at the time on the defendant roads. The Canadian Pacific rate on dried fruit to Chicago was at different times ninety cents and one dollar.

It does not appear that the Canadian Pacific line charged a less rate to St. Paul and other points in the United States near the northern boundary than it charged to Omaha, Kansas City, Chicago, New York, and other more distant points in the United States on the same line in the same direction. It is not known, however, that any limitation exists upon the said line in respect to charging any desired rate to and from intermediate points in the Dominion of Canada, without reference to the rates established at more distant points, either in Canada or in the United States; and higher rates to and from intermediate points are in fact there charged. Nor does it appear that the Canadian business of this carrier is subject to any statutory prohibition of rebates, drawbacks, or other forms of unjust discrimination, or to any restrictions in respect to preferences between persons or localities. So far as appears, its Canadian rates may be changed at will and be varied from at pleasure. A general revision of railway laws now pending in the Canadian Parliament, introduced pursuant to the report of a Commission which has given much consideration to the question, provides as follows:

"No company in fixing any toll or rate shall, under like conditions and circumstances, make any unjust or partial discrimination between different localities, but no discrimination between localities, which, by reason of competition by water or railway, it is necessary to make to secure traffic, shall be deemed to be unjust or partial."

The policy of the Canadian Pacific Company during the period following the taking effect in the United States of the Act to Regulate Commerce was to maintain its rates between San Francisco and the Central and Eastern States, upon leading articles, a little below the rates made by the transcontinental lines in this country; this was designed to compel the recognition by the latter of the general principle which it asserted, that rates upon a circuitous line between like terminals should be lower than rates upon the direct line, in order to enable the longer route to obtain a certain portion of the traffic. In other words, that natural disadvantages, operating to the prejudice

of a route competing for the business in question, should be compensated by the privilege of offering to the public a lower rate.

And that policy was pursued with sufficient energy to produce at last the effect desired. On January 16, 1888, an arrangement was made by which the Canadian Pacific Railway became a member of the Transcontinental Association. The transcontinental lines, including the Canadian Pacific, are now working under a tariff which fixes rates from Pacific coast points to Missouri River common points and easterly to New York, that are considerably advanced from the low rates which prevailed after May 25, 1887. The new tariff provides that on rates from San Francisco to Chicago and the East, via the Canadian Pacific Railway, certain differentials are to be deducted amounting to a reduction of from 5 to 10 per cent in favor of the Canadian road. No differentials are given that line on shipments to and from the Missouri River, the result of which is that business from the Pacific coast to Missouri River points is not now competed for by the Canadian road.

The competition of the Canadian Pacific Railway, a foreign railroad not subject to the provisions of the Act to Regulate Commerce, is the only justification relied upon by the defendants for charging higher rates at intermediate points in the case now under consideration.

The foregoing facts present the following question: Under the circumstances and conditions stated, is a higher rate justifiable for the shorter haul from San Francisco and Pacific coast common points to Green River, Cheyenne, Denver, and common points, than for the longer haul to Kansas City, Omaha, and other Missouri River points?

Before proceeding to the consideration of this question it is important to obtain exact knowledge of just what disparity now exists between the rates in question, and how it is practically effected.

It appears from the proofs, and from the files in the office of the Commission, that the rates in force August 9, 1887, from San Francisco to Denver, upon the ten classes of the western classification, were as follows:

| | | | | | | | | | | |
|-----------|------|------|------|------|------|------|------|-----|-----|-----|
| Class.... | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
| | 3.00 | 2.65 | 2.30 | 1.95 | 1.70 | 1.50 | 1.20 | .95 | .85 | .80 |

It also appears that the rates in force at the same time from San Francisco to the Missouri River, upon the nine classes of the Pacific coast east bound classification, were as follows:

| | | | | | | | | | |
|-----------|------|------|------|------|------|------|------|-----|-----|
| Class.... | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| | 2.80 | 2.24 | 1.75 | 1.50 | 1.40 | 1.23 | 1.05 | .88 | .70 |

It further appears that the class rates from the Pacific coast to Denver, under the western classification, since February 14, 1888, are as follows:

| | | | | | | | | | | |
|-----------|------|------|------|------|------|------|------|-----|-----|-----|
| Class.... | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
| | 3.00 | 2.60 | 1.90 | 1.55 | 1.30 | 1.40 | 1.20 | .95 | .85 | .80 |

And that the class rates put in effect January 16, 1888, from San Francisco to Missouri River points, under the Pacific coast east bound classification, are as follows:

| | | | | | | | | | |
|-----------|------|------|------|------|------|------|------|------|------|
| Class.... | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 |
| | 3.00 | 2.40 | 1.90 | 1.65 | 1.55 | 1.40 | 1.25 | 1.10 | 1.00 |

It would at first appear from a comparison of the foregoing tables that the rule of the fourth section had now been substantially put in force; and that, excepting in class 2, no greater charge is at the present time made from the Pacific coast to the Missouri River than to Denver.

Such a comparison, however, does not exhibit the true situation, for the reason that the classifications are not the same.

The Pacific coast east bound classification, which is applied only upon long distance freight, to the Missouri River and beyond, was evidently prepared for the purpose of facilitating a free and cheap movement of California products to competing centers of trade in the east. The western classification, under which all the local business of the transcontinental lines is handled, is in many instances higher. Special or commodity rates have also been customary on many articles, which are thereby taken out of the classification altogether.

It is apparent that the use by the carriers in question of different classifications, when the effect is to increase their revenue from their local traffic as compared with that obtained from through traffic, accomplishes a violation of the fourth section of the Act to Regulate Commerce—no less potent in its results than would be the imposition of a higher tariff upon the same class in the same classification, and not less unlawful.

Since the hearing of this case the through rates have been increased from the exceedingly low competitive rates which prevailed in the summer of 1887, as above shown, the tariff of January 16, 1888, being united in by the Canadian Pacific as well as by the lines in the United States.

An east bound through freight tariff, taking effect March 10, 1888, had the effect still further to reduce the disparity upon many important articles of traffic. Meanwhile the rates to Denver and its common points, on classes 2, 3, 4, 5, and A were reduced, as above shown. The joint freight tariff, San Francisco to Denver, in effect February 14, 1880, also names a commodity rate on "Fruit, dried, and raisins, straight or mixed." Applying the present tariffs to the articles here in question, and we have the following result:

| | To Missouri River. | | To Denver. | |
|------------------|--------------------|-------|------------|-------|
| | L. C. L. | C. L. | L. C. L. | C. L. |
| Dried Fruit..... | 1.55 | 1.25 | 1.85 | 1.50 |
| Raisins | 1.65 | 1.25 | 1.85 | 1.50 |

The shipment in question at the present Denver rate would have cost \$313.87.

The tariffs now in effect have been examined by the Commission with much care. It is found that on many articles the rates from the Pacific coast to Denver are no greater than to points further east. The differences which remain are principally the result of different classifications. In fact, the subject of classification lies at the foundation of any attempt to place the through and local business of the transcontinental lines upon a relatively just and intelligible basis. Nothing in the nature of a stated proportion can at present be discovered. The matter is now in a state of crystallization among the carriers themselves. The

changes that have been made within the past three months in the way of equalization of tariffs and doing away with differences that have long been maintained against interior points, are very noteworthy. So long as the carriers are actively engaged in a rearrangement of the tariffs and classifications, and while the changes made are in the direction of conformity to the law, it is better that the details of the matter be not interfered with by the Commission. There are many factors in the situation which are obviously uncertain. The subject must be dealt with as somewhat experimental. It is not yet known that the present through rates can be maintained with a reasonable certainty of permanence, although the situation supports the belief that they may be. The effect of the changes that are being made upon the revenues of the carriers has not yet been ascertained. Radical measures taken suddenly might produce unforeseen disasters.

As the matter now stands, however, and while Canadian competition does not seek to participate in the Missouri River business, it is impossible for the Commission to discover any adequate ground upon which the defendants can claim that the circumstances and conditions of the traffic from San Francisco to Denver are so materially different from those of the traffic from San Francisco to the Missouri River as to warrant them in charging a greater sum for the shorter distance.

The distance from San Francisco to Kansas City is 2,098 miles, to Denver, 1,455 miles—a difference of 543 miles, or more than one fourth of the entire haul in favor of Denver.

Whatever may be thought of the situation as a theoretical question, or in view of the customs or laws of other countries, the will of the supreme law making authority of this country has been distinctly stated in the fourth section of the Act to Regulate Commerce, and no valid reason now appears to prevent the rule of the statute being enforced in respect to the traffic in question.

In reaching this result no modification is intended in respect to the construction of the statute which was announced in the case of *Re Louisville & Nashville Railroad Company*, 1 Inters. Com. Com. Rep. 31 [1 Inters. Com. Rep. 278]. The Commission as yet has found no reason to change the rules there laid down, and this decision is in strict conformity therewith.

The long distance rates in question from the Pacific coast to Missouri River points are not now subject to "actual competition of controlling force in respect to traffic important in amount" engaged in by Canadian roads which are not subject to the provisions of our statute. On the contrary, the Canadian Pacific has retired from such Missouri River business as it at one time undertook to compete for, and the through rates of the roads in the United States have accordingly been substantially advanced.

The great distance of Denver from the Missouri River of itself denotes an obvious impropriety in the charges to that point which exceed those to Kansas City. The longer haul exceeds the shorter in the given case by several hundred miles.

No fact is shown to exist upon which the greater charge for the shorter haul in the case stated can be justified at the present time.

The Commission, at more recent hearings involving questions to some extent, though not altogether similar, has been informed that the traffic managers of the defendant roads are now engaged in considering a general reconstruction of their tariffs and classifications, in view, among other things, of the higher rates now obtained upon through business, and in the light of suggestions informally made by the Commission upon various matters of detail. A reasonable time should be allowed for the completion of the work, which is necessarily complicated, and which involves much correspondence and conference. Believing that an effort is being made in good faith to readjust the local tariffs of the transcontinental lines, and to simplify and combine the classifications in use upon through and local business in accordance with the requirements of the law and the views of the Commission, it is considered best to leave the matter for the present in the hands of the carriers, and allow an opportunity for them to complete the work in which they are engaged.

No order, therefore, will be entered in this case for a period of sixty days from this date, and further proceedings are for the present suspended.

Re FILING OF JOINT TARIFFS.

(CIRCULAR No. 6.)

February 13, 1888.

Roads located wholly in one State or Territory, which interchange freight or passenger traffic with connections to or from points outside of such State or Territory on through tickets or bills of lading, should file tariffs covering such traffic with the Commission.

If such through rates are made by the addition of local rates to the rates of connecting roads, such local tariffs should be filed with the Commission, together with a statement that through interstate rates are made by adding such local rates to the rates of the carrier (naming it) with which connection is made.

If joint rates are made on any basis other than by the addition of the local rates to the through rates of connecting carriers, tariffs showing such rates should be filed with the Commission covering all interstate business transacted thereunder.

For the Commission.

C. C. McCain, Auditor.

Re PUBLICATION OF EXPORT TARIFFS.

At a meeting of the Interstate Commerce Commission held in the City of Washington on the 8th day of March, 1888.

Present: All the **Commissioners**.

The subject of the publication of joint tariffs being under consideration, the following preamble and order were unanimously adopted, and directed to be sent to all common carriers subject to the Act to Regulate Commerce:

Whereas, section 6 of the Act to Regulate Commerce authorizes the Commission to direct when joint tariffs shall be made public, INTER S.

and to prescribe the measure of publicity to be given to the same:

It is ordered as follows:

Every tariff of rates and charges which a common carrier subject to the provisions of the Act to Regulate Commerce, by itself or jointly with one or more other carriers, whether such carriers are or are not subject to such Act, shall establish for the transportation of grain, flour, meal, meats, provisions, lard, tallow, canned goods, cotton, tobacco, live stock or other articles of customary export, from any point within the United States to a seaport thereof, or to any point in or on the boundary of an adjacent country, or to any foreign port or place, is required to be filed with the Commission, and shall be made public.

In all cases where a tariff is established for such merchandise billed or intended for export by sea, and ocean rates are not specified, either because of their fluctuation, or for any other reason, so that only the charge for inland transportation is definitely fixed, the tariff as filed and made public shall show the rate charged by the inland carrier or carriers to the point of export, including all terminal charges or expenses, and shall also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate from time to time prevailing, or how otherwise. When the rate is a gross sum for the transportation of freight from a point within the United States to a port or place in a foreign country, the tariff as filed and made public shall in every case show what part of the whole is allowed to the carrier or carriers for inland transportation to the point of export by sea, including all terminal expenses or charges; and if such part is subject to be increased or diminished, contingently or otherwise, or if in any other case the charge for inland transportation is subjected to any change or modification in case the property carried is exported, the fact, and the manner in which the increase, diminution, or change is to be determined, and the extent thereof, shall be stated.

Every such tariff of rates and charges shall be published by plainly printing the same in large type of at least the size of ordinary pica, and copies thereof shall be kept for the use of the public in such places and in such form that they can be conveniently inspected at every depot and station of any carrier making or issuing the same at which any traffic to which it relates is received or delivered.

This order shall become operative on March 20, 1888.

A true copy:

Edw. A. Moseley, *Secretary*.

LA CROSSE MANUFACTURERS & JOBBERS UNION

CHICAGO, MILWAUKEE & ST. PAUL R. CO., Chicago & Northwestern R. Co. and Chicago, Burlington & Northern R. Co.

1. The fact that the **rates** of a railroad company are **not established on a mil-**

- age basis does not necessarily make out their illegality or injustice.
2. A prayer in a petition against a railroad company that the company be required to make its **rates** from one terminus to the town from which the petition proceeds and to other towns in the same section, and also from such terminus to the petitioning town and from thence to such other towns, **on a uniform and equal mileage basis**, cannot be granted, the **Commission having no power to require the adoption** of such a basis.
 3. A complaint, of which **no reasonable ground for investigation** appears, will not be filed.

(Decided March 10, 1888.)

By the Commission :

In the petition offered for filing in this case complaint is made of the rates charged by the defendant companies for the transportation of merchandise from Chicago, Illinois, to La Crosse, Wisconsin, from Chicago towns in the vicinity of La Crosse, and other towns further to the West and Northwest whose merchants and dealers have been accustomed to make their purchases in La Crosse, and from La Crosse to such other towns respectively. The complaint briefly stated is that the defendant companies make the same charge for the transportation of merchandise from Chicago to La Crosse that they do for the transportation of like merchandise from Chicago to other towns which are at a greater distance, and that they charge relatively much more from La Crosse to the towns which would naturally do business with it than they do from Chicago to the same towns. The results are alleged to be injurious to La Crosse, and especially to its jobbing trade, since it enables the towns which would naturally purchase their stocks and supplies at La Crosse to procure them from Chicago direct at much less cost for transportation than must be paid when the same goods are sent first to the jobber in La Crosse and from thence to the dealer in such other towns, which would be the course of business if transportation rates were favorable.

The prayer of the petition is that the Commission "will make such order as will restrain the several respondent companies from such practice, and will compel them to carry freight from Chicago to La Crosse at the same rate per ton per mile as they do or may hereafter charge for carrying the same class of freight from Chicago to points beyond La Crosse; and also that the said railroad companies be ordered to charge the same rate per ton per mile on each class of merchandise carried from La Crosse as they do or may hereafter charge on the same classes from Chicago to points beyond La Crosse, with the addition of such charges for terminal expenses and rehandling as the Commission may find just and reasonable; and petitioner has reason to believe that an average addition of not more than five cents per 100 pounds for the first and second classes of freight and 2½ cents per 100 pounds for the third, fourth and fifth classes, would be more than sufficient to cover such terminal charges and the cost of rehandling at La Crosse."

Before filing the petition and calling upon defendants for an answer, it may be desirable to consider whether the Commission has the power to give to the petitioner and those it represents the relief which it seeks. This question must be determined in the light of the prayer which is above recited. The prayer defines what is desired, and what it is supposed will remedy the mischief of which petitioner complains; and if any different or other relief would be possible on the facts, a discussion thereof would be irrelevant now. We have only to consider in this case whether it is possible and proper for us to grant the particular relief prayed.

Referring to the petition it will be observed that what is prayed for is the establishment of the mileage basis for rates for the transportation of merchandise in the territory northwest of Chicago in which the jobbers of La Crosse find market for their goods. La Crosse desires the same distance rates for the transportation of goods from Chicago which are given to any other town in that section of the country, and the same distance rates on consignments to other towns which are made on consignments from Chicago.

The rates to La Crosse from Chicago are not complained of as being in themselves excessive; but the defendant companies, it appears, in making rates into that territory, group the towns of a considerable district and charge the same rates to all within the district. This is a practice which prevails very largely in the making of rates and results in giving to some towns rates which are relatively lower than are charged to others. It is probably a convenient practice to the railroad companies or it would not be so often adopted; and it may sometimes tend to equalize railroad advantages as between towns without wronging anyone. The system is, therefore, not necessarily illegal; it only becomes illegal when it can be shown that illegal results flow from it.

What the Commission is required to determine, then, is whether one town is entitled to demand equal mileage rates with other towns, and especially whether the merchants and traders of La Crosse in their jobbing trade of goods, of which the chief center of supply is Chicago, are entitled to the same rates, first from Chicago to La Crosse, and then from La Crosse to the ultimate point of sale, which are given when the merchandise is sent from Chicago direct to the same ultimate market. And the question is not whether the carriers might voluntarily give the same rates, but whether they are required by law to give them.

The question is not new to the Commission; it has been raised several times, and has once been formally passed upon. In considering such a question it is proper to observe that the ruling asked for cannot be made for any one town or place, except upon principles which will generally be applicable. No city or locality can be recognized as having in law natural or other claims to special rates which cannot be claimed by others. Natural and other special advantages and disadvantages must no doubt be had in mind and considered by those who make rates, and must sometimes to some extent govern in making them; but the spirit and purpose of the Act

from which the Commission derives its powers require equal and impartial rules, and do not recognize any authority in the Commission to give any locality special advantages. If, therefore, La Crosse can demand the mileage basis for the making of rates to and from that city, so can Red Wing, Albert Lea, and all the smaller towns in the territory whose people are accustomed to trade at La Crosse; and the final result of the recognition of the right must be the establishment of the mileage basis, not merely for the country in which the merchants and traders of La Crosse find their markets, but for the whole country.

It is a matter of general history that when the Act to Regulate Commerce was pending in Congress the mileage basis was suggested but was not adopted. The reasons against it were, no doubt, thought to be conclusive. Many circumstances fairly entitle and sometimes compel the carrier to make rates on one line proportionately less than are made on another. The volume of business, the strength of competing forces, the direction of traffic, the convenience of exchanges, the relations of carriers to each other, and a multitude of other circumstances have or may have, an important bearing. All of these the carriers, in making their rates, ought to have in mind and consider with care, with a view to the establishment of such charges as shall be relatively equal and just, or as nearly so as may be found practicable; but the mere fact that in the making of rates the mileage basis has been disregarded cannot be deemed proof of unlawful action when it is considered that the law making authority, for reasons which must be deemed conclusive, has refrained from adopting that basis.

It is possible that if the tariffs of the defendants had been framed by the Commission, points so far apart as La Crosse and Mankato would not have been grouped under identical rates, and that in some other particulars the rates might have been different. But on this petition we deal only with the question which we conceive it to present. That question was fully and deliberately considered in the case of *Crews v. Richmond & Danville Company* [1 Inters. Com. Rep. 703], 1 Inters. Com. Rep. 401, in which case like privileges were demanded on behalf of the merchants and traders of Danville to those here claimed for the people of La Crosse; and the Commission was unanimously of opinion that it had no power to require what was sought. There were, as between that case and this, some differences in the facts and the prayers for relief, but the principle there involved was the same that must here be invoked. The question having, therefore, been deliberately considered and passed upon, it would be idle to send out this complaint as the beginning of a new litigation, the result of which must necessarily be the same as in a case already decided. The petitioner will therefore be notified accordingly.

found not sufficient to warrant deviation from the law.

2. Carriers should bring their tariffs into conformity with the statute without suggestions from the Commission as to details.

(Decided March 12, 1888.)

THE following letter was addressed by a member of the Commission to the Central Railway & Banking Company of Georgia, operating the Columbus & Western Railway from Columbus to Childersburg, Alabama:

"To The Central Railroad & Banking Company of Georgia,

Savannah, Georgia.

Gentlemen: The Commission is in receipt of your tariff E—198, establishing class rates from Savannah, Georgia, to points on the line of the Columbus & Western, taking effect January 16, 1888, from which it appears that a greater sum is charged to a large number of points at a less distance from Savannah than Sylacauga, than is charged to Sylacauga over the same line in the same direction.

The Commission will entertain the consideration of any statement or argument which you may see fit to make and file within twenty days from this date, upon the question whether said tariff is not in contravention of the provisions of the Act to Regulate Commerce."

To said letter the following reply was received:

"February 13, 1888.

Interstate Commerce Commission, Washington, D. C.

Gentlemen: I acknowledge herewith receipt of your letter of February 1, on the subject of rates from Savannah to Sylacauga.

I beg leave to say that the rates from Savannah to all stations this side of Sylacauga are practically the rates established by the State Commissioners of Georgia and Alabama until we come to Sylacauga itself. There we found in effect upon the Anniston & Atlantic Railroad rates which were very much lower. As we could not control their rates at this point, we were compelled to conform our rates to them or else to abandon the business. The business at that point is light, and we would greatly prefer to abandon it to scaling the rates this side. As the rate which prevails on the Anniston & Atlantic is based, I understand, upon the rates at Selma, upon the Alabama River, added to the East Tennessee local to Sylacauga, I considered the competition at Sylacauga as under dissimilar circumstances from the competition at points east thereof.

As to the actual amount of the rate and comparative differences between Sylacauga and adjacent stations, I beg leave to say that even with those rates the Columbus & Western Railroad has never yet paid the interest upon its bonds, and is practically supported by the Georgia Central Railroad. Its local rates have been approved by the State Commission of Alabama, on the ground of its poverty and low earnings. Anticipating, however, an early improvement by the approaching completion of the line to Birmingham, a new set of rates has been in process of preparation and was forwarded to the Alabama Commission for approval on January 23. These new rates make

Re TARIFFS OF THE COLUMBUS & WESTERN RAILWAY.

1. Tariffs not conforming to fourth section criticised. Circumstances stated INTER S.

a very material reduction, and will be put in effect as soon thereafter as it is possible to print them and distribute them. They will very largely modify the differences which prevail under Tariff E—198. I beg leave to hand you herewith a copy of these rates, with comparison on the same sheets with the rates now in force. I will be under many obligations to have the judgment of the Commission upon them, or the suggestion of any other basis upon which they could be made than the one adopted.

Very Respectfully,
E. P. Alexander, President.

Memorandum by the Commission.

In view of the decisions heretofore made by the Commission upon the subject of the interpretation of the fourth section of the Act to Regulate Commerce, it is not apparent how the facts and considerations which are stated in the foregoing letter can be regarded as sufficient to warrant the deviations from the rule of said section which are found in the tariffs from Savannah to points on the Columbus & Western Railroad, as now on file or as proposed.

The concluding request for "the suggestion of any other basis upon which they could be made" is also noted. The Commission had not as yet considered it necessary or expedient to make such suggestions; it has uniformly held that the carriers themselves should devise the methods by which their tariffs should be framed in conformity to the law. Other carriers have found it possible to enter upon a reconstruction of their modes of rate making, involving a substantial abandonment of many of the discriminations which seem to the public to be unjust, the existence of which was, in part at least, the occasion of the passage of the Act to Regulate Commerce; this has in some instances been accomplished by the grouping of stations for the making of through rates.

The views of the Commission, so far as it has yet found occasion to formulate them, are expressed in the opinions heretofore rendered, particularly those in the matter of *Louisville & Nashville Railroad Company* [1 Inters. Com. Rep. 279], 1 Inters. Com. Rep. 31, and in the case of *Harrell v. Columbus & Western Railroad Company* [1 Inters. Com. Rep. 631], 1 Inters. Com. Rep. 236.

NOTE.—A new tariff was immediately filed with the Commission, making interstate rates to and from the road above named, which do not charge a higher rate for a shorter distance than for a longer, over the same line.

MICHIGAN CONGRESS WATER CO.,
v.
CHICAGO & GRAND TRUNK R. CO.
(No. 128.)

ABSTRACT of Answer filed May 3, 1888.
(See Complaint, 1 Inters. Com. Rep. 797).
Mr. E. W. Meddaugh, for defendant:

The answer admits the charge of \$57 per car on complainant's mineral water from Lansing, Michigan, to New York City, but says that the agent was not authorized to make

such charge, the same being that which was established on mineral water in vessels of wood, and that the second shipment was correctly placed according to a subsequent classification at \$79.20 per car, or 33 cents per hundred pounds on a minimum weight of 24,000 pounds; and denies that it and its connections have ever charged complainant a rate of \$89.20 for a like shipment.

It admits the classification of said mineral water as class 4 without tank car mileage, while pine oil is class 6 with mileage one way, and that petroleum is "special," and denies that the mineral water rate is unreasonable or unjust, as the tank cars loaded by it have to be returned empty, earning freight for the carrier but one way, and are detained at places of destination for a long period to accommodate petitioner in peddling out said water at retail, thereby interfering with the switching facilities at such stations; also the unevenly distributed load renders it liable to breakage, and the general construction of the tank cars greatly increases the chances of accidents to train men. In reference to the fire extinguishing qualities of the water, while they are doubtless good, yet defendant's insurers would undoubtedly refuse to abate any part of their premiums on account thereof.

Defendant further submits that before the case can be disposed of, the other carriers who unite with it in the making of the rate and the carriage of said water must be joined as co-defendants and be heard.

WORCESTER EXCURSION CAR CO.,
v.
PENNSYLVANIA R. CO.
(No. 129)

ABSTRACT of Answer filed April 24, 1888, to complaint charging unjust discrimination in hauling cars of the Pullman Palace Car Company and in refusing to haul cars belonging to the complainant company. The complaint is to be found in 1 Interstate Commerce Reports, 811.

Messrs. John Scott and James A. Logan, for defendant:

Defendant denies that the cars of complainant are of proper construction to be safely and conveniently hauled over defendant's lines of road, and also that any request was made by complainant to draw its cars from Pittsburgh to New York with offer to pay regular and proper charges for such service, and says that it could not have complied with a request to draw cars from Chicago to Philadelphia and New York as it does not operate a road west of Pittsburgh; admits that it hauls the cars of the Pullman Palace Car Company in accordance with two certain contracts, copies of which are filed with the Commission, but denies that such cars are similar to complainant's or that complainant offered to make a contract with defendant similar to those above mentioned; avers that with its own equipment and those acquired under said contracts it is abundantly able to accommodate the public travel; that its numerous trains are all arranged under fixed rules, and the adding to said trains of cars of

outside parties will delay the same, render greater the liability to accident and impair the service generally.

Defendant therefore denies giving any undue preference or advantage to the said Pullman Palace Car Company or subjecting complainant to any undue or unreasonable prejudice or disadvantage within the meaning of the Act to Regulate Commerce.

Defendant also states that of complainant's capital stock of \$250,000 but \$85,000 has been paid in and that its resources are not adequate to maintain a proper and sufficient service of cars, that it, in fact, owns but nine cars, and that it is without corporate authority to operate cars, but can only build, construct, furnish and keep them in repair.

Wherefore, defendant prays that the petition be dismissed.

NEW YORK PRODUCE EXCHANGE v.

NEW YORK CENTRAL & HUDSON RIVER; Michigan Central; Lake Shore & Michigan Southern; Chicago & Grand Trunk; Great Western of Canada; New York, Lake Erie & Western; Chicago & Atlantic; New York, Pennsylvania & Ohio; New York, Chicago & St. Louis; West Shore; Delaware, Lackawanna & Western; Grand Trunk Railway of Canada; Pittsburgh, Fort Wayne & Chicago; Pennsylvania; Pittsburg, Cincinnati & St. Louis; Wabash Western; Baltimore & Ohio; Philadelphia & Reading Railroads, and Central Railroad of New Jersey.

(No. 130.)

PETITION filed April 18, 1888, alleging unjust discrimination in rates from the West in favor of goods for export.

Messrs. Foster & Wentworth, attorneys, and *Mr. John D. Kernan*, of counsel for complainants:

To the Honorable the Interstate Commerce Commission:

The New York Produce Exchange, a corporation duly created and existing under the laws of the State of New York and located in the City of New York, composed largely of merchants engaged in foreign and domestic commerce, respectfully petition your honorable body that you will hear and determine the complaints of your petitioner as hereinafter set forth pursuant to the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887.

Upon information and belief, the complainants allege:

First. That since about April 4, 1887, the defendants have been railroads and corporations engaged as common carriers in the transportation of property shipped from Chicago and other western points to New York City and other Atlantic points and to European ports, such transportation being made to New York City and other Atlantic points wholly by rail; or to New York City and such other points and European ports partly by rail and partly by water, and such transportation being in all cases under some common control, management or arrangement for continuous carriage be-

tween the points aforesaid, so that each of the defendants constituted a part or portion of some through and continuous line of transportation so engaged as aforesaid under an established joint tariff, and is as to the said transportation within the provisions of said Act. That the Trunk Line Association; the Central Traffic Association; the Joint Committee, so-called, and all of the fast freight lines operating over one or more of said railroads, are agents of some or all of said railroads so engaged as aforesaid, and the rates, classifications, rules and regulations which they make and enforce are those of said railroads, and are those which regulate and substantially govern and control all such through and continuous transportation between the points aforesaid. That since about April 4, 1887, the defendants have professed to maintain joint rates and classifications between Chicago and New York for their said continuous lines and routes, as follows:

| | CLASS. RATE. | |
|---|--------------|---------|
| Flour, grain, in car load lots..... | 6 | 25 cts. |
| Flour, grain, in less than car load lots | 5 | 30 " |
| Provisions as salted meats, etc., in car load lots..... | 5 | 30 " |
| Provisions as salted meats, etc., in less than car load lots..... | 4 | 35 " |

That the joint rates for the transportation of like property from a number of western points are based upon the Chicago rate, and are either the Chicago rate or a certain agreed amount or percentage added to or deducted therefrom.

That the defendants since April 4, 1887, in violation of said Act, have been guilty of unjust discriminations, in that they have notoriously allowed to a large number of persons special rates, rebates and drawbacks, either given directly or indirectly, by means of such devices as underbilling or underweighing property transported, and have also been in the habit of charging a large number of persons for transportation from Chicago and other western points taking Chicago rates as aforesaid to New York City, the foregoing schedule rates upon flour, grain, provisions and property covered by classes 4, 5 and 6, when such property was delivered to consignees at New York City for domestic consumption or was subsequently exported, while charging other persons rates much lower and even as low as 50 per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions when the property was delivered to vessels and steamship lines for shipment to foreign ports under through bills of lading, issued by the defendants under common arrangement with such vessels and steamship lines for continuous carriage at joint rates from the point of shipment to Europe—that, for example, while charging and receiving thirty-three and thirty-five cents per 100 pounds for transporting goods of class 5 in less than car load lots from Chicago to New York, they at the same time have charged and received but nineteen cents for the same transportation of like goods when the same were delivered to steamship companies for export, which charge of nineteen cents included a charge of three cents per 100 pounds for light-erage in New York which the defendants paid out of the said nineteen cents—that by

the first of March last the foregoing unjust discriminations had become notorious and matter of common report, and were carried to such an extent through the payment of rebates by railroads and steamship companies to some shippers and localities that the net rates to foreign ports were lower than to New York; that on March 8, 1888, your Honorable Commission issued an order to take effect on March 20, 1888, requiring the defendants, among others, to prepare and file and publish their rates to the seaboard with the ocean rates, if any given, separately stated; that the defendants have failed and neglected to file and publish rates as required by said order except in a few instances where there has been a partial compliance; that said defendants also fail to state in each bill of lading issued by either of them to foreign ports the inland charge and the ocean charge separately, and thus prevent ascertainment of the actual inland rate.

Second. That by reason of the difference in their rates for transportation hereinbefore referred to the said defendants since April 4, 1887, have thereby made and given undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities engaged in the shipment under such through bills of lading, or in the handling and consumption of such goods abroad, and have subjected persons, companies, firms and corporations and consignees in and about the City of New York to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and contemporaneous service under substantially similar conditions and circumstances; that there are no conditions or circumstances relating to or bearing upon the transportation in question that justify any such difference in rates as have existed and do exist between the rates to New York City for export under through bills of lading and the rates upon consignment to New York City—that the complainants insist that the said Act requires that the rates to New York City shall be the same upon the said classes of property whether the same are carried to New York and there delivered to consignees or through New York and delivered to consignees abroad.

Third. That the said defendants, in violation of said Act since April 4, 1887, have charged and received, and do now charge and receive, a greater compensation for transporting property as hereinbefore described from Chicago and said western points to New York City, than they charged and received for like service under substantially similar circumstances and conditions for transporting like property from said Chicago and western points through New York City to European ports under common arrangement for joint rates with vessels and steamships, the shorter being included within the longer distance; that rates to foreign ports can now be obtained from Chicago through New York at about three cents per 100 pounds less than to New York City.

Wherefore, the complainants respectfully ask that the honorable Interstate Commerce Commission shall investigate the matters herein complained of, and shall obtain from the defendants full and complete information in regard thereto, and shall then adjudge and determine:

1. That in the particulars in this petition alleged, the said defendants have violated and are violating the Act to Regulate Commerce, approved February 4, 1887;

2. That all rates for transportation from Chicago to or through New York City to foreign ports, shall be the same for the transportation to New York;

3. That compliance with the law and with the order of March 8, 1888, as to filing joint tariffs, be compelled by the methods and under the penalties provided, and that all such tariffs be likewise posted and published by order, to be issued under the discretion given to the Commission in that regard, and that in every bill of lading issued to a foreign port the inland rate and the ocean rate be stated separately;

4. That in reference to all of the matters complained of, your petitioners may have such other or further relief as to your honorable Commission may seem just and proper.

(Signed and verified.)

United States of America, }
Southern District of New York, } ss.

Jacob H. Herrick, being duly sworn, says: That he is a member of the New York Produce Exchange and of the committee appointed to take charge of and investigate the complaints alleged in the foregoing petition, and that the allegations of said petition are true according to his best knowledge, information and belief.

J. H. Herrick.

Sworn to before me, this 16th }
day of April, 1888, }

[Seal] H. W. Norton, Notary Public Kings
Co. Cert. filed in New York Co.

HENRY McMORRAN *et al.*, Partners, as
McMorrان & Co.,

v.

CHICAGO & GRAND TRUNK R. CO. and
Grand Trunk R. Co. of Canada.

(No. 131.)

A BSTRACT of Complaint filed April 21, 1888.
Complaint alleges that defendants' rates of eight cents per 100 pounds on grain and ten cents per one hundred pounds on flour and feed, each in the sixth class, from Port Huron, Michigan to Buffalo, N. Y. a distance of 196 miles, is unjust and unreasonable, while the rate on said articles from Chicago, Illinois, to Port Huron, a distance of 335 miles, is nine cents per 100 pounds and the through rate from Chicago is fifteen cents per 100 pounds, and asks that a reasonable rate be fixed to apply on all articles in the sixth class alike.

T. M. C. Logan, F. D. Babcock and E. M. Parsons, Committee of NORTHWESTERN IOWA GRAIN & STOCK SHIPPERS ASSO.

v.

CHICAGO & NORTHWESTERN R. CO.
(No. 132.)

A BSTRACT of Complaint forwarded by the Board of Railroad Commissioners for the State of Iowa, and filed May 8, 1888.

Complaint alleges unjust discrimination and violation of the fourth section of the Act as follows: defendant gives relatively lower rates to Chicago from Carroll and points on its main line and south branches west of Carroll, than it affords to Odebolt, Arthur and Ida Grove and other points on its north branches; shipments of corn and oats from Nebraska points over defendant's lines to New York and other eastern points are billed to Rochelle and Turner Junction in Illinois and from thence take the Chicago rate to said eastern points, but such privilege is refused to Iowa stations and such rate is not published thereat; the rate per car on live stock from River Sioux and other Iowa points on defendant's north branches to Chicago is \$45 while from stations on its main line and south branches, of relatively the same distance from Chicago, the rate is \$30; defendant's tariff rate on corn and oats from all stations between Carroll and Missouri Valley, inclusive, to New York, *via* Chicago, is 36.5 cents per 100 pounds, but defendant refused a through rate to New York to complainants from Ida Grove, Arthur and Odebolt, on its north branch, and instead thereof quoted rates on corn per 100 pounds, as follows: Odebolt to Chicago, twenty cents, Arthur and Ida Grove to Chicago, twenty-one cents; Chicago to New York, 27.5 cents—a difference discriminating against complainants of eleven and twelve cents per 100 pounds respectively, which prevented the sale of thousands of bushels of complainants' corn in the New York market.

Frank L. HURLBURT

v.

PENNSYLVANIA R. CO.

(No. 133.)

SAME

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

(No. 134.)

A BSTRACT of Complaints filed May 8, 1888. The complaints in the above entitled cases allege excessive and unreasonable charges in the transportation of rough hub blocks in car loads 28,000 pounds minimum weight, at fifth class instead of sixth class rates, the classification in force prior to September 1, 1887; also discrimination between rough and manufactured hub blocks, each placed in defendant's fifth class, although their relative value is about four and twenty-five cents per block respectively, and more than 50 per cent of the rough block is wasted in manufacture.

C. H. GRIFFEE

v.

BURLINGTON & MISSOURI RIVER R. CO. IN NEBRASKA, Lessee of Atchison & Nebraska Railway.

(No. 137.)

A BSTRACT of Complaint filed May 10, 1888.

The complaint alleges that defendant has illegally issued free passes to one C. H. Waite, a passenger, while charging other persons its regular rates of fare for a like service.

SPARTANBURG BOARD OF TRADE

v.

RICHMOND & DANVILLE R. CO. *et al.*

(No. 135.)

COMPLAINT filed May 21, 1888, alleging unjust discrimination against Spartanburg, South Carolina.

Spartanburg, S. C., April 16, 1888.

To the Honorable the Interstate Railroad Commissioners, Washington, D. C.

Gentlemen: The undersigned, President and Secretary of the Spartanburg Board of Trade, representing by authority the said Board and through it speaking for this entire business community, do hereby most respectfully call your attention to and urge your consideration of the following grievances, to wit.:

First: The City of Spartanburg, South Carolina, is, in the intent and meaning of the Interstate Railroad Law, a terminal station and a competitive point, and as such is entitled to all the advantages in freight rates, etc., guaranteed by said law.

Second: Spartanburg is, at the present time, and has been for some time past, suffering from unfair and unjust discrimination on the part of the railroads centering here.

The following instances are cited as examples of such injustice, viz.:

A. First class rate from New York to Charlotte, North Carolina (which, as a terminal and competitive point, is identical with Spartanburg), is \$1.05 per 100 pounds; to Gastonia, North Carolina, twenty miles from Charlotte, \$1.18; to Blacks, South Carolina, forty miles from Charlotte, \$1.18 (this is a prospective competitive point); to Gaffneys, South Carolina, fifty-eight miles from Charlotte, \$1.22; to Spartanburg, South Carolina, seventy-six miles from Charlotte, North Carolina, and a terminal and competitive point, the rate is \$1.35 per 100 pounds. Thus far the gradation of rates from Charlotte on to Spartanburg seems to be regular in the main. But, after passing this city, the gradation of rates instead of increasing in like manner as before reaching Spartanburg, remains the same, \$1.35 per 100 pounds, to all the intermediate stations on the Atlanta & Charlotte Air Line Railroad for a distance of more than 100 miles, to Longview, Georgia; and from that point on to Atlanta, Georgia, the rate diminishes until it reaches \$1.14 at Atlanta which point is 196 miles further away from Charlotte, North Carolina, and on the same line of railroad and in the same direction as Spartanburg. These figures seem to point conclusively to a policy of discrimination against this city.

As evidence of the above facts the published rates in the accompanying "How To Ship" are submitted.

B. The following tabulated statement of comparative rates is likewise submitted as further evidence:

| FROM NEW YORK TO STATIONS. | CLASS. | | | | | | | | Further from N. Y. than Spartanburg, and in the same direction. |
|----------------------------------|--------|------|------|----|----|----|----|----|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | A | B | FURTHER. |
| Spartanburg,..... S. C. | 1.35 | 1.18 | 1.01 | 84 | 69 | 55 | 45 | 53 | miles. |
| Gainesville,..... Ga. | | | | | | | | | 245 " |
| Griffin,..... " | | | | | | | | | 275 " |
| Duluth,..... " | | | | | | | | | 171 " |
| Athens,..... " | 1.14 | 98 | 86 | 73 | 60 | 49 | 36 | 48 | 182 " |
| Norcross,..... " | | | | | | | | | 176 " |
| Atlanta,..... " | | | | | | | | | 196 " |
| Columbus,..... " | | | | | | | | | 300 " |
| Columbia,..... S. C. | | | | | | | | | 50 " |
| Rutherfordton, N. C. | 1.18 | 1.04 | 89 | 74 | 61 | 52 | 37 | 46 | By Piedmont A. L. 35 miles. |

C. The same policy of unfair and unjust discrimination is found also to exist in rates from western points to Spartanburg as is seen from the following table of comparative rates:

(See accompanying "Southeastern Tariff" of rates from Evansville, Indiana, Owensboro and Henderson, Kentucky).

| FROM EVANSVILLE, IND., OWENSBORO AND HENDERSON, KENTUCKY To | CLASS | | | | Further than Spartanburg. |
|--|-----------|------------|------------|-----------------------|------------------------------|
| | B Meat | C Flour | D Grain | F Flour in wood | |
| Spartanburg,..... S. C. | .60 | .49 | .45 | .92 | miles |
| Union,..... S. C. | .60 | .45 | .45 | .90 | 30 " |
| Gaffneys,..... S. C. | .55 | .48 | .43 | .90 | 22 " |
| Blacks,..... S. C. | .53 | .47 | .41 | .88 | 40 " |
| Chester,..... S. C. | .56 | .45 | .43 | .82 | 125 " |
| Columbia,..... S. C. | .45 | .37 | .33 | .66 | 98 " |
| Rutherfordton,..... N. C. | .55 | .47 | .41 | .88 | 100 " |
| Charlotte,..... N. C. | .46 | .41 | .32 | .78 | 75 " |
| Atlanta,..... Ga. | .36 | .31 | .27 | .54 | |

About the same differences are noticeable also in rates from Cincinnati, Ohio, and from Louisville, Kentucky, and Jeffersonville, Indiana. (See accompanying "Southeastern Freight Tariffs" of rates from Cincinnati, Ohio, and from Louisville, Kentucky, and Jeffersonville, Indiana).

We, therefore, respectfully submit the foregoing evidence to show your honorable Commission that injustice is being done this city, contrary to the Interstate Railroad Law; and we urgently request that you interfere in our behalf and give us such relief as you know to be just and equitable.

And we will most respectfully ever pray,

Your Most Obedient Servants,

Geo. Cofield, President Spartanburg Board of Trade.

Chas. H. Carlisle, Secretary Spartanburg Board of Trade.

[Seal.]

We hereby fully indorse the above complaint and respectfully ask for relief.

Joseph Walker, Mayor.

[Seal.]

Jos. M. Elford, City Clerk.
City Council of Spartanburg, S. C.

Appendix.

The several railroads concerned in the un-

just discrimination against the City of Spartanburg, contained in this complaint are as follows:

Rates from Northern and Eastern Points:

Richmond & Danville R. Co.
Central Railroad of Georgia.
Augusta & Knoxville R. Co.
Port Royal & Augusta R. Co.
Port Royal & Western Carolina R. Co.

Rates from Western Points:

Ohio & Mississippi R. Co.
Nashville & Chattanooga & St. Louis R. Co.
Louisville & Nashville R. Co.
St. Louis, Iron Mountain & Southern R. Co.
Chicago, St. Louis & Pittsburg R. Co.
Jefferson, Madison & Indianapolis R. Co.
Cincinnati, Hamilton & Dayton R. Co.
Cincinnati Southern R. Co.
East Tennessee, Virginia & Georgia R. Co.
Western & Atlantic R. Co.
Richmond & Danville R. Co.
Western North Carolina R. Co.
Asheville & Spartanburg R. Co.
Georgia R. Co.
Illinois Central R. Co.
Cincinnati, St. Louis & Chicago R. Co.

ATLANTA CHAMBER OF COMMERCE

v.

SOUTHERN RAILWAY & STEAMSHIP

ASSO. *et al.*

(No. 136.)

COMPLAINT filed May 10, 1888, alleging unjust discrimination against Atlanta.

Atlanta, Ga., May 1, 1888.

To the Interstate Commerce Commission, Washington, D. C.:

Your petitioners, a committee appointed by the Atlanta Chamber of Commerce, bring this their complaint against the Southern Railway & Steamship Association; and more especially the Louisville & Nashville Railroad; Nashville, Chattanooga & St. Louis Railway; Western & Atlantic Railroad; Georgia Central Railroad; Georgia Railroad; South Carolina Railway; etc.

Charges.

1. The said Association, in conjunction with the said roads named, give undue advantage and preference to the merchants of Nashville, Tennessee, as compared with the merchants of Atlanta, Georgia, which we claim is in direct violation of sections 2 and 3 of the Interstate Commerce Act.

2. The said Southern Railway & Steamship Association, in making joint tariffs within its territory, unjustly discriminates against Atlanta as compared with competing cities, which we claim to be in violation of section 3 of said Act.

Specifications as to First Charge.

The roads named, with their connections, allow the Nashville merchant the privilege of stopping his goods in Nashville for an indefinite period, and thence shipping a like kind and quantity to any point south at through rate in existence between the initial shipping point and final destination.

This not only applies to milling wheat in transit and shipping the flour on the through rate, but also to any kind or description of merchandise.

The two rates, first from initial shipping point to Nashville, thence from Nashville to final destination, invariably being higher than the direct rate between the said first shipping point and final destination; the difference be-

tween the said two local rates and the through rate being refunded to the Nashville shipper.

Under this system it is not required that the identical goods should be reshipped, but it simply gives the purchaser a privilege, at any time in the future, to forward a like kind and quantity at said reduced rate. The said privilege (*i. e.*, bill lading) being easily worth a premium to other shippers in case the original owner did not avail himself of same.

| | |
|---|-------|
| Tariff rate St. Louis to Nashville on grain 15 | |
| " " Nashville to Augusta, Ga., on grain..... | 22-37 |
| Tariff rate direct St. Louis to Augusta, Ga., on grain..... | 34 |

The difference of three cents per 100 pounds being refunded to the Nashville shipper when he ships forward to Augusta.

| | |
|--|----|
| Rate St. Louis to Atlanta, Ga., on grain 32 | |
| " Atlanta to Augusta, Ga., on grain... 14-46 | |
| " direct from St. Louis to Augusta on grain..... | 34 |

Showing a difference of twelve cents per 100 pounds against the Atlanta merchant stopping his shipment over and thence reshipping to destination in Augusta, although being on direct line between St. Louis and Augusta.

We claim that this privilege granted to the Nashville shipper, enabling him to purchase his goods advantageously, ship to Nashville, unload same, place in warehouse until suitable time to dispose of same, thence reload and ship forward to any point south of said city at the same rate as though the shipment had gone direct from initial shipping point to final destination, amounts to a concession in rates to the Nashville merchant, as the cost of carriage in the one case must necessarily be greater than in the other.

We claim that the granting of this privilege to the Nashville merchant, and refusing to grant same privilege to the Atlanta merchant, both of whom are doing business in the same territory, constitutes a clear case of unjust discrimination in favor of the former city as compared with the latter.

Specifications as to Second Charge.

The rates as established by the said Southern Railway & Steamship Association into Atlanta, we regard as unjust and unreasonable. We submit rates to a few of the competing cities:

Rates from all Points on Ohio River—LOUISVILLE AS BASIS—On Grain.

| To | DISTANCE. | RATE. | RATE PER TON PER MILE. |
|------------------------|-----------|-------|------------------------|
| Montgomery, Ala. | 490 | 20 | 816-1000 |
| Birmingham, Ala. | 394 | 20 | 1 015-1000 |
| Charleston, S. C. | 782 | 25 | 638-1000 |
| Savannah, Ga. | 769 | 25 | 650-1000 |
| Augusta, Ga. | 645 | 29 | 899-1000 |
| Macon, Ga. | 564 | 29 | 1 028-1000 |
| Atlanta, Ga. | 474 | 27 | 1 139-1000 |

Rates from Chattanooga, Tenn., on Grain.

| To | DISTANCE. | RATE. | RATE PER TON PER MILE. | Proportion of through rate received on haul up to ATLANTA. | BEYOND. |
|------------------------|-----------|-------|------------------------|--|---------|
| Charleston, S. C. | 447 | 14 | 625-1000 | 3.90 | 10.10 |
| Savannah, Ga. | 433 | 14 | 645-1000 | 4.50 | 9.50 |
| Augusta, Ga. | 399 | 16 | 1 035-1000 | 7.50 | 8.50 |
| Macon, Ga. | 228 | 16 | 1 403-1000 | 9.70 | 6.30 |
| Atlanta, Ga. | 138 | 12½ | 1 811-1000 | 12.50 | |

Local Rates Charged by Railroads in Georgia.

| | ON CLASS D— GRAIN. | RATE PER TON PER MILE. |
|---------------|-----------------------|---------------------------|
| 10 Miles..... | 5 | 10 000-1000 |
| 50 " | 8 | 3 200-1000 |
| 100 " | 11 | 2 200-1000 |
| 200 " | 15 | 1 500-1000 |
| 300 " | 20 | 1 333-1000 |

It will thus be seen that Atlanta is paying the highest rate per ton per mile—in some cases more than twice the mileage rate charged to competing cities.

The said roads now haul through Atlanta to Savannah, Charleston and other seaport cities (300 miles greater distance) at considerably less rates than charged to Atlanta.

We would respectfully ask that if our charges are substantiated, your honorable body pass the necessary orders, giving us the desired relief, as to the future, and require the said roads to refund the amounts over charged in rates during the past for such period as may be determined upon.

Respectfully,

S. F. Woodson,
Aaron Haas,
J. G. Oglesby,

Committee Atlanta Chamber of Commerce.

State of Georgia, }
Fulton County. }

Personally appeared before me a notary public duly commissioned and qualified as and for said State and county. Stewart F. Woodson, with whom I am personally acquainted and whom I know to be one of the within named petitioners, and who made oath in due form of law that the facts stated in the foregoing petition as of petitioners own knowledge are true, and that those stated upon information and belief he believes to be true.

Stewart F. Woodson.

[Seal] Sworn to and subscribed before me this 7th day of May, 1888.
Chas. S. Norther, N. P.

President and Directors of the NEW JERSEY FRUIT EXCHANGE

CENTRAL R. CO. OF NEW JERSEY
and Lehigh Valley R. Co.

(No. 138.)

COMPLAINT filed May 17, 1888, alleging unjust rates for the transportation of peaches.

To the Honorable, the Interstate Commerce Commission:

We, the undersigned, President and Directors of the New Jersey Fruit Exchange, respectfully represent that the Central Railroad Company of New Jersey, and the Lehigh Valley Railroad Company charge eleven cents per basket of sixteen quarts for transportation of peaches from Flemington and neighboring stations to New York; eight cents from Bloomsburg to Easton, and similar rates from and to other places, as shown by the schedules hereto appended. The average weight of a basket of peaches is thirty pounds, and the distance from Flemington to New York is fifty-two miles,

making the freightage fourteen cents per ton per mile between those places. The distance from Bloomsburg to Easton is eight miles and the rate is forty-four cents per ton per mile. Peaches from this section are generally transported in full cars, several being filled at each station every day during the season of gathering this fruit. These rates are obviously excessive, unreasonable and unjust, and in violation of section 1 of the Interstate Commerce Law.

We, the undersigned, as aforesaid, respectfully petition your honorable Commission to order such reduction of rates by these companies as shall make them reasonable and just, and accordant with the provisions of the Interstate Commerce Law.

Dated May 10, A. D. 1888.

Alexander B. Allen,
President Board of Directors.
John B. Case, Secy.

B. Bird Uriah Sutton
Wm. J. Case Benj. Abbott
G. C. Garhart John Barton
Phuton Case Henry Race
N. S. Conover Geo. Hoffman
Directors.

[Verified.]

IMPERIAL COAL CO. and Andrews, Hitchcock & Co.

PITTSBURGH & LAKE ERIE R. CO. and
New York, Lake Erie & Western R. Co.,
Lessee of New York, Pennsylvania &
Ohio Railroad.

(No. 139.)

COMPLAINT filed May 28, 1888, alleging unjust and excessive rates for and discrimination in the transportation of coal.

Mr. W. B. Rodgers, Pittsburgh, Pa., attorney for complainants:
To the Honorable, the Interstate Commerce Commission:

The petition of the Imperial Coal Company and Andrews, Hitchcock & Company, respectfully represents:

1. That the Imperial Coal Company is a Corporation of the State of Pennsylvania, engaged in the business of mining, shipping and selling bituminous coal—the works of said Company being situated in the County of Allegheny and State of Pennsylvania, on the line of the Montour Railroad, which road connects with the Pittsburgh & Lake Erie Railroad at Montour Junction, twelve miles west of the City of Pittsburgh in said State.

2. The firm of Andrews, Hitchcock & Company are dealers in coal, doing business in the City of Cleveland, in the State of Ohio, and have been and are purchasing large quantities of coal from said Imperial Coal Company and shipping the same to Cleveland; the same being delivered to the Pittsburgh & Lake Erie Railroad at Montour Junction, and carried over said railroad to its terminus at Youngstown, Ohio, and from thence over the New York, Pennsylvania & Ohio Railroad to Cleveland, the same being delivered by said Imperial Coal Company to said Andrews, Hitchcock & Company at said Montour Junction, and the

rate given by said Pittsburgh & Lake Erie Railroad Company.

3. Your petitioners aver that the rate charged on coal mined and sold by said Imperial Coal Company to said Andrews, Hitchcock & Company, and others, and so shipped from said Montour Junction to Cleveland, is unjust and excessive, and that there is, and has been, a discrimination against the said Imperial Coal Company and the said Andrews, Hitchcock & Company and others dealing with said Imperial Coal Company in favor of miners and shippers of coal whose freights originate east of the City of Pittsburgh and are delivered in the City of Cleveland and other points.

4. The said unjust and excessive rate and the said discrimination is as follows:

The said Pittsburgh & Lake Erie Railroad Company leases and operates the Pittsburgh, McKeesport & Youghiogheny Railroad, running from the City of Pittsburgh east — miles. The said Pittsburgh & Lake Erie Railroad Company makes and charges a uniform rate of ninety cents per ton on coal destined for Cleveland, and originating at any point on the said Pittsburgh, McKeesport & Youghiogheny Railroad and Pittsburgh & Lake Erie Railroad, which is divided between the roads carrying the same as follows:

| | |
|--|-------|
| The Pittsburgh, McKeesport & Youghiogheny Railroad Company forty-three miles,..... | .25 |
| The Pittsburgh & Lake Erie Railroad Company, Pittsburgh to Youngstown, sixty-eight miles,..... | .32.5 |
| The New York, Lake Erie & Western Railroad Company, Lessee of the New York, Pennsylvania & Ohio R. Company, Youngstown to Cleveland, sixty-eight miles,..... | .32.5 |
| 179 miles,..... | .90 |

On coal shipped from Montour Junction to Cleveland, the rate charged is 76½ cents, which is divided between the roads carrying the same as follows:

| | |
|---|--------|
| The Pittsburgh & Lake Erie Railroad, Montour Junction to Youngstown, fifty-six miles,..... | .36.72 |
| New York, Lake Erie & Western R. Company, Lessee of the New York, Pennsylvania & Ohio R. Youngstown to Cleveland, sixty-eight miles,..... | .39.78 |
| 124 miles,..... | .76.50 |

Thus the Pittsburgh & Lake Erie Railroad Company charge the petitioners .36.72 cents per ton for fifty-six miles, and for coal originating east of Pittsburgh .32.5 per ton for sixty-eight miles, and the New York, Lake Erie & Western Railroad Company, lessee of the New York Pennsylvania & Ohio Railroad charge petitioners .39.78 cents per ton for sixty-eight miles for the same service it only charges for coal originating east of Pittsburgh .32.5 cents per ton.

Wherefore your petitioners ask that an order be made declaring the rate charged on coal shipped as aforesaid from Montour Junction to Cleveland is excessive, unjust and unfair discrimination, and that a just and fair rate be fixed therefor.

Imperial Coal Company,
By U. A. Andrews, Pres't.
Andrews, Hitchcock & Company.

[Verified.]

INTER S.

Henry McMORRAN *et al.*, Partners as McMORRAN & Co.

v.

CHICAGO & GRAND TRUNK R. CO. and
Grand Trunk R. Co. of Canada.

(No. 131.)

ABSTRACT of Joint Answer filed May 28, 1888, to complaint given *ante*, 14.

Mr. E. W. Meddaugh, for defendants:

Defendants say they are distinct corporations. The Chicago & Grand Trunk Railway runs from Chicago to Port Huron, Michigan, and the Grand Trunk Railway runs from Port Huron to Buffalo, New York, using ferry boats to transfer cars and traffic across the St. Clair River between Port Huron and its railway on the Canadian side. Rates upon each line are made by the company owning the same without any dictation or control of the other, and through rates are divided between them as they from time to time agree. On all shipments of grain, flour and feed from Port Huron to Buffalo over the Grand Trunk Railway a local switching charge of \$2.50 per car is paid to the Chicago & Grand Trunk Railway Company by the Grand Trunk Railway Company of Canada.

It has been for many years the practice of competing companies to make uniform rates between Chicago and Buffalo on the three different routes, to wit: via the Cities of Toledo, Detroit and Port Huron, and between Chicago and said cities and also between said cities and Buffalo, notwithstanding the differences in mileage, in order that a war of rates might be avoided, except that the rate on flour and feed has been and is, from said Cities of Port Huron, Detroit and Toledo to Buffalo ten cents per 100 pounds. Defendants admit that prior to the taking effect of the Interstate Commerce Act the rate from Port Huron to Buffalo over the Grand Trunk Railway was at times as low as seven and even six cents per 100 pounds, but this was forced by water and other competition, and said railway company was at the same time charging from eight to ten cents per 100 pounds on similar traffic from places on its line in Canada, easterly of Port Huron to Buffalo. The right to charge the higher rate for the shorter haul being against the letter and spirit of said Act the defendant, the said Grand Trunk Railway Company, considered itself justified in advancing the rate between Port Huron and Buffalo to the existing rate when said Act became operative. And defendants deny that the existing rates complained of are excessive, unreasonable or unjust.

F. D. Babcock and E. M. Parsons, T. M. C. Logan, Committee of NORTHWESTERN IOWA GRAIN & STOCK SHIPPERS ASSOCIATION

v.

CHICAGO & NORTHWESTERN R. CO.

(No. 132.)

ABSTRACT of Answer filed June 4, 1888, to complaint given *ante*, 14.

Mr. W. C. Goudy, for defendant:

Defendant states that the rates on corn from

Council Bluffs were reduced because of reductions by other railroad companies to Peoria, St. Louis and other points, and the reason for reducing the rates south of Carroll was because the Chicago, Milwaukee & St. Paul Railway Company's main line from Council Bluffs crosses the branch line of defendant to Audubon at Manning, thereby preventing the establishment of any higher rate than the Council Bluffs rate. Such reduction was not put in force at Ida Grove, Odebolt and Arthur, nor any other station not crossed by lines running from Council Bluffs. By adjustments of rates on corn reductions were made from Ida Grove Odebolt and Arthur, August 25, 1887, to twenty-one cents, October 4, 1887, to twenty cents, November 1, 1887, to twenty cents from Odebolt and twenty-one cents from Ida Grove and Arthur, and the difference in rates from stations on the branches not less than twenty miles from the main line was for twenty-four days, four cents, for forty days, three cents, and since October 4, 1887, two cents per 100 pounds. In December, 1887, owing to rates established by other carriers from Nebraska points to Baltimore, Philadelphia and New York via junction points in Illinois south of Chicago, the Fremont, Elkhorn & Missouri Valley Railroad Company was compelled to make the same through rates with railroads running from Chicago to the Atlantic seaboard and to join in making on its freight traffic the same rates from Turner and Rochelle, Illinois, that were made at Peoria. The reason for selecting Turner and Rochelle was because they are about equi-distant from the eastern points as Peoria, but those rates did not apply on corn shipped from Ida Grove, or other stations on the Northern Iowa division, that being on a different line from the main line of the defendant, and defendant denies that in such difference there is any unjust discrimination or violation of the fourth section. In relation to rates on stock it denies that it violates the fourth section, calls attention to tariffs G. F. D. No. 916, 1 S. C. & P. G. F. D. No. 301, taking effect February 29, 1888, in which it is expressly stated that "The above rates will be the maximum for intermediate points in the same direction on direct line to all points on branches south of main line, Council Bluffs to Chicago."

CIRCULAR LETTER BY THE COMMISSION ON
THE SUBJECT OF ANNUAL REPORTS
FROM CARRIERS.

Interstate Commerce Commission,
Washington, D. C., June 1, 1888.

To All Carriers Engaged in Interstate Commerce.

The Interstate Commerce Commission desires to call your attention to the subject of the Annual Reports, which are provided for by section 20 of the Act to Regulate Commerce, as follows:

Sec. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to

all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

Said Act applies to all common carriers engaged in such transportation of passengers or property as is described in its first section. Very many railroads, which are located wholly within one state, are, nevertheless, very largely engaged in interstate commerce. In fact, under the present methods of conducting joint traffic, nearly every road, however short its line, unites in making through rates, under which it issues and receives tickets or bills of lading, in connection with roads in other States, upon which passengers and freight are transported across state boundaries; the revenues of every such road are derived, to a greater or less extent, from the traffic which is regulated by the provisions of the Interstate Commerce Law.

The information which this law authorizes the Commission to require is very general in its nature and scope. It embraces "a complete exhibit of the financial operations" of the carriers each year, as well as all the details which are enumerated in the section quoted above.

It is apparent that it was the purpose of Congress to inaugurate an annual collection of statistics, which should faithfully present the entire transactions of every railroad in the United States for the preceding year; and that the information so obtained should be authoritative and trustworthy.

Such returns, when arranged upon a uniform system and presented under official sanction, cannot fail to be of great interest and value to all carriers, as well as to Congress and the public.

As to many of the matters enumerated, the value will be greatly lessened if the statistics are incomplete. No attempt has heretofore been made to provide for a general collection of railroad facts and figures, except through unofficial methods and by the Census Bureau.

For obvious reasons these methods have not given satisfactory results, in comparison with the annual statistics which are obtained in other countries. A new plan has been established, under the supervision of official authority, in the expectation that a permanent and uniform system of reports, both as to date of compilation and form of statement, may soon prevail throughout the land.

In preparing the blank return, which is now in press and about to be issued, every effort has been made to reduce it to a simple, intelligible, and practicable form. If the efforts of this Commission shall be seconded by the railroad companies and by the various state railroad commissioners, it is entirely feasible to speedily bring all railroad accounts throughout the United States upon a uniform basis, and to present them annually to the country and to the world in a manner worthy of the importance of the subject.

Up to this time the suggestions and requests of the Commission have been most satisfactorily met by both the state commissions and the carriers. A very free interchange of views has been had with the accounting officers, in the first place before the preparation of an experi-

mental form, and afterwards in its revision and correction. The blank about to be issued is believed to be the closest approach to a universally satisfactory system which has yet been made in this country. It is also confidently believed that there is no information asked which the carriers cannot readily furnish and will not cheerfully give, and it is hoped that every detail of inquiry has a permanent value.

The Commission, therefore, without ruling definitely at the present time upon the question of what railroad companies may or may not be required by the Act to file the returns in question, will furnish blanks to every railroad company in the United States, whatever its situation or relative importance, in the belief that every carrier will cheerfully and promptly contribute its share towards the attainment of a complete and trustworthy annual exhibit of the entire railroad system of our country.

Very Respectfully,

Thomas M. Cooley,
William R. Morrison,
Augustus Schoonmaker,
Aldace F. Walker,
Walter L. Bragg,

Interstate Commerce Commission.

SUPREME COURT OF ALABAMA.

State of ALABAMA, *Appt.*,

v.

W. C. AGEE.

The **Alabama Act** of January 15, 1887 (Acts 1886-1887, p. 36, § 5, subd. 10), **which exacts a license fee from itinerant dealers in fruit trees, etc., is an attempted regulation of commerce between the States, and hence in conflict with the Federal Constitution, and therefore void.**

(Decided February 28, 1888.)

APPEAL by the State from a judgment of the City Court of Montgomery, in favor of the defendant on the trial of a criminal case for carrying on the business of an itinerant dealer in fruit trees, etc., without having paid for and taken off the license required by law. *Affirmed.*

It appeared at the trial that defendant had carried on the business charged, in Montgomery County, Alabama, only as the agent or drummer of a firm engaged in business in the State of Virginia, where all the members of the firm resided.

The material provisions of the statute brought in question are set forth in the opinion.

Mr. Thomas N. McClellan, Atty. Gen., for the State, appellant.

Messrs. Sayre, Stringfellow & LeGrand, for appellee.

Somerville, J., delivered the opinion of the court:

The defendant was indicted and found guilty of carrying on the business of an "itinerant dealer in fruit trees, vines, shrubs, or plants," without a license, after the Act of January 15, 1887, which exacts a license of \$50 from dealers of this class. Acts 1886-1887, p.

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36, § 5, subd. 10. The city court decided the Act to be unconstitutional, as an attempted regulation of commerce between the States.

The present appeal is taken by the State, under the provision of Code 1886, § 4515, which reads as follows: "In all criminal cases, when the Act of the Legislature, under which the indictment is found, is held to be unconstitutional, the solicitor may take an appeal, on behalf of the State, to the supreme court, which appeal shall be certified as other appeals in criminal cases." This is a change of the statute, as it existed before the new Code, under the Act approved December 8, 1880, which provided that the constitutionality of a statute under which an indictment is found could be raised only by demurrer to the indictment, and that the State might take an appeal in case the Act was held unconstitutional by ruling of the court on such demurrer. Acts 1880, 1881, p. 65; *State v. Bauerman*, 72 Ala. 252. The present statute is broader than that Act, and confers upon the State the right of appeal in all criminal cases where the record affirmatively shows that the trial court held the statute under which the indictment was found to be unconstitutional.

This case, on its merits, is in every respect similar to *Robbins v. Tuxing Dist. of Shelby Co.* 120 U. S. 489 (30 L. ed. 694); 1 Inters. Com. Rep. 45; decided by the United States Supreme Court in March, 1887. It was there held that a foreign drummer or traveling agent of a mercantile firm, in the State of Ohio, who sold goods only by sample in the State of Tennessee, could not be lawfully subjected to license in the latter State as a condition to the exercise of his vocation of soliciting the sale of goods. A law of Tennessee, exacting such license, was held to be unconstitutional, as applied to persons who were itinerant drummers selling goods only by sample for nonresident merchants.

The Alabama Statute under consideration is subject to precisely the same objection as the Tennessee law, which was declared void in the *Robbins Case*. Whatever may be our views as to the soundness of this decision, it involves a judicial construction by the Supreme Court of

the United States, of a clause of the Federal Constitution; and it is therefore binding in this court, and we for this reason adhere to it as conclusive of the present case. *Pollard v. Zuber*, 65 Ala. 628; *Green v. State*, 73 Ala. 26. Judgment affirmed.

SUPREME COURT OF MISSOURI.

Charles C. CHRISTIE, *Respt.*,

v.

MISSOURI PACIFIC R. CO., *Appt.*

1. Where a **petition alleges** that a **contract** was made with the agent of a railroad company regarding the shipment of grain, states its **terms**, avers a **breach** thereof **and** the amount of **damages** claimed, the **defendant is not entitled**, under Rev. Stat. § 3529, to require the **petition made more definite**.
2. A common carrier may contract to ship **freight at a lower rate** than the published tariff, **but he cannot contract to deny** the same **reduced rate to other shippers**.
3. A **contract** by a railroad company to **carry corn at the customary rates** and to **grant a rebate** to the shipper, is **not illegal**, as being in violation of the law to prevent unjust discrimination, **nor is it fraudulent as to the purchaser of the corn**.
4. An **instruction was proper**, that as **defendant resisted the payment** of the sum claimed as rebate, on the **sole ground that no such contract had been made**, the **jury might infer** that the **amounts claimed to have been paid had been received** by defendant, where there was evidence of such payment and the presentation of the bills therefor to the defendant.

(Decided March 19, 1888.)

A PPEAL from a judgment of the Buchanan Circuit Court, Grubb, J., against the defendant in a suit to recover a rebate upon shipment of corn under contract. *Affirmed*.

The facts are stated in the opinion.

Messrs. Thos. J. Portis, Adams & Bowles and Vinton Pike, for appellant:

The court erred in overruling defendant's motion to require plaintiff to make his petition more definite and certain, and to require him to state whether said alleged agreement was in writing, and, if so, to file same in court.

Rev. Stat. 1879, § 3529; Bliss, Code Pl. 2d ed. p. 657, § 425; *Hannibal & St. J. R. Co. v. Knudson*, 62 Mo. 569; *Hay v. Short*, 49 Mo. 141; *Rothwell v. Morgan*, 37 Mo. 107; *Pennsylvania Co. v. Dean*, 92 Ind. 459; *Addison v. Lake Shore & M. S. R. Co.* 48 Mich. 155.

The court erred in overruling defendant's objection to the introduction of any evidence: (1) because the alleged contract is against the policy of the law; (2) because it is void as against public policy; (3) because it is in conflict with the Constitution and statutes of this State.

Const. art. 12, §§ 14, 23; Rev. Stat. § 821; *Seafield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571; *Messenger v. Penn-*

sylvania R. Co. 36 N. J. L. 407; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531; *Denver etc. R. Co. v. Atchison etc. R. Co.* 16 Cent. L. J. 209; *Hayes v. Pennsylvania Co.* 15 Rep. 323.

The contract created an illegal preference, and was void as against public policy.

New England Express Co. v. Maine Cent. R. Co. 57 Me. 196; *Messenger v. Pennsylvania R. Co.* and *Same v. Same*, *supra*; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33, 43; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Peoria & R. I. R. Co. v. Coal Valley Min. Co.* 68 Ill. 489; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430; *Shipper v. Pennsylvania R. Co.* 47 Pa. 338; *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378; *Audenried v. Philadelphia & R. R. Co.* 68 Pa. 370; *Cumberland Valley R. Co's App.* 62 Pa. 218-230.

The court should have instructed the jury, as prayed by defendant at the close of the testimony, to the effect that plaintiff was 'not entitled to recover.

Seafield v. Lake Shore & M. S. R. Co. 1 West. Rep. 812, 43 Ohio St. 571; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407; *Messenger v. Pennsylvania R. Co.* 37 N. J. L. 531; *Denver etc. R. Co. v. Atchison etc. R. Co.* 16 Cent. L. J. 209; *Hayes v. Pennsylvania Co.* 15 Rep. 323.

Messrs. Green & Burnes, for respondent:

That the contract created an illegal preference, and was therefore void as against public policy, we submit does not appear from the facts and the record. And if appellant claims immunity from the obligations incurred by a contract on the ground of the illegality of the contract, such illegality must be specially pleaded, and cannot be presented under a general denial.

Bliss, Code Pl. § 330; 76 Ill. 67; *Stafford P. Co. v. Monheimer*, 9 Jones & S. 184.

Norton, Ch. J., delivered the opinion of the court:

This suit is based upon an alleged contract whereby it was agreed that plaintiff should ship grain of various kinds from certain stations in the State of Kansas to Chicago, Illinois; and that, on presentation of bills for such shipments, the plaintiff should pay the usual and ordinary rates therefor, according to defendant's tariff rates; and that defendant should repay to plaintiff all sums of money which defendant should receive over and above the rate agreed upon between the parties.

The object of the suit is to recover from defendant the difference between the amounts paid by plaintiff according to defendant's tariff rates, and the amount that was by the agreement of the parties to be paid.

The answer of defendant was a general denial. On the trial, plaintiff had judgment, from which the defendant has appealed.

There were six counts in the petition, each one of them alleging different shipments made under the same contract.

The first error assigned is the action of the

court in overruling a motion filed by defendant, asking the court to make an order requiring plaintiff to make his petition more definite and certain,—in this, that he be required to state where and by what officers of defendant's the alleged agreement was made with plaintiff, and whether the same was verbal or in writing, and, if in writing, that plaintiff be required to file the same in court for defendant's inspection.

It is held in the case of *Hannibal & St. J. R. Co. v. Knudson*, 62 Mo. 569, that when a suit is brought upon an instrument in writing alleged to have been executed by the other party, it must be filed with the petition, unless it is alleged to have been lost or destroyed. If it is not filed, and no reason given for not filing it, the remedy is either by motion to dismiss or motion to require the party to file it.

In this case it does not appear that the suit was founded on a contract in writing alleged to have been executed by defendant. It can be construed in no other way than as a verbal contract, and the evidence adduced on the trial shows it was of that character. It is provided by Rev. Stat. § 3529, among other things, that "where the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent, the court, on motion of the adverse party, may require the pleading to be made definite and certain."

No such indefiniteness as is contemplated by this statute exists in the petition. It alleges that a contract was made with defendant's agent, sets out its terms, avers a breach thereof, and the amount of damages claimed therefor.

The defendant objected to the introduction of any evidence, on the ground that the contract set up in the petition was in violation of the Constitution and statute of the State, and was void as being against public policy. This objection was overruled, and this action of the court is assigned for error; and in support of the contention we have been cited to a number of authorities; and among them to the case of *Scofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571, where, in an elaborate opinion, all the other authorities to which we have been cited by counsel are reviewed and discussed.

In that case it appears that the railway company, having tariff rates for the public generally, contracted with the Standard Oil Company that, in consideration of said company giving to the railway company its entire freight business in the products of petroleum, they would transport such freight for the company at certain rates, about ten cents per barrel cheaper than for any other customers; and the railway company not only agreed and undertook to carry at the reduced rate, but also that they would not ship for any other at less than full tariff rates; and, if they did, the said Standard Oil Company would take from the railway company all its business, and deprive it of its patronage. Scofield and others, being also engaged in the manufacture and also dealers in refined and other products of petroleum, offered their products to the railway company for shipment on the same terms granted to the Standard Oil Company, and, on being refused shipment on the terms, brought their bill to enjoin the railway company from charging and

collecting from them, for freight on said line, rates and amounts in excess of those charged to the Standard Company for like goods to the same points, or from discriminating against them in favor of the Standard Company. The prayer of the bill was granted, the court holding as follows: That where a lower rate is given by a railroad company, engaged as a common carrier, to a favored shipper, which is to give, and necessarily gives, an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have a right to require an equal rate for all, under like circumstances.

Where such a corporation as a common carrier, in consideration of the fact that a shipper furnished a greater quantity of freight than other shippers during a given term, agrees to make a rebate on the published tariff rates on such freights, to the prejudice of like freight under the same circumstances, such a contract is an unlawful discrimination in favor of the larger shipper, tending to create monopoly, destroy competition, and injure, if not destroy, the business of smaller operators, and is contrary to public policy, and will be declared void at the instance of parties injured thereby.

The principles thus enumerated leave their foundation in the common law, and Const. art. 12, §§ 12, 23, and § 821 of the Revision of 1879, are but declaratory of the common law in reference to the subject of which said sections treat. A common carrier has the right to contract to ship freight at a lower rate than the published tariff rate, if he choose to do so; and such a contract is not against public policy unless the privilege to ship at such rate is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination, and renders the contract void as against public policy. No such exclusiveness or discrimination appears in the contract sued upon, and the objection of defendant to the reception of any evidence was properly overruled.

In the case of *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67, the precise question involved in this case was considered; and it was there held that such a contract as the one before us was not illegal as being in violation of the law to prevent unjust discrimination, as the company was to carry at the customary rates; and that the rebate in the charges was a matter of private agreement between the carrier and the shipper, and the contract was not fraudulent as to the purchaser of the corn.

In view of the evidence which tended to show that the sum claimed by plaintiff had been paid and received by defendant; and in view of the fact that when, previous to the institution of the suit, plaintiff presented to defendant freight bills showing the amounts claimed to have been paid, and demanded repayment, such payment was resisted, not on the ground that defendant had not received the amount claimed to have been paid, but on the sole ground that no such contract as plaintiff set up had been made,—the seventh instruction, of which defendant complains, was not improperly given; the said instruction in effect telling the jury that, from the fact that defendant resisted the claim of plaintiff for repayment on

the sole ground that no such contract as he set up had been made, they might infer that the amounts claimed to have been paid had been received by defendant.

We perceive no error in the record justifying an interference with the judgment, and it is hereby affirmed.

All concur except **Ray, J.**, absent.

UNITED STATES SUPREME COURT.

PEMBINA CONSOLIDATED SILVER MINING & MILLING CO., *Plff in Err.*,

v.

COMMONWEALTH OF PENNSYLVANIA.

(From Lawyers' ed. U. S. Reports, Bk. 31.)

1. **Section 16 of the Pennsylvania Revenue Act of June 7, 1879, is not in conflict with the clause of the Federal Constitution vesting in Congress the power to regulate commerce;** nor with the clause declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States; nor with the clause in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.
2. The States may require such conditions as they may choose, for the admission with their limits of a **corporation of another State**, without acting in conflict with said Fourteenth Amendment.
3. The only **limitation upon this power of the State** to exclude a foreign corporation from doing business within its limits or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises **where** the corporation is in the employ of the Federal Government, or where its **business is strictly commerce, interstate or foreign.**
4. The **control of such commerce**, being in the Federal Government, is not to be restricted by state authority.
5. **States may exclude the foreign corporation** entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests.
6. The State could make the grant of the privilege to the corporation, the plaintiff in error, of having an office within its limits, conditional upon the payment of a **license tax**, and fix the sum according to the amount of the authorized capital of the Corporation.
7. **Corporations are not citizens** within the meaning of the clause of the Constitution declaring that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

(Argued Feb. 16, 1888, Decided March 19, 1888.)

IN ERROR to the Supreme Court of the State of Pennsylvania, to review a judgment of that court affirming a judgment of the Common Pleas of Dauphin County affirming the

validity of an assessment of a tax against a foreign corporation. *Affirmed.*

Statement by *Mr. Justice Field*:

In May, 1881, the Pembina Consolidated Silver Mining and Milling Company was incorporated under the laws of Colorado, with an authorized capital of one million dollars, for the purpose of carrying on a general mining and milling business in that State. Its principal office is in Alpine, Colorado, and since July 1, 1881, it has had, and still has, an office in the City of Philadelphia, "for the use of its officers, stockholders, and employees." On the 31st of October, 1881, the auditor-general and treasurer of Pennsylvania, assessed a tax against the Corporation for "office license" from July 1, 1881, to July 1, 1882, at the rate of one fourth of a mill on each dollar of its capital stock, which amounted to \$250, and added to it a penalty of \$125 for failure to take out a license. This tax was assessed and penalty imposed under section sixteen of the Act of the Legislature of the Commonwealth, approved June 7, 1879, entitled "An Act to Provide Revenue by Taxation." The section provides as follows:

"That from and after the first day of July, A. D. 1879, no foreign corporation, except foreign insurance companies, which does not invest and use its capital in this Commonwealth, shall have an office or offices in this Commonwealth, for the use of its officers, stockholders, agents or employees, unless it shall first have obtained from the auditor-general in annual license so to do; and for said license every such corporation shall pay into the state treasury, for the use of the Commonwealth, annually, one fourth of a mill on each dollar of capital stock which said company is authorized to have, and the auditor-general shall not issue a license to any corporation until said license fee shall have been paid. The auditor-general and state treasurer are hereby authorized to settle and have collected an account against any company violating the provisions of this section for the amount of such license fee, together with a penalty of fifty per centum for failure to pay the same; *Provided*, That no license shall be necessary for any corporation paying a tax under any previous section of this Act, or whose capital stock, or a majority thereof, is owned or controlled by a corporation of this State which does pay a tax under any previous section of this Act."

It is conceded that the Corporation is not within the exception of the *proviso* of the Act, as it pays no tax under any previous section.

From this assessment, or settlement of the account against the Corporation, as it is termed is termed in the record, the Corporation appealed to the Court of Common Pleas of Dauphin County, on the ground, among others, that the said 16th section of the Revenue Act is in conflict with the clause of the Constitution of the United States declaring that "Con-

gress shall have power to regulate commerce with foreign Nations and among the several States" (art. 1, § 8, clause 3), and also with the clause declaring that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" (art. 4, § 2, clause 1.) In that court the Commonwealth filed a declaration in debt against the Corporation for the amount claimed. It does not appear from the record that any answer or plea was filed to this declaration, but it is assumed that issue was joined, as counsel of the parties agreed that a trial by jury should be waived, and that the case should be submitted to the decision of the court, subject to a writ of error as in other cases, at the option of either party.

The court of common pleas affirmed the validity of the assessment, and the Corporation took the case on writ on writ of error to the Supreme Court of the Commonwealth, which affirmed the judgment of the common pleas. To review this judgment the case is brought here.

Mr. James W. M. Newlin, for plaintiff in error:

The tax is void, as being an attempt by Pennsylvania to tax a franchise not granted by her, property not within her jurisdiction, and business not carried on in her jurisdiction.

State Tax on Foreign-held Bonds, 82 U. S. 15 Wall. 319 (21 L. ed. 186); *Com. v. Gloucester Ferry Co.* 98 Pa. 105; *Com. v. Standard Oil Co.* 101 Pa. 147; *License Cases*, 46 U. S. 5 How. 504 (12 L. ed. 259); *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 407 (15 L. ed. 452); *Paul v. Virginia*, 75 U. S. 8 Wall. 180 (19 L. ed. 360); *St. Clair v. Cox*, 106 U. S. 350 (27 L. ed. 222); 5 Morrison's Trans. Supreme Ct. of U. S. 422; *McCabe v. Illinois Cent. R. Co.* 13 Fed. Rep. 830; *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532.

The tax is void under the Federal Constitution, because it is an attempt to tax and regulate interstate commerce.

Council Bluffs v. Kansas City, St. J. & C. B. R. Co. 45 Iowa, 338; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *People v. Brooks*, 4 Den. 469; *Smith v. Turner*, 48 U. S. 7 How. 337 (12 L. ed. 725); *U. S. v. Holliday*, 70 U. S. 3 Wall. 417 (18 L. ed. 185); *Western U. Tel. Co. v. Atlantic & P. S. Tel. Co.* 5 Nev. 102; *Paul v. Virginia*, supra; *Osborne v. Mobile*, 83 U. S. 16 Wall. 481 (21 L. ed. 472); *Welton v. Missouri*, 91 U. S. 278 (23 L. ed. 348).

Corporations are persons within the meaning of the Fourteenth Amendment.

Bank of U. S. v. Deveaux, 9 U. S. 5 Cranch, 61 (3 L. ed. 38); *Society of Gospel v. New Haven*, 21 U. S. 11 Wheat. 392 (6 L. ed. 502); *Marshall v. Bait. & O. R. Co.* 57 U. S. 16 How. 314 (14 L. ed. 953); *Munn v. Illinois*, 94 U. S. 113 (24 L. ed. 77); *Sinking Fund Cases*, 99 U. S. 718 (25 L. ed. 501); *Baldwin v. Ministerial Fund*, 37 Me. 369; *Otis Co. v. Ware*, 8 Gray, 509; *People v. Utica Ins. Co.* 15 Johns. 358; *Planters & M. Bank v. Andrews*, 8 Port. 404; *State v. Nashville University*, 4 Humph. 166; *San Mateo Co. v. Southern P. R. Co.* 13 Fed. Rep. 145; *Northwestern Fertilizing Co. v. Hyde Park*, 3 Biss. 480.

INTER S.

The tax in question is a "denial of the equal protection of the laws."

Washington Avenue, 69 Pa. 362; *Woodbridge v. Detroit*, 8 Mich. 301; *Lexington v. McQuil-lan*, 9 Dana, 513; *Exchange Bank v. Hines*, 3 Ohio St. 17; *People v. Coleman*, 4 Cal. 46; *People v. Twelfth Dist. Judge*, 17 Cal. 547; *Geebrick v. State*, 5 Iowa, 491; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 338; *Pearson v. Portland*, 69 Me. 278.

Messrs. John F. Sanderson, Deputy Atty-Gen. and W. S. Kirkpatrick, Atty-Gen., for defendant in error:

No question under the Fourteenth Amendment to the Constitution of the United States is properly presented.

Delaware, L. & W. R. Co. v. Commonwealth, 66 Pa. 94; *Phila. Fire Asso. v. N. Y.* 119 U. S. 110 (30 L. ed. 346); *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519 (10 L. ed. 274); *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404 (15 L. ed. 451); *Liverpool Ins. Co. v. Mass.* 77 U. S. 10 Wall. 566 (19 L. ed. 1029); *Doyle v. Continental Ins. Co.* 94 U. S. 535 (24 L. ed. 148); *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 (28 L. ed. 1137); *Stanley v. Albany*, 121 U. S. 550 (30 L. ed. 1003).

Mr. Justice Field, after stating the case, delivered the opinion of the court:

The only questions passed upon by the Supreme Court of Pennsylvania, which can be considered by us, are those which rise upon its ruling against the contention of the plaintiff in error that the statute of the Commonwealth is in conflict with clauses of the Federal Constitution. Its ruling upon the conformity of the statute with the Constitution of the Commonwealth does not come under our jurisdiction.

The clauses of the Federal Constitution, with which it was urged in the state supreme court that the statute conflicts, are the one vesting in Congress the power to regulate foreign and interstate commerce, the one declaring that the citizens of each State are entitled to the privileges and immunities of citizens in the several States, and the one embodied in the Fourteenth Amendment declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.

1. It is not perceived in what way the statute impinges upon the commercial clause of the Federal Constitution. It imposes no prohibition upon the transportation into Pennsylvania of the products of the Corporation, or upon their sale in the Commonwealth. It only exacts a license tax from the Corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employes. The tax is not for their office, but for the office of the Corporation, and the use to which it is put is presumably for the latter's business and interest. For no other purpose can it be supposed that the office would be hired by the corporation.

The exaction of a license fee to enable the Corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature. It was decided long ago, and the doctrine has been often affirmed since, that a corporation formed

by one State cannot, with some exceptions, to which we shall presently refer, do business in another State without the latter's consent, express or implied. In *Paul v. Virginia*, 75 U. S. 8 Wall. 168 [19:357], this court, speaking of a foreign corporation (and under that definition the plaintiff in error, being created under the laws of Colorado, is to be regarded), said: "The recognition of its existence even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States, a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests, or repugnant to their policy. Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their consent, it follows as a matter of course that such consent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interests. The whole matter rests in their discretion." A qualification of this doctrine was expressed in *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 12 [24 L. ed. 711], so far as it applies to corporations engaged in commerce under the authority or with the permission of Congress. The Act of July 24, 1866, "to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal, military, and other purposes," which was considered in that case, declared that any telegraph company then organized, or which might thereafter be organized, under the laws of any State, should have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which had been or might thereafter be declared such by Act of Congress, and over, under, or across the navigable streams or waters of the United States," upon certain conditions specified therein; and this court held that the telegraph, as an agency of commerce and intercommunication, came under the controlling power of Congress, as against any hostile state legislation; and that the Western Union Telegraph Company, having accepted the conditions of the Act, could not be excluded by another State from prosecuting its business within her jurisdiction. The Legislature of Florida had granted to another company, for twenty years, the exclusive right to establish and maintain telegraph lines in certain counties of the State; but this exclusive grant was adjudged to be invalid as against the company acting under the law of Congress. And undoubtedly a corporation of one State, employed in the business of the General Government, may do such business in other States without obtaining a license from them. Thus to take an illustration from the opinion of Mr. Justice Bradley in a case recently decided by him, "If Congress should employ a corporation of ship builders

to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any State of the Union," and, we may add, without the permission and against the prohibition of the State. *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9, 14.

These exceptions do not touch the general doctrine declared as to corporations not carrying on foreign or interstate commerce, or not employed by the government. As to these corporations, the doctrine of *Paul v. Virginia* applies. The Colorado Corporation does not come within any of the exceptions. Therefore, the recognition of its existence in Pennsylvania, even to the limited extent of allowing it to have an office within its limits for the use of its officers, stockholders, agents, and employes, was a matter dependent on the will of the State. It could make the grant of the privilege conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the Corporation. The absolute power of exclusion includes the right to allow a conditional and restricted exercise of its corporate powers within the State. *Bank of Augusta v. Earle*, 38 U. S. 13 Pet. 519 [10 L. ed. 274]; *Lafayette Ins. Co. v. French*, 59 U. S. 18 How. 404 [15 L. ed. 451]; *Ducat v. Chicago*, 77 U. S. 10 Wall. 410 [19 L. ed. 972]; *St. Clair v. Cox*, 106 U. S. 350 [27 L. ed. 222].

We do not perceive the pertinency of the position advanced by counsel that the tax in question is void as an attempt by the State to tax a franchise not granted by her, and property or business not within her jurisdiction. The fact is otherwise. No tax upon the franchise of the foreign corporation is levied, nor upon its business or property without the State. A license tax only is exacted as a condition of its keeping an office within the State for the use of its officers, stockholders, agents, and employes; nothing more and nothing less; and in what way this can be considered as a regulation of interstate commerce is not apparent.

2. Nor does the clause of the Constitution declaring that the "citizens of each State shall be entitled to all privileges and immunities of citizens in the several States" have any bearing upon the question of the validity of the license tax in question. Corporations are not citizens within the meaning of that clause. This was expressly held in *Paul v. Virginia*. In that case it appeared that a Statute of Virginia, passed in February, 1866, declared that no insurance company not incorporated under the laws of the State should carry on business within her limits without previously obtaining a license for that purpose, and that no license should be received by the corporation until it had deposited, with the treasurer of the State, bonds of a designated character and amount, the latter varying according to the extent of the capital employed. No such deposit was required of insurance companies incorporated by the State for carrying on their business within her limits. A subsequent Statute of Virginia made it a penal offense for a person to act in the State as an agent of a foreign insurance company without such license. One Samuel Paul, having acted in the State as an

agent for a New York insurance company without a license, was indicted and convicted in a circuit court of Virginia, and sentenced to pay a fine of \$50. On error to the Court of Appeals of the State, the judgment was affirmed, and to review that judgment the case was brought to this court. Here it was contended, as in the present case, that the Statute of Virginia was invalid by reason of its discriminating provisions between her corporations and corporations of other States; that in this particular it was in conflict with the clause of the Constitution mentioned, that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States. But the court answered, that corporations are not citizens within the meaning of the clause; that the term citizens, as used in the clause, applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the Legislature, and possessing only such attributes as the Legislature has prescribed; that the privileges and immunities secured to citizens of each State in the several States by the clause in question are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their citizenship; that special privileges enjoyed by citizens in their own States are not secured in other States by that provision; that it was not intended that the laws of one State should thereby have any operation in other States; that they can have such operation only by the permission, express or implied, of those States; that special privileges which are conferred must be enjoyed at home, unless the assent of other States to their enjoyment therein be given; and that a grant of corporate existence was a grant of special privileges to the corporations, enabling them to act for certain specified purposes as a single individual, and exempting them, unless otherwise provided, from individual liability, which could therefore be enjoyed in other States only by their assent. In the subsequent case of *Ducat v. Chicago*, 77 U. S. 10 Wall. 410 [19 L. ed. 972], the court followed this decision, and observed that the power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, was clearly established by it and the previous case of *Augusta v. Earle*, 38 U. S. 13 Pet. 519 [10 L. ed. 274], and added that "As to the nature or decree of discrimination, it belongs to the State to determine, subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union." *Philadelphia Fire Assn. v. New York*, 119 U. S. 110, 120 [30 L. ed. 342, 347].

3. The application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax in question is not more apparent than the application of the clause of the Constitution to the rights of citizens of one State to the privileges and immunities of citizens in other States. The inhibition of the amendment: that no State shall deprive any person within its jurisdiction of the equal protection of the laws, was designed to prevent any person or class of persons from being singled out as a special subject for discriminating

and hostile legislation. Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men." *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514, 562 [7 L. ed. 939]. The equal protection of the laws which these bodies may claim is only such as is accorded to similar associations within the jurisdiction of the State. The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. The office it hires is within such jurisdiction, and on condition that it pays the required license tax it can claim the same protection in the use of the office that any other corporation having a similar office may claim. It would then have the equal protection of the law so far as it had anything within the jurisdiction of the State, and the constitutional amendment requires nothing more. The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limits, provided always such discrimination does not interfere with any transaction by such corporations of interstate or foreign commerce. It is not every corporation, lawful in the State of its creation, that other States may be willing to admit within their jurisdiction or consent that it have offices in them; such, for example, as a corporation for lotteries. And even where the business of a foreign corporation is not unlawful in other States the latter may wish to limit the number of such corporations, or to subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character. The States may therefore require for the admission within their limits of the corporations of other States, or of any number of them, such conditions as they may choose, without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment. As to the meaning and extent of that section of the amendment, see *Barbier v. Connolly*, 113 U. S. 27 [23 L. ed. 923]; *Soon Hing v. Crowley*, 113 U. S. 703 [28 L. ed. 1145]; *Missouri v. Lewis*, 101 U. S. 22, 30 [25 L. ed. 939, 992]; *Missouri Pacific R. Co. v. Humes*, 115 U. S. 512 [29 L. ed. 463]; *Yick Wo v. Hopkins*, 118 U. S. 356 [30 L. ed. 229]; *Hayes v. Missouri*, 120 U. S. 68 [30 L. ed. 578].

The only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring officers for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the Federal Government, or where its business is strictly commerce, interstate or foreign. The control of such commerce, being in the Federal Government, is not to be restricted by state authority.

Judgment affirmed.

Mr. Justice Bradley was not present at the argument of this cause and took no part in its decision.

THE INTERSTATE COMMERCE COMMISSION.

NEW YORK PRODUCE EXCHANGE

NEW YORK CENTRAL & HUDSON RIVER; Michigan Central; Lake Shore & Michigan Southern; Chicago & Grand Trunk; Great Western of Canada; New York, Lake Erie & Western; Chicago & Atlantic; New York, Pennsylvania & Ohio; New York, Chicago & St. Louis; West Shore; Delaware, Lackawanna & Western; Grand Trunk Railway of Canada; Pittsburgh, Fort Wayne & Chicago; Pennsylvania; Pittsburg, Cincinnati & St. Louis; Wabash Western; Baltimore & Ohio; Philadelphia & Reading Railroads, and Central Railroad of New Jersey.

(No. 130.)

ANSWERS.

JOINT Answer of the New York Central & Hudson River Railroad Company, the Michigan Central Railroad Company, and the Lake Shore & Michigan Southern Railway Company, filed May 24, 1888, to complaint alleging unjust discrimination in rates from the West in favor of goods for export. See Complaint, *ante*, 13.

The New York Central & Hudson River Railroad Company, the Michigan Central Railroad Company, and the Lake Shore & Michigan Southern Railway Company jointly answer the petition herein as follows:

1. Admit and allege that since April 4, 1887, the respondents named in said petition have been railroad corporations as therein alleged, and that these respondents have been railroad corporations engaged in the transportation of property shipped from Chicago, and some other western points, to New York City and other Atlantic points wholly by rail, and to European ports partly by rail and partly by water, such transportation being under some common control, management or arrangement for continuous carriage between the points aforesaid, so that each of these respondents' roads constituted a part or portion of some through and continuous line of transportation engaged as aforesaid under an established joint tariff, and they are as to such transportation to New York City and other Atlantic points within the provisions of the Act to Regulate Commerce. That the Trunk Line Association, the Central Traffic Association, the Joint Committee (so called), and such of the fast freight lines as are operated over respondents' roads are only to a qualified and limited extent agents of these respondents and connecting lines with which said respondents have established such joint tariffs.

That the Trunk Line Association, the Central Traffic Association, and the Joint Committee (so-called), make rates, classifications, rules and regulations, which are accepted by the said railroads and the fast freight lines operated over certain of them; which rates, classifications, rules and regulations are those which regulate, and govern and control such through and continuous transportation between the points aforesaid as to classification and joint rates.

These respondents deny that since April 4, 1887, they have professed to maintain the joint rates between Chicago and New York for said continuous lines and routes stated in said petition, but their joint rates and classification since that time, as from time to time established, published and filed, have been as follows:

Flour and grain in car load lots:

| | | |
|-------------------------------------|-----|--------|
| April 4, 1887, to Jan. 2, 1888..... | 25 | cents. |
| Jan. 2, 1888, to Mar. 5, 1888..... | 27½ | cents. |
| Since Mar. 5, 1888..... | 25 | cents. |

Flour and grain in less than car load lots:

| | | |
|-------------------------------------|----|--------|
| April 4, 1887, to Jan. 2, 1888..... | 30 | cents. |
| Jan. 2, 1888, to Mar. 5, 1888..... | 33 | cents. |
| Since Mar. 5, 1888..... | 30 | cents. |

Provisions, as salted meats, etc., in car load lots:

| | | |
|-------------------------------------|----|--------|
| April 4, 1887, to Jan. 2, 1888..... | 30 | cents. |
| Jan. 2, 1888, to Mar. 5, 1888..... | 33 | cents. |
| Since Mar. 5, 1888..... | 30 | cents. |

Provisions, as salted meats, etc., in less than car load lots:

| | | |
|-------------------------------------|-----|--------|
| April 4, 1887, to Jan. 2, 1888..... | 35 | cents. |
| Jan. 2, 1888, to Mar. 5, 1888..... | 38½ | cents. |
| Since Mar. 5, 1888..... | 35 | cents. |

Respondents admit that the joint rates for transportation of like property from a number of western points to New York are based upon the Chicago rate, and on either the Chicago rate or a certain or agreed amount or percentage added to or deducted therefrom.

Respondents deny that since April 4, 1887, in violation of said Act, they have been guilty of unjust discrimination in notoriously or otherwise allowing to a large or any number of persons special rates, rebates or drawbacks, either given directly or indirectly by means of such devices as underbilling or underweighing property transported. On the contrary, they have diligently endeavored to prevent any shippers having or obtaining any advantage whatever by resort to underbilling or underweighing, but respondents have reason to believe that, notwithstanding such efforts to prevent it, such devices have been secretly and fraudulently practiced by some shippers to obtain such advantage without the knowledge, consent or approval of respondents; and respondents ask that in this proceeding careful and thorough investigation may be made to discover those guilty of such practices, and that the petitioner and those it represents may be called upon and required to disclose all knowledge they may possess relating to the subject.

Respondents deny that they have been in the habit of charging a large number of persons for transportation from Chicago and other western points taking Chicago rate to New York City the said schedule rates when such property was delivered to consignees at New York City for domestic consumption or was subsequently exported, while charging other persons rates much lower and as low as 50 per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions, and respondents allege that when the property transported was delivered to vessels and steamship lines for shipment to foreign ports under through bills of lading, issued by respondents at the initial

point of shipment under common arrangement with other and connecting railroads and such vessels and steamship lines, for continuous carriage at joint rates from the point of shipment to Europe, the traffic and service of respondents in that behalf was not a like and contemporaneous service under substantially similar circumstances and conditions, as when the property was only transported to New York City whether for domestic consumption or subsequently exported; but each of said respondents admits that its proportion of a through rate or joint tariff from initial point of shipment to foreign destination has in many cases been less than its proportion of the through rate or joint tariff to New York.

And respondents deny that they have failed or neglected to file and publish rates as required by the order of the Commission issued March 8, 1888, referred to in said petition, but allege that they have in all respects complied with the requirements of said order.

And said respondents deny that at any time since the 23d day of February, 1888, they have charged or received any greater rate or compensation for transportation of flour, grain, provisions, or property covered by classes 4, 5, 6, when such property was delivered to consignees at New York City for domestic consumption or was subsequently exported than they have at the same time charged and received when the property was delivered to vessels and steamship lines for shipment to foreign ports under through bills of lading, and allege that since the date last aforesaid they have charged and received the same rates for all such transportation, and that in pursuance of the order of this Commission issued March 8, 1888, and which is referred to in said petition, respondents have filed and published such rates as required by said order, as will more fully and at large appear by reference to the several tariffs filed with this Commission, and to which reference is made as forming a part of this answer. And respondents admit that bills of lading issued by them respectively have not in all cases stated the in land charge and the ocean charge separately.

And respondents deny the allegations in said petition contained, except as herein above admitted, stated or qualified.

Wherefore, respondents pray that the said petition be dismissed.

The New York Central & Hudson River Railroad Company,

By Nathan Guilford, General Traffic Manager.
Frank Loomis, General Counsel.

New York.

The Michigan Central Railroad Company,

By Henry Pratt, Treasurer.

Ashley Pond, General Counsel, Detroit, Mich.

The Lake Shore & Michigan Southern Railway Company,
By John Newell, Prest.

Geo. C. Greene, General Counsel.

[Verified.]

Buffalo.

Joint Answer of the New York, Lake Erie & Western Railroad Company and The New York, Pennsylvania & Ohio Railroad Company to the petition in the above entitled matter, respectfully shows:

INTER S.

First, they admit that they are railroad corporations, and that since about April 4, 1887, these respondents have been engaged as common carriers in the transportation of property shipped from Chicago and other western points to New York City and other Atlantic ports by rail and water, or to New York City and such other points and European ports partly by rail and partly by water, and that such transportation in which these respondents have been engaged as aforesaid was in all cases under some common contract, management or arrangement for continuous carriage in such a manner as to bring said carriage within the provisions of the Act to Regulate Commerce. And the respondent, The New York, Lake Erie & Western Railroad Company, avers that since April 30, 1883, it has been, and now is, the lessee of the railroad of the respondent, The New York, Pennsylvania & Ohio Railroad Company, and has ever since continued to operate, and now operates, the same.

And these respondents further admit that the joint rates and classifications for the transportation of property for through and *continuous* transportation between Chicago and New York City charged by the Trunk Line Association and the other association and companies specified in the complainant's petition, are those which regulate and substantially govern and control them between the points aforesaid, as stated in said petition.

Second, but these respondents deny each and all the averments of the petition which allege that since about April 4, 1887, these respondents, while professing to maintain joint rates and classifications between Chicago and New York City (at the rates and in the manner stated in the petition), have allowed to a large number of persons special rates, rebates and drawbacks, either given directly, or indirectly, by means of such devices as under-billing or under-weighing property transported; and they also deny that they have been in the habit of charging a large number of persons for transportation from Chicago and other western points taking Chicago rates, as averred in said petition, to New York City, the schedule of rates stated and scheduled therein, upon flour, grain, provisions and property covered by classes 4, 5 and 6, when such property was delivered to consignees at New York City for domestic consumption, or was subsequently exported, while charging other persons rates much lower and even as low as 50 per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions when the property was delivered to vessels and steamship lines for shipment to foreign ports under through bills of lading issued by these respondents under common arrangements with such vessels and steamship lines for continuous carriage at joint rates from the point of shipment to Europe. And, on the contrary, these respondents aver the facts to be, that from and about the 4th day of April, 1887, the time when the Act to Regulate Commerce went into force and effect, these respondents have not carried on or been engaged in such transportation between western points and European points; nor have they charged such rates as the petitioner has averred

and stated in the first part of its petition; and they have not so conducted said transportation business so as to violate any provision of the Act to Regulate Commerce.

Third, and these respondents specifically and emphatically deny each and all of the allegations and averments contained in the second clause of the complainant's petition, as to the difference of rates and the undue and unreasonable preferences and advantages therein alleged to be given; and these respondents aver that they have not since, or about, the 4th of April, 1887, done or performed any of the acts or things therein specified, nor carried on such transportation at the rates or in the manner specified in the second clause of the complainant's petition.

Fourth, and these respondents further deny each and all of the allegations of the third clause of the complainant's petition, wherein complainant avers that these respondents in violation of the Act to Regulate Commerce, since April 4, 1887, have charged, and do now charge and receive, a greater compensation for transporting property, as in said petition previously described, from said Chicago and said western points to New York City than they charged and received for like service under substantially similar circumstances and conditions for transporting like property from Chicago and said western points through New York City to European points, under common arrangements with vessels and steamships as stated in said petition. And these respondents aver that they have not since, or about, the 4th of April, 1887, so conducted said transportation business as in any way to violate any of the provisions or requirements of the Act to Regulate Commerce.

And for further answer, these respondents aver and say that so far from these respondents, for themselves or in connection with any of the other respondents, having been, or being engaged in any attempt to violate the provisions of the Act to Regulate Commerce, by means of such devices as under-billing or under-weighting, as the complainant has averred in its petition, the greatest care has been taken by these respondents (and, as they believe, by the other respondents) to prevent and put a stop to any and all such attempts and devices, and that a careful and thorough system has been inaugurated, and is now in full force and effect, to have all the cars engaged in interstate traffic weighed, and to have the same reweighed whenever it is deemed necessary to do so in order to ascertain the accurate and true weight thereof, and whenever any error in weight of such cars is discovered it is promptly rectified, and allowed for, so as to put all shippers on a fair and equal footing in regard to the amount of freight carried, and the rates charged for the shipments between the points before mentioned in this answer.

Fifth, and these respondents further say that they have at all times since the Act to Regulate Commerce went into effect, fully complied with all of its provisions relative to the publishing and posting of their tariff rates, and filing the same with the Interstate Commerce Commission, and with each and all of the orders of this Commission relating thereto.

Sixth, and these respondents further say that before the filing of the petition in these proceedings, they furnished the petitioner with all information which was within the knowledge of these respondents, or under their control, relative to the shipments referred to in the petition, so that the petitioner might have full and accurate knowledge of the manner in which the transportation of said shipments was conducted, and the rates charged therefor; and these respondents are now ready and willing to furnish any other and further information bearing upon these matters whenever the petitioner shall call upon them for the same, as they have no desire whatever to withhold from the petitioner such full and accurate information upon this subject as will give the petitioner all the knowledge of the manner in which said transportation business is conducted, and the rates charged thereupon necessary to enable the petitioner to carry into effect its purpose of giving the business and trade of New York City all the protection to which it is legally entitled.

Seventh, and these respondents finally say that having fully and particularly answered all the allegations of complainant's petition, they respectfully submit the matters contained in the second and third points of the petition on the 6th page thereof, for such action as the Commission may think just and proper, and they pray that the said petition as to these respondents may be dismissed.

The New York, Lake Erie &
Western Railroad Company,
For itself and as Lessee of the New York,
Pennsylvania & Ohio Railroad.
[Verified.] By J. A. Buchanan,
Attorney.

Separate answer of the Philadelphia & Reading Railroad Company.

The defendant, The Philadelphia & Reading Railroad Company, for a separate answer to the complaint herein filed against it and others, says:

1. That the complainant does not show that it is authorized to have or maintain this complaint against this or other defendants herein, or that said complainant has been damaged or discriminated against by this defendant, or its codefendants; that complainant does not show that it has had any dealings or transactions with this or other defendants; nor does the complainant show that it is or has been engaged in buying, selling or dealing in any commodity that is shipped to or by it; that complainant does not show that it is authorized or empowered to make or maintain in its own name, or on behalf of others, a complaint based upon dealings between this or other defendants and individuals, whether members of said complainant corporation or not; and this defendant says that by reason thereof, this honorable Commission has no jurisdiction under this complaint, and cannot make or enforce any order thereunder.

2. That it is not true, as averred in the first paragraph of the said complaint, that the said

defendant, since April 4, 1887, in violation of the Act entitled An Act to Regulate Commerce, has been guilty of unjust discriminations; and it is not true that it has injuriously allowed to a large number as alleged, or any number of persons special rates, rebates and drawbacks, given either directly or indirectly, by means of such devices as underbidding or underweighing property transported, or by means of any other devices; and it is not true that it has been in the habit of charging a large number of persons for transportation from Chicago and other western points, taking Chicago rates to New York City, upon flour, grain, provisions and property covered by classes 4, 5 and 6 of said complaint, when such property was delivered to consignees at New York City for domestic consumption, or was subsequently exported, the rates mentioned in said complaint, while charging other persons rates much lower, or any lower, for like and contemporaneous service under substantially similar circumstances and conditions, when the property was to be delivered to vessels and steamship lines for shipment to foreign ports under through bills of lading. That while it is true that the defendant has not published schedules of rates showing charges for transportation by rail and by ocean service, it has been for the reason that no contracts or engagements were made by the defendant for the conveyance of such merchandise partly by rail and partly by ocean service.

3. It is not true, as stated in paragraph second of said complaint, that this defendant has given undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities engaged in the shipment of merchandise to foreign ports, or that it has subjected persons, companies, firms, corporations and consignees in and about the City of New York to undue and unreasonable prejudice and disadvantage, by reason of higher rates charged to them for like and contemporaneous service under substantially similar conditions and circumstances.

4. It is not true that this defendant has charged and received, or that it is now charging and receiving, a greater compensation for transporting property from Chicago and western points to New York City, than it charges and receives for like service under substantially similar circumstances and conditions for transporting like property from said Chicago and western points, when such property is to be shipped to foreign ports by vessels, and defendant has no arrangement, for joint rates, with vessels and steamships, for shipping such merchandise—and has had none since April 4, 1887—to foreign ports. The defendant is not informed and does not know whether the rates to foreign ports now being obtained are about three cents per 100 pounds less than to New York City.

Wherefore, your defendant prays that the complaint may be dismissed at the costs of complainant.

The Philadelphia & Reading Railroad Company.

By A. A. McLeod, *Vice President.*

Attest: W. R. Taylor, *Secretary.*

[Verified.]

INTER S.

The answers by the other defendants are of the same general tenor.

Frank L. HURLBURT

v.

PENNSYLVANIA R. CO.

(No. 133.)

SAME

v.

LAKE SHORE & MICHIGAN SOUTHERN R. Co.

(No. 134.)

ABSTRACT of Answers to complaints alleging unreasonable charges for transportation of rough hub blocks in car loads. See complaints, *ante*, 15.

The answer of the defendant, the Pennsylvania Railroad Company (**James A. Logan, Solicitor**), denies that it owns or operates any railroad in the United States west of Pittsburgh, Pa., or that it received and billed from the points specified the property mentioned; and states that it is unable to say whether any portion of said shipments were received by it from any connecting carrier for transportation over its lines because of the complaint being inspecific as to dates and numbers of cars; but if any did pass over its lines it also denies that any charges made by it were excessive, unreasonable or unjust.

The answer of the defendant, the Lake Shore & Michigan Southern Railway Company (**George C. Greene, Solicitor**) admits that shipments were made over its line as set forth in the complaint; but denies that it transported the same to destination, and states that the property was carried over only a small part of its road, and was thence delivered to connecting carriers under joint tariffs established by the several railroad companies comprising the routes from places of shipment to points of destination and therefore claims that each and every of such other carriers should have been made parties to this proceeding. Defendant also denies that hub blocks, rough, are improperly placed in the fifth instead of the sixth class.

C. H. GRIFFEE

v.

BURLINGTON & MISSOURI RIVER R. Co.
IN NEBRASKA, Lessee of Atchison
& Nebraska Railway.

(No. 137.)

ABSTRACT of Answer filed June 1, 1888, to a complaint charging the illegal issue of a free pass. See abstract of complaint, *ante*, 15. *Messrs. Marquette and Demeese*, defendant's solicitors:

The answer sets forth that the C. H. Waite mentioned in the complaint had been employed by the defendant for a little over eight years prior to April 10, 1888; but a short time prior to that time he had been discharged from defendant's service for good and sufficient reasons; that on or about April 10, 1888, said

Waite applied to the superintendent of the line for a pass to Atchison and return, giving as a reason his long service with the Company, his poverty and dependent family, and that he could get employment at Ottawa, Kansas, which he was unable to procure at Lincoln; and in consideration of his poverty and cramped circumstances in connection with his long service, a pass was issued to him as an employé. A letter of recommendation was also given him to the master mechanic of the Southern Kansas Railroad at Ottawa. The pass was never used by said Waite or anyone else, but was obtained by him for the purpose of blackmailing or injuring the Company which had discharged him from its employ.

Defendant denies that it discriminates between passengers, and says that its regular mileage for all passengers is three cents per mile, as stated in the said complaint.

James F. SLATER

v.

NORTHERN PACIFIC R. CO.

(No. 140.)

ABSTRACT of Complaint filed June 6, 1888. Complaint alleges the free transportation of one Frederick Fischer, not a railway employé, from St. Paul, Minnesota, to Tacoma, Washington Territory, and return, over defendant's line of railroad.

CAMPBELL & SYDNOR

v.

CHICAGO & ALTON R. Co.

(No. 141.)

ABSTRACT of Complaint filed June 12, 1888. Complaint alleges that on Feb. 15, 1888, the complainants shipped two car loads of cattle from Corder, a station on defendant's main line, to Chicago, Ill., which were charged \$47.50 per car, and 10 per cent extra for thirty-five foot cars, while at said date the rates from Kansas City, fifty-nine miles west of Corder on defendant's road, to Chicago were \$30 per car load on live stock, with 10 per cent extra for thirty-five foot cars.—(the greater charge for the shorter haul).

INTERNATIONAL EXPRESS

v.

PHILADELPHIA R. Co.

(No. 142.)

ABSTRACT of Complaint filed June 12, 1888. Complaint alleges unjust discrimination by defendant as follows: Complainant has established an express business which combines the facilities of transportation by express with the economy of transportation by freight. Defendant refused at various times to transport its chests of express matter, directed that such shipments over its line must first be delivered to Adams Express Company, and that charges on packages of less than 100 pounds would be for 100 pounds, notwithstanding several of such packages were at one time consigned.

Euclid MARTIN *et al.*, Constituting the Freight Bureau of the Omaha Board of Trade,

v.

CHICAGO, BURLINGTON & QUINCY R. Co., Chicago & Northwestern R. Co., Union Pacific R. Co., Chicago, Milwaukee & St. Paul R. Co., Chicago, Rock Island & Pacific R. Co., and Burlington & Missouri River R. Co. in Nebraska.

(No. 93.)

1. The principles laid down in the case of *Crews v. Richmond & Danville Railroad Company*, 1 Interstate Commerce Reports, 703, 1 Interstate Commerce Commission Reports, 401, restated and **reaffirmed**.
2. **Trade centers**, or large commercial towns, are **not**, as a matter of right, **entitled to have more favorable rates** than the smaller towns for which they form distributing centers; and if carriers shall give to such smaller towns rates as favorable as to the larger, the Commission will not interfere.
3. The fact that under rates which are impartially arranged as between large and small towns **one large distributing center** may have an **advantage over another** in competition for the business of the small towns, does **not** make out a case of **undue preference** in favor of the one distributing center as against the other. Impartial rates are not rendered illegal by their effect upon the business of localities.
4. A distributing center, however great or important, cannot demand as a matter of right that the rates from a common source of supply to more distant and smaller towns shall be made up of the sum of the rate to itself and the rate thence to such smaller towns; but the carriers may make **rates from the common source of supply to the smaller towns directly, as single rates**; and if the single rate is less than the sum of the two which are made to and from the distributing center, it is not for that reason necessarily objectionable.
5. A case cannot be decided on a **theory** which is **neither presented by the complaint nor advanced in the taking of the testimony**.
6. What constitutes **local** and what **through** rates considered.

(Heard March 19, Decided June 19, 1888.)

Messrs. J. M. Woolworth and W. F. Griffiths, for complainants.

Mr. J. M. Thurston, for Union Pacific R. Co.

Mr. W. C. Goudy, for Chicago & Northwestern R. Co.

Mr. C. J. Greene, for Chicago, Burlington & Quincy and Burlington & Missouri River R. Cos.

Mr. J. W. Cary, for Chicago, Milwaukee & St. Paul R. Co.

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

The original petition in this cause was filed November 16, 1887, and the grievance alleged was the following:

That the several defendant railroads, by joint tariffs agreed upon and promulgated through a common agent, were charging upon the first five classes of merchandise from Chicago to Lincoln, Fremont, Wahoo, Beatrice and Blue Springs, stations located upon the Union Pacific Railway system in the State of Nebraska, rates as follows:

| Classes— | 1 | 2 | 3 | 4 | 5 |
|-------------------|------|------|-----|-----|-----|
| To Lincoln | 1.00 | .84 | .57 | .41 | .35 |
| Wahoo | 1.00 | .84 | .57 | .41 | .35 |
| Fremont | 1.00 | .84 | .57 | .41 | .35 |
| Beatrice | 1.15 | 1.00 | .70 | .55 | .40 |
| Blue Springs..... | 1.15 | 1.00 | .70 | .55 | .40 |

That the said defendant companies were at the same time charging, by tariffs in like manner agreed upon and promulgated, from Chicago to Omaha, upon the said five classes of merchandise, rates as follows: 1, .90; 2, .75; 3, .50; 4, .35; 5, .30; and from Omaha to the Nebraska points above mentioned as follows:

| Classes— | 1 | 2 | 3 | 4 | 5 |
|-------------------|-----|-----|-----|-----|-----|
| To Lincoln | .33 | .28 | .23 | .19 | .15 |
| Fremont | .26 | .24 | .22 | .19 | .15 |
| Wahoo | .26 | .24 | .22 | .19 | .15 |
| Beatrice | .50 | .40 | .35 | .25 | .20 |
| Blue Springs..... | .50 | .40 | .35 | .25 | .20 |

That the differences between the rates from Chicago to the interior points named and the rates from Chicago to Omaha, plus the rates from Omaha to the same points, are:

| Classes— | 1 | 2 | 3 | 4 | 5 |
|-------------------|-----|-----|-----|-----|-----|
| To Lincoln | .23 | .19 | .16 | .13 | .10 |
| Fremont | .16 | .15 | .15 | .13 | .10 |
| Wahoo | .16 | .15 | .15 | .13 | .10 |
| Beatrice | .25 | .15 | .15 | .05 | .10 |
| Blue Springs..... | .25 | .15 | .15 | .05 | .10 |

Upon this statement of facts it was charged:

1. That the City of Omaha was unlawfully discriminated against and subjected to undue and unreasonable prejudice and disadvantage within the meaning of the third section of the Act to Regulate Commerce;

2. That by reason of the freight tariffs thus arranged and in effect the City of Chicago was largely and unlawfully benefited, to the detriment of the City of Omaha.

After answers had been filed, but before the case had been set down for hearing, the complainants filed an amended petition, alleging therein that the defendants had made and promulgated new freight tariffs on merchandise from Chicago to stations located on the Union Pacific Railway system in the State of Nebraska, which discriminate still more severely against the business interests of Omaha, and afford increased preferences to the City of Chicago. The amended petition proceeds to give the charges by the new tariffs on the first five classes of merchandise from Chicago to sixty-one Nebraska points named. It is not deemed important to mention all these points here, but a few, with the charges to them respectively, are given:

INTER S.

| Classes— | 1 | 2 | 3 | 4 | 5 |
|--------------------|------|------|------|------|------|
| To Elkhorn..... | .80 | .65 | .44 | .33 | .28 |
| Wahoo | .80 | .65 | .44 | .34 | .28 |
| Lincoln | .80 | .65 | .44 | .34 | .28 |
| Beatrice | .95 | .81 | .57 | .48 | .38 |
| Fremont | .80 | .65 | .44 | .34 | .28 |
| Blue Springs..... | .95 | .81 | .57 | .48 | .38 |
| Cedar Rapids | 1.37 | 1.14 | .89 | .70 | .59 |
| Hastings | 1.15 | 1.03 | .72 | .53 | .46 |
| Buda | 1.30 | 1.17 | .85 | .65 | .55 |
| Sidney | 2.00 | 1.78 | 1.48 | 1.21 | 1.05 |
| Kimball | 2.25 | 1.91 | 1.55 | 1.25 | 1.05 |

It is averred by complainants that the rates made by said defendant companies from Chicago to Omaha at the same time, upon the same classes of merchandise, are as follows: first class, .75; second, .60; third, .40; fourth, .30; fifth, .25.

It is further averred that the rates charged by the Union Pacific Railway Company from Omaha to the points named are at the same time as follows:

| Classes— | 1 | 2 | 3 | 4 | 5 |
|--------------------|------|------|------|-----|-----|
| To Elkhorn..... | .19 | .17 | .16 | .12 | .10 |
| Wahoo | .26 | .24 | .22 | .19 | .15 |
| Lincoln | .33 | .28 | .23 | .19 | .15 |
| Beatrice | .50 | .40 | .35 | .25 | .20 |
| Fremont | .26 | .24 | .22 | .19 | .14 |
| Blue Springs..... | .50 | .40 | .35 | .25 | .20 |
| Cedar Rapids | .62 | .54 | .49 | .40 | .35 |
| Hastings | .54 | .48 | .42 | .40 | .34 |
| Buda | .65 | .60 | .50 | .45 | .39 |
| Sidney | 1.25 | 1.18 | 1.08 | .91 | .81 |
| Kimball | 1.50 | 1.31 | 1.21 | .98 | .90 |

And, further, that the differences between the rates per ton from Chicago to the interior Nebraska points named and the rates from Chicago plus the rates from Omaha to said Nebraska points are as follows:

| Classes— | 1 | 2 | 3 | 4 | 5 |
|--------------------|-------|-------|-------|-------|------|
| To Elkhorn..... | 2.80 | 2.40 | 2.20 | 1.80 | 1.20 |
| Wahoo | 4.20 | 3.80 | 3.60 | 3.00 | 2.40 |
| Lincoln | 5.60 | 4.60 | 3.80 | 3.00 | 2.40 |
| Beatrice | 6.00 | 3.80 | 3.60 | 1.40 | 1.40 |
| Fremont | 4.20 | 3.80 | 3.60 | 3.00 | 2.20 |
| Blue Springs..... | 6.00 | 3.80 | 3.60 | 1.40 | 1.40 |
| Cedar Rapids ..... | ..... | ..... | ..... | ..... | .20 |
| Hastings | 2.80 | 1.00 | 2.00 | 3.40 | 2.60 |
| Buda | 2.00 | .60 | ..... | 2.00 | 1.80 |
| Sidney ..... | ..... | ..... | ..... | ..... | .20 |
| Kimball ..... | ..... | ..... | 1.20 | .60 | 2.00 |

It is further represented that the Chicago, Burlington & Quincy Railroad Company has, conjointly with the Burlington & Missouri River Railroad Company, established rates from Chicago to thirty-five named points in Nebraska located on the Burlington & Missouri River Railroad, and that the differences expressed in rates per ton between those rates and the rates from Chicago to Omaha plus the rates from Omaha to said Nebraska points by way of said Burlington & Missouri Railroad, as shown by its local freight tariff, are as follows to the points named, which are some of the thirty-five points mentioned:

| Classes— | 1 | 2 | 3 | 4 | 5 |
|-------------------|------|------|------|------|------|
| To Lincoln | 5.60 | 4.60 | 3.80 | 3.00 | 2.40 |
| Hastings | 2.80 | 1.00 | 2.00 | 3.40 | 2.80 |
| Wahoo | 4.20 | 3.80 | 3.60 | 3.00 | 2.40 |
| Beatrice | 6.00 | 3.80 | 3.60 | 1.40 | 1.40 |
| Blue Springs..... | 6.00 | 3.80 | 3.60 | 1.40 | 1.40 |
| Hebron | 2.80 | 1.00 | 2.40 | 3.60 | 3.40 |

Upon this showing the complainants charge:

1. That the defendant companies "are now

actually violating the Interstate Commerce Law, inasmuch as they have authorized and are now using freight tariffs from Chicago to interior Nebraska points, which tariffs are heavily discriminating against the City of Omaha and as heavily discriminating in favor of the City of Chicago, to our great detriment and disadvantage, and which discrimination we respectfully submit is made unlawful by the terms of the third section of the Law; * * *

"2. That the City of Omaha is unlawfully discriminated against, and is subjected to undue and unreasonable prejudice and disadvantage, within the meaning of the third section of the Interstate Commerce Law;

"3. That by reason of freight tariffs thus arranged and in effect the City of Chicago is largely benefited to our detriment—a condition clearly forbidden, not only by the general tenor of the Law, but involving a distinct violation of its third section."

And the complainants pray that the Commission "will so order that freight tariffs between the City of Chicago and all interior Nebraska points be hereafter constructed on a basis that shall give the City of Omaha an equal chance with Chicago as a market and distributing point for west bound traffic for the State of Nebraska."

The defendants answered the amended complaint as follows:

The Chicago, Burlington & Quincy Railroad Company and the Burlington & Missouri River Railroad Company in Nebraska, answering jointly, deny that said rates effect any unlawful discrimination in favor of Chicago or against Omaha, or that they are contrary to the letter or spirit of the third section of the Act to Regulate Commerce, and they aver that the rates between Chicago and Omaha and between Chicago and interior Nebraska points are just, reasonable, nondiscriminating and in accordance with the letter and spirit of said Act.

The Chicago & Northwestern Railway Company avers that the rates are lawful and reasonable; denies that Omaha is thereby unlawfully discriminated against or subjected to undue and unreasonable prejudice and disadvantage, and avers that the freight carried by it to the several points mentioned in the complaint is so carried without going through Omaha, and that Omaha is on a different line from that on which the business is conducted to the other points named in Nebraska. It avers further that "There is a contest between the business men of the City of Omaha and those of the City of Lincoln, each claiming to be the distributing point for the State of Nebraska and each demanding more favorable rates from the carriers than those allowed to the other; but this respondent avers that the rates established by the tariffs now in force are in every respect reasonable and just." The answer also raises the question of the competency of complainants as an unincorporated body to institute the proceeding.

The Chicago, Milwaukee & St. Paul Railway Company answered the original petition only, but when the amended petition was filed elected to stand upon the answer instead of filing another.

The answer claimed that defendant has the

shortest line of railroad from Chicago to Omaha; that it has nothing to do with the making of rates from Omaha to the five Nebraska points named in the original petition, but accepts the rates made by connecting lines; that the Chicago, Burlington & Quincy is the shortest line from Chicago to Lincoln, and by that line the distance from Chicago to Lincoln is 549 miles, which is but forty-one miles greater than the distance from Chicago to Omaha by the same line; "that the distance from Chicago to Omaha by this respondent's railway and the Union Pacific is 490 miles; to Wahoo, 519 miles; to Fremont, 537 miles; to Lincoln, 558 miles; to Beatrice, 623 miles, and to Blue Springs, 637 miles; that the distance from Chicago to Omaha is 95 per cent of the whole distance from Chicago to Wahoo by the line of this respondent and the Union Pacific, and more than 90 per cent of the whole distance from Chicago to Fremont by the same route, and nearly 90 per cent of the entire distance from Chicago to Lincoln, about 80 per cent of the entire distance from Chicago to Beatrice, and 78 per cent of the entire distance from Chicago to Blue Springs; that said distance from Chicago to Omaha is also 90 per cent of the entire distance from Chicago to Lincoln by way of the Chicago, Burlington & Quincy; that the tariff of freight charged by the respondent from Chicago to Omaha is only 90 per cent of the rate charged from Chicago to Lincoln, Wahoo and Fremont, and 79 per cent of the rate charged from Chicago to Beatrice and Blue Springs on first class freight, and on all other classes of freight named in said complaint the rate from Chicago to Fremont and other points named is less than that percentage. A division of the rates charged, as stated in the complaint, from Chicago to the points in Nebraska west of Omaha, on a strictly mileage basis, would give a higher rate than is now charged to Omaha on shipments to each of the places named except Blue Springs, and the proportion to Omaha on shipments to that point would amount to nearly ninety cents on first class freight."

The answer further says that "The complaint does not state that the rates to Omaha are too high, but complains that the rates to points beyond Omaha are too low, and asks that the several respondents shall be restrained and compelled to withdraw the freight tariffs in reference to points west of Omaha, and substitute therefor such freight tariffs from Chicago to the Nebraska points in question as shall be just and equitable to the reasonable demand of the City of Omaha to be considered as the chief distributing point for Nebraska, and substantially asks to have rates to all points west of Omaha increased; but this respondent respectfully shows that the rates now in force are not in any respect in violation of any provision of the Interstate Commerce Act, and that they are substantially upon a mileage basis, and that it is not competent for railway companies under said Act to so arrange their tariffs as to make any particular city or point the chief distributing city or center for the freight of any particular State, and that no such practice can be recognized or enter into the making of tariffs under the Interstate Commerce Act."

The answer of the Chicago, Rock Island &

Pacific Railway Company avers the rates complained of to be just, and denies any unjust or unlawful discrimination or preference.

The answer of the Union Pacific Railway Company denies responsibility for rates east of Omaha, justifies the rates actually made by it, and avers them to be just, reasonable, and non-discriminating.

On issues thus made the case was brought to a hearing at Omaha, March 19, 1888, and was submitted on testimony given and arguments made in open sessions. The testimony was not voluminous, and was directed in the main to showing that the rates complained of operated injuriously to the business interests of Omaha.

W. A. L. Gibbon, wholesale dealer for three years in iron, steel, and hardware, testified that the rates had a very injurious effect on the wholesale business of Omaha. His house had been compelled to give up the trade in a great many towns where they formerly did business because they could no longer do business there except at a sacrifice of their profits. He gave an instance of an order for a carload of iron from Fremont. But the freight from Chicago to Omaha was thirty cents, and from Omaha to Fremont nineteen cents, while from Chicago to Fremont it was thirty-five cents. The figure he made on the iron was twelve cents higher than was offered at Chicago, and the Chicago dealer got the trade. He gave another instance of a sale at Lincoln, which he was only enabled to make by having the goods shipped directly from the mill, although he had the same goods in stock and should have preferred to ship from Omaha. The witness testified how rates were customarily made, as follows:

"We purchased goods in Boston, New York, Troy, Philadelphia, Pittsburgh, Johnstown, Pennsylvania; Youngstown, Ohio; Cleveland, and other places. These are the principal towns that we buy our goods at. The manufacturers would sell goods sometimes at the mill, sometimes delivered at Chicago, and sometimes in Omaha. We bought in these ways, and of course became familiar with the rates from these points, both to Chicago and Omaha. With very few exceptions the through rate was the sum of the two local rates—that is, the rate from the mills to Omaha was the sum of the rate from the mills to Chicago and the rate from Chicago here. That was the universal rule and is."

In answer to a question, What is it precisely which the people of Omaha demand? the witness said:

"The only rule we advance is that the rates between competing trade centers should be made nearly, if not exactly, upon the basis of the sum of the two locals. We don't care anything about the locals purely, as that is a private matter for the railroad companies to adjust. But this rule that we want is the one that covers shipments from the Atlantic seaboard to the Missouri River. We want that same rule here."

Further on the following proceedings took place:

"By Mr. Thurston:

Q. Mr. Gibbon, are you Omaha people willing to have the same rule applied, which you

now contend for, to shipments made from Omaha, Lincoln and Fremont, to points common to all?

A. Yes sir; unquestionably.

Q. You are willing to have the rate from Omaha to Kearney, on the Union Pacific Railroad, made of the sum of the locals from Omaha to Fremont and from Fremont to Kearney?

A. That's a ridiculous comparison, sir; Kearney is not a distributing center.

Q. Are you willing, as a merchant of Omaha, to have the rate from Omaha to Beatrice made up of the sum of the locals from Omaha to Lincoln, and from Lincoln to Beatrice?

A. That is the same comparison. Beatrice is not a distributing center. When Beatrice becomes a distributing center we are willing to recognize it.

Q. How about Lincoln?

A. We are willing to recognize that as such.

Q. And Fremont?

A. Yes sir.

Q. You are willing that these two towns should be afforded these rates then? They are interior Nebraska points.

A. A town of consumption and of distribution are two entirely different sort of points.

Chairman Cooley: Do I understand that this principle that you are contending for is that this method of making up the rates shall apply from Omaha to trade centers and from thence to small towns beyond?

A. It is to be applied to Omaha in connection with competing trade centers and towns beyond.

Mr. Thurston:

Q. To all towns beyond?

A. Yes sir.

Q. This is to apply to Omaha, Fremont and Lincoln?

A. Yes sir.

Q. And applied from Fremont to all these other towns beyond, irrespective of their being trade centers?

A. It should apply from trade centers to all these towns.

Q. Then it would apply from Fremont to all these towns the same as regards Omaha?

A. Yes sir.

Q. So that Fremont could buy and sell goods as cheap as you can?

A. Yes sir.

Q. And as cheap as Chicago?

A. Yes sir.

Q. It is a matter of no moment that the place of ultimate destination is not a trade center?

A. I don't understand the point you want to make.

Q. I do not want to make any point, but simply want to know what you think should be the application of this principle? Is it a matter of any moment to the application of this principle that the point of the ultimate destination of the goods is not a trade center?

A. No, not of any moment. It is simply to place the distributing centers on a par in competing for the trade of these points of ultimate destination.

Commissioner Walker: Do you recognize the existence of any distributing center between here and Chicago?

A. We don't come in competition with any distributing center west of Chicago to amount to anything.

Q. There are distributing centers in Iowa on the Mississippi River?

A. Yes sir.

Q. Do you think the same rule should be applied to them?

A. Yes; as far as we are concerned, we want to recognize all distributing centers.

Q. I suppose, then, that you think, according to your rule, that the rate from Chicago to Omaha should be the rate from Chicago to the Mississippi River, plus the rate from there to Des Moines, plus the rate from Des Moines to Omaha?

A. If Des Moines were competing for Omaha business against Chicago that would be the rule.

Chairman Cooley: Does not Des Moines come into competition with you through all this country in which you trade?

A. I never heard of Des Moines in competition with Omaha.

Mr. Goudy: Is it not true that Des Moines sells furniture out through this country?

A. It is a business I am not engaged in—a traffic that I am not familiar with.

Q. You don't know just what traffic Des Moines does have then?

A. No sir.

Mr. Woolworth: You are well acquainted with the whole course of business in this town?

A. Yes.

Q. And if Des Moines did business in this country would you know it?

A. To any considerable extent; yes sir.

Q. And neither Des Moines nor any other Iowa town comes into competition with Omaha for the Western business?

A. I never heard of Des Moines in competition with Omaha.

Q. Or any other Iowa town?

A. No sir.

Q. Do you know what the relative business of Fremont and Omaha are as compared with each other, say last year?

A. Fremont?

Q. Yes sir.

A. The relative business of Fremont, Lincoln and Omaha? The business of Lincoln, from the best information I can get, is about one fifth of that of Omaha. Fremont is probably about one tenth.

Q. Do you know what the wholesale business of Omaha amounted to during the last year?

A. The merchants' traffic amounted to something like forty millions of dollars.

Q. Do you know what the manufacturing business amounted to?

A. Something like thirty millions of dollars. Mr. Thurston:

Q. What is the relative business of Omaha and Chicago?

A. Omaha's business is probably, in merchandise, one fifth of Chicago. That is an approximate figure. As a meat packing center, we are the third in the United States.

Q. Then, if Lincoln and Fremont have no rights against Omaha by reason of doing only one fifth of the amount of business that Omaha does, why should Omaha have any equality

with Chicago when the ratio between them is the same?

A. There is some place where you must draw the line, and the business of Omaha would seem to warrant that it had passed that line."

Robert Easson, another witness, testified to having been in the wholesale grocery business at Omaha nine or ten years. Formerly his house had rebates from the Chicago roads, but since the Interstate Commerce Law was passed they had had none. The rates from Chicago to Omaha had not been diminished in consequence of the stoppage of the rebates. The result of the new rates was a loss of business at a good many competing towns or buying points, and a necessity of selling in other cases at cost or with very little profit.

"At Grand Island, for instance. The rate from Chicago to Grand Island was fifty-five cents, fourth class. The rate from Chicago to Omaha was thirty-five cents, and the rate from Omaha to Grand Island was forty cents, making the rate from Chicago to Grand Island by Omaha seventy-five cents. This was twenty cents higher than the through rate. The staple goods in our line are sold on very close margins, and these rates force us to sell at cost in many instances, or they force us to lose the business."

Charles A. Harvey and F. Colpetzer gave similar evidence regarding the lumber trade. Mr. Colpetzer testified as follows in regard to rebates:

Question by Mr. Woolworth. "Did you use to get rebates before the operation of the Interstate Law?"

A. Yes sir.

Q. Have you ever got them since?

A. I have not.

Q. Have the railroads reduced their charges here in consequence of taking away these rebates?

A. No sir; the rates are higher from Chicago and elsewhere to Omaha than they were prior to the Interstate Law, and up to December they were higher than they have been for three or four years, and I think possibly five years. I think the present basis that is now in order is higher. The tariffs have been on the whole lower than they will be when they are restored again. They used to average about sixteen cents, but in addition to that we received refunds. I do not believe that the lumber which was hauled into Omaha netted any road more on an average than twelve cents for the past three or four years, if they paid the agreed rebates.

Q. Were these rebates allowed secretly or were they notorious?

A. Secretly, certainly. The rebates or special rates were made to get the business.

Q. Is it not an open secret that all large dealers got rebates?

A. Yes; I should think it would be.

Question by Mr. Thurston: You say these rebates were an open secret. You do not mean that the public knew what rebates your company were getting. You did not give it away, did you?

A. No sir."

Allen T. Rector, in the wholesale hardware trade, testified to having formerly received rebates from the railroad companies, but these

were discontinued March 5, 1887. He produced a table of figures to show that the discrimination against Omaha was as alleged in the complaint, and being asked why this discrimination should be made replied:

"The present fourth and fifth class rates in operation from Chicago to Omaha are—fourth class, thirty cents, and fifth class, thirty-five cents. Take Edgar, Nebraska, for instance. That is a common point 100 miles west of Omaha—a point tributary to Omaha. The fourth class rate from Chicago to Edgar is fifty cents. Our fourth class rate from Chicago to Omaha is thirty cents; and the fourth class rate from Omaha to Edgar is forty cents, making a discrimination against us of twenty cents.

Q. And you don't know of any good reason for this discrimination?

A. No sir; I cannot assign any good reason; I do not know any good reason for it."

This statement of the salient points of the evidence will be sufficient for an understanding of its bearing upon the legal questions.

When the issues in this case were read, and the opening made, the questions presented seemed to be so nearly identical with those which were considered and passed upon in *Crews v. Richmond & Danville Railroad Co.* 1 Inters. Com. Com. Rep. 401, 1 Inters. Com. Rep. 703, that a comparison with that case was necessarily in the minds of the Commission and also of counsel, and continued to be so throughout the hearing. In the case mentioned a claim was made on behalf of the City of Danville, Virginia, which was, to say the least, analogous to that here made on behalf of Omaha; and the Commission had been obliged to hold that it was not tenable. Danville claimed to be, and unquestionably was, a trade center of large importance; and it was insisted on its behalf that in making rates this fact should be recognized by the railroad company, and its trade with the towns naturally tributary to it protected. Taking a concrete case, for illustration of the manner in which rates should be made to give this protection, it was claimed that the rates from Richmond to Danville added to the rate from Danville to one of the smaller points beyond it on the same line should not exceed the rate from Richmond direct to such smaller point, since if it did the rates would give Richmond, in respect to all merchandise coming from or beyond that city, an advantage over Danville in the competition with the trade of such smaller point, and this would amount to unlawful discrimination. The complaint in that case, as in this, directed the attention of the Commission specially to the competition between the trade centers as the circumstance to be prominently kept in view in making rates, as if the question to be determined related exclusively to the large towns, though it was evident upon the face of the complaint that if the relief prayed for were granted, it must necessarily result in a large relative increase in the rates on long hauls to the smaller towns as compared to the rates which would be charged to trade centers.

In disposing of that case the conclusion of the Commission, as summarized in the syllabus, was that it was not a ground of complaint against a railroad company that it equalizes its rates as between small and large towns,

even though the effect may be prejudicial to the large towns, which before had been specially favored. The spirit and purpose of the Act to Regulate Commerce requires that where the circumstances and conditions will fairly admit of it the charges to all points for a like service should be made relatively equal; further, that a carrier is not compellable by law to give to merchants of a town on its line the privilege of shipping their goods from the point of purchase to their own locality and again from thence to the place at which the goods may be sold by them at the same rate which would have been charged had there been but one shipment from the point of purchase to the point of ultimate delivery. The fact that a refusal to give the through rate as for one shipment operates prejudicially to the town desiring the privilege and favorably to another town does not make the refusal operate as unjust discrimination when the carrier applies the same rule to all towns and accords the privilege to none. Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial.

This is a short statement of what was decided in the *Danville Case*, and the principles laid down seem to cover the case before us now. The relative position of Richmond and Danville as trade centers for any purposes of the application of the contested principle was the same as is the relative position of Chicago and Omaha; and the question of protecting Danville in its jobbing trade was the same that is now raised for the protection of the jobbing trade of Omaha. The Omaha rates are not in themselves alleged to be excessive or unjust. The claim of the complainants is tersely stated in one of the arguments presented on their behalf, as follows:

"We do not attempt at this time to say that the rates in issue are too high or too low; that is not the question; it is the principle of their construction and the disastrous results that follow against which we are contending. This, and this alone, is the sum and substance of our complaint. Our presentations are surely sufficiently clear to avoid the possibility of misunderstanding. If the Chicago jobber can deliver his merchandise in Hastings, Nebraska, at a lesser cost for transportation than can his Omaha competitor, using the same Nebraska rails to the same destination, we think it proves beyond cavil that a preference is exhibited favoring the locality of Chicago to the detriment and disadvantage of Omaha."

This, with merely a change of names, is precisely what was claimed in the *Danville Case*. The railroad company in making its rates had ignored the claims of trade centers to special privileges and made the rates to all the towns on its line proportional to distance, or nearly so, without distinguishing between those which claimed the distinction of being trade centers and those which could set up no such claim. The Commission held that in doing this the carrier did not depart from the spirit and intent of the Act to Regulate Commerce. In its indirect effects its action undoubtedly benefited the more distant trade center in the competition with one nearer a point for the trade of

which both were contending; but this was not an illegal consequence when it resulted from action which in itself was impartial as between all towns, large and small. The *Danville Case* would, therefore, seem to be decisive of the case before us.

In the arguments presented on the hearing, however, an endeavor was made to point out a distinction between the cases, and in one of them the distinction was supposed to be found in this: that in the *Danville Case* the rates complained of were made by the defendant road exclusively, and were to towns on its own line, while in this case the roads from Chicago to Omaha "do not confine themselves to nominating rates to the end of their lines, but by a species of commercial conspiracy unite with the Union Pacific and others in a policy establishing joint rates between their initial point and interior Nebraska points which has for its avowed object, among others, the building up the jobbing and manufacturing interests of Chicago to our most serious hurt." As there is no proof of avowal of such an object as is here stated, we may pass that by without further notice, and say only of the distinction here relied upon that it rests upon facts which in no way affect the principle.

If a rate when made by one company as a single rate would in law be unobjectionable, it would be equally so when made by several as a joint rate. The policy of the law and the convenience of business favor the making of joint rates; and the more completely the whole railroad system of the country can be treated as a unit, as if it were all under one management, the greater will be the benefit of its service to the public and the less the liability to unfair exactions. All the joint rates from Chicago to interior points in Nebraska may, therefore, for the purposes of this case, be tested by the same rules as if the lines were continuous and under one management. The uniting of the carriers in making them is not censurable, unless the joint agreement is for the accomplishment of something unlawful or unjust in itself or in its consequences.

In a printed brief for complainants, filed with the Commission since the hearing, a different position is taken. In that brief, referring to the *Danville Case*, it is said:

"The Commission holds that, as between Danville considered as a competitive point and local towns considered as noncompetitive points, the former is not entitled to better rates than the latter. We accept that rule; we do not claim better rates for Omaha because it is a large town, at which many lines center, than are given to interior towns which are small and are located upon a single line. We go even further, and admit that, laying out of view the size of the town and its location upon one or several railroads, one point should have as good rates as another, regard being had to circumstances. It is here that we make our complaint. We say that better rates are given from Chicago to interior, smaller, and noncompetitive points that Omaha enjoys. We claim the converse of the rule laid down by the Commission in the *Danville Case*. The Commission should not be betrayed into error by a discussion of the abstract rule of the sum of the two locals. Our contention does not

compel us to defend that rule. We say the sum of two locals must not so far exceed the through rate as to operate a discrimination. It thus appears that the claim in favor of competitive points; as such, made in the *Danville Case* is not made by us, and what is said in the opinion on that point has no application here."

And again:

"What we contend for is that the sum of two locals should not unreasonably exceed the through rate. Let allowance be made for the greater trouble and expense of reshipments; but you must not make the difference so great as to operate a discrimination. To illustrate: take a rate from Chicago to Omaha of fifty cents and a rate to Kearney, 200 miles farther west, of fifty-one cents, so that Omaha is shut out of and Chicago let in to the trade at Kearney, there is a discrimination against Omaha which this Commission is organized to forbid."

One difficulty with this is that it does not harmonize either with the complaint or with the positions taken on the hearing. The complaint is planted distinctly on the claim that Omaha is discriminated against because the rates from Chicago to Omaha added to the rates from thence to the interior Nebraska points are greater than the rates from Chicago to such points direct. It was not conceded, but was inferentially denied, both in the complaint and on the argument, that they could be any greater and still be legal. The distinction which the brief attempts to make is therefore not in the case. But a further difficulty with it is that no evidence was given in the case to support any such theory as the brief advances; and if it is admissible that "allowance be made for the greater trouble and expense of reshipment," we are without evidence to show whether the difference in rates complained of is or is not, on this theory, too great. It would be impossible, therefore, to decide the case on this theory, even if the issue made would admit of it, which it does not.

We are constrained, therefore, to hold that the decision in the *Danville Case* covers the one before us; and if that decision is adhered to, this complaint cannot be sustained. Nevertheless, this case has been pushed with earnestness and manifest sincerity. We have listened carefully to all that has been advanced, being not only willing but desirous to overrule the former decision, if satisfied that we have committed any error in making it. We shall therefore proceed to consider the case in the light of what was said on the hearing, for the purpose of satisfying ourselves whether any reasons exist for a change of opinion.

But, first, we must repeat here what in substance has already been said: that this case cannot be regarded as one in which Omaha and Chicago are the business points exclusively interested. The case is very different from what it would be if that were the fact. The nature of the complaint is such that the sixty-one interior Nebraska towns named in it are the real parties respondent in interest, while Chicago, though its interest may be large, is interested only incidentally, and because the rates made from Chicago and Omaha, respectively, to such interior towns enable the latter to obtain their goods from Chicago direct

cheaper than they can obtain them from Chicago indirectly through the jobbing houses of Omaha. The prayer of the petition can only be granted by increasing the rates from Chicago to such interior Nebraska towns without increasing those to Omaha, or in some other way making a relative difference in rates as against such towns which does not now exist. The parties who would directly or immediately suffer in consequence would, therefore, be the towns whose rates would be thus relatively increased.

The justification which is advanced for this relative difference in rates is that Omaha is a great distributing point as Chicago is, and entitled as such to special rates. It had special rates in the form of rebates before the passage of the Act to Regulate Commerce, and prospered upon them; but with the prohibition of rebates and the giving to the interior towns as favorable rates as Omaha now obtains the field of its operations is narrowed and its business suffers, while Chicago reaps the benefit of its losses. Omaha, it is urged, is thus robbed of the advantages resulting from natural location and the enterprise of its citizens in building it up.

An obvious embarrassment in attempting to provide for and protect the claim made on behalf of trade centers is that it is impossible that there should be any general agreement as to the towns which can be regarded as such trade centers. Indeed, in the nature of things, it is quite out of the power of anyone to point out any test by which we may classify those which are and distinguish them from those which are not. The classification cannot be by size merely, for all trade centers are at some period small; and if the classification is by amount of business, it will sometimes be found that a small town is, in some articles if not in all, doing a much larger jobbing business than another which is considerably greater. It often happens that a small town will have a large business in the manufacture and sale of some one article, and perhaps be as truly a trade center for that article as some other town ten or twenty times as great; but the small town which has begun a general jobbing trade with the hope and prospect of a great growth is not likely to perceive any justice in being kept from the fulfillment of its hopes by competition being precluded through the more advantageous rates which are given to the larger town which it aspires to rival. If equal rates will enable it to compete, its business men are very certain to think themselves wronged if they are not given such rates.

The difficulty in classifying towns as being or not being trade centers, or, as some of the witnesses phrase it, as being competitive or noncompetitive, is made very plain in this case. The amended complaint assumes that none of the sixty-one interior points named is entitled to the privilege in rates which Omaha claims; or, in other words, is entitled to be considered a trade center. But Mr. Gibbon, a very intelligent witness for the complainants, concedes that Lincoln and Fremont are entitled to that privilege, and should have rates made to and from them on the same principle that Omaha seeks to establish on its own behalf. At the same time he apparently thinks it would be

absurd to concede the like privilege to Beatrice. But why would it be absurd? We have no evidence that Beatrice or Kearney or other towns named in the complaint are entirely without jobbing trade. From our general knowledge of the country we can take notice that, as compared with Omaha, they are much smaller towns; but we cannot know, unless informed by evidence, that they have not become, to some extent, centers of trade to still smaller towns about them; and if the trade center theory were to be accepted and acted upon, it might become necessary to call upon the complainants to throw more light upon the case by evidence, and to put before us more distinctly their view of what constitutes a trade center, and at what stage in the growth of a prosperous Nebraska town it can claim privileges as such. Upon these subjects very little information was given on the hearing.

But a fatal difficulty with the theory that a trade center as such is entitled to specially favorable rates is found in the fact that it is in conflict with the spirit and purpose of the Act to Regulate Commerce. One of the reasons for the passage of that Act was that, by means of rebates and other contrivances, large towns and heavy dealers secured advantages which gave them a practical monopoly of markets and shut out the small towns and small dealers. Omaha dealers, as the evidence shows, formerly had rebates, and the business of the town prospered to some extent in consequence thereof. The rebates are now forbidden, and the rates are not so made as to secure to dealers the advantages which the rebates formerly gave. This the witnesses think a grievance; but, if it be one, it is very certain that it is not one which the law has empowered the Commission to correct. The law, in forbidding rebates in the interest of equality as between large towns and small and large dealers and small, certainly did not intend that by any indirect action of any public authority this purpose of equality should be neutralized. All large towns, by reason of their being large, inevitably secure certain advantages in transportation. They get more roads, more trains, more agents and servants to attend promptly to business demands, and will be more accommodated within the limits allowed by law than will smaller towns; but it does not lie within the power of this Commission to add to these advantages by compelling the carriers operating the lines which reach out from a great railroad center to give to the large towns on their lines more favorable rates than they give to those which are smaller. The fact that under relatively equal rates one town, by reason of its situation, its size, the extent of its manufactures or trade, or for any other reason, secures the major part of the trade with the small towns is not a fact which can empower this Commission to interfere. There may be great hardships in the situation, but those do not change the law. In contemplation of a law which was enacted in the interest of equality as between large and small interests, there can be no unjust discrimination in giving to large and small towns relatively equal rates. It is not a matter of the least importance, in a legal sense, that the small towns are strictly local and noncompetitive. If, under relative equal rates, they can elevate themselves to the class

of jobbing towns, it is their right to do so; but, if not, they are still entitled, as against any action of this Commission, to have the benefit of such favorable rates as do not unjustly discriminate against others.

A statement was made by Mr. Gibbon in his testimony, and was repeated on the argument, in regard to the method of making rates, which requires some attention. It was assumed in both instances that these defendants, in making rates from Chicago to interior Nebraska points, made them on a different principle to that which was applied elsewhere. Mr. Gibbon in his testimony states how he understands the rates to be made from New York to the Missouri River, and in the argument made on the hearing and filed in writing with the Commission afterward the same statement is in substance repeated, and is tersely summed up as follows:

"We have already shown the basis of construction of rates from the Atlantic seaboard to Omaha to be, for all practical purposes, the sum of the locals to Chicago added to the locals thence to the Missouri River."

This statement, to say the least, is exceedingly inaccurate. The rates from the seaboard to Chicago are very far from being the sum of the locals. The Chicago rate is made as a through rate, and in making it the locals are not taken as a measure. If the rates from the seaboard to the successive trade centers, such as Albany, Buffalo, Detroit and Chicago were aggregated, the Chicago rate would be much greater than it is now; so the aggregate of the locals from Chicago to the Missouri River would be greater than the through rate now given. Mr. Gibbon speaks of the through rates from New York to Chicago and from Chicago to the Missouri River as two locals; and his position is that, as the rate from New York to the Missouri River is made up of the sum of these two locals, so the rate from Chicago to the interior Nebraska towns should be made up of the sum of the two locals—first from Chicago to Omaha and then from Omaha to the interior town; but this reasoning is on a purely arbitrary basis. The rate from New York to Chicago is not a local at all, but is in the strictest sense a through rate, and in making it, as is stated above, the great intermediate trade centers are disregarded. It is certainly in entire harmony with the method in which the Chicago rate is made by the roads reaching out from New York that the rate from Chicago to Lincoln, Fremont, or any other town of corresponding importance should be made as a through rate, taking no notice of intervening towns in making it; but if the method of making rates from New York is examined further, it will be found that not only are single through rates made to Chicago and to other great centers, but they are also made to small towns and insignificant stations in Ohio, Indiana, Michigan and Illinois, and, indeed, generally through the country; so that the practice of the defendant roads in making rates from Chicago to towns in Nebraska, large or small, as single rates, instead of being exceptional and peculiar, is in accordance with the practice generally prevailing.

In making use of the term "through rate" in respect to the rates from the seaboard to Chi-

cago and from Chicago to Omaha we have done so without undertaking to indicate by definition the distinction between what rates should be called through and local, respectively. The needs of this case do not call for such a definition. To give some idea of how these rates are made and how they would compare with rates where the hauls are shorter, we give here the rates by the Pennsylvania from New York to Chicago, and also to important towns on its line before Chicago is reached, with the distance from New York, respectively—the rates being on merchandise in the first class:

| | Distance. | Rate. |
|------------------|-----------|-------|
| To Trenton..... | 56 miles. | .25 |
| Harrisburg | 195 " | .33 |
| Pittsburgh | 444 " | .45 |
| Chicago | 912 " | .75 |

We also give a like table of rates from Chicago on the Chicago & Northwestern:

| | Distance. | Rate. |
|--------------------|------------|-------|
| To Sterling | 110 miles. | .30 |
| Clinton | 138 " | .40 |
| Cedar Rapids | 219 " | .50 |
| Omaha | 492 " | .75 |

The points taken in each case are important points, and it is seen at a glance how the rates to Chicago and Omaha, respectively, are diminished with the distance, as compared with the rates to the other towns, and how inappropriate would be the designation of "local" as applied to them. A still more striking table would be presented if the comparison were made with rates from station to station along the lines of these roads. Taking the rates on the Chicago & Northwestern, for example, we find that the sum of four locals for twenty miles each might exceed the rate for the whole 492 miles to Omaha, so that the carrier may receive more for transporting a like kind of freight eighty miles in four consignments than for transporting it 492 miles in one consignment. But the four would be purely local, and the one a through shipment. These instances distinguish broadly between what is local and what is through freight, and they leave no question as to what term should be applied in the case before us. Purely local rates are those which are made from station to station and with some approximation to distance; and though the term may be, and frequently is, applied more broadly, it is never in railroad circles or railroad literature made use of in connection with rates for long distances, which are made in disregard of rates to and from numerous intermediate stations.

But the arbitrary basis of the reasoning in support of the complaint on this branch of the case is manifest from another consideration, namely: that it has no force what ever except upon a concession of superior rights to Omaha as against other Nebraska towns. In the argument filed it is said:

"We respectfully submit that if rates from Chicago on all classes of merchandise to interior Nebraska points be made on the basis of the sum of the locals it will be entirely consistent with the mode of construction obtaining from the Atlantic seaboard to the Missouri River, will equalize our advantages, so far as figures are concerned, with Chicago, and place

every town in our State on a perfect plane of equality as to rates."

Now, as already stated, the rates from Chicago to Omaha are not the sum of the locals. If they were, as, for example, if the Chicago & Northwestern were to make the Omaha rates the sum of the rates from Chicago to Clinton and from Clinton to Omaha, they would be considerably above what they are now. What this carrier does, however, is to make a through rate, disregarding the intermediate rates in doing so; there is no sum of rates about it. It does precisely the same in making the rate to Lincoln, to Fremont, to Blue Springs, and to all the other towns named; in this respect it treats them all alike. As it does not add together locals in making the rate to Omaha, neither does it in making the rate to the interior Nebraska towns. This certainly is not illegal unless Omaha has in law some right to consideration in the making of rates superior to that of other Nebraska towns. In the argument, as above quoted, it is assumed that it has, for when it speaks of placing "every town in our State on a perfect plane of equality as to rates," Omaha is by implication excluded as the one town which, by its size, its importance, and the extent and nature of its business, is entitled to have its advantages equalized with those of Chicago, instead of being put on a plane of equality in rates with the others. We are compelled to say that the law does not confer upon the Commission the power thus to equalize the advantages of commercial centers.

We have no occasion at this time to inquire how generally it is true that the rates from the seaboard to towns west of Chicago are made up of the rates to Chicago added to the local from Chicago to the point of destination. When any question respecting such rates, or rates in any other part of the country, is presented to the Commission and the principles stated in this opinion are found to be applicable they will be applied without hesitation, in the belief that they are just and right, and that they conform to the spirit of the Act to Regulate Commerce.

The conclusions of the Commission may be summed up in very few words:

First. The objection taken in one of the answers to the institution of proceedings by the Freight Bureau of the Omaha Board of Trade is not sustained. The case of *The Vermont State Grange v. Boston & Lowell Railroad Company* (1 Inters. Com. Com. Rep. 158, 1 Inters. Com. Rep. 571), is sufficient authority for this ruling.

Second. We find the facts constituting the alleged ground of grievances to be as set forth in the complaint and amended complaint, respectively.

Third. Those facts do not make out a case of unlawful discrimination by the defendant carriers as against the City of Omaha or show that that city is subjected to undue or unreasonable prejudice within the meaning of the third section of the Act to Regulate Commerce.

Fourth. The complaint must therefore be held not sustained.

BUSINESS MEN'S ASSOCIATION OF the State of MINNESOTA

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO.

(No. 75.)

1. One feature of the transportation of freight by railroads in long hauls on joint rates, or what is usually called **through rates**, unless there be exceptional conditions which modify the rule, is that the **rate per ton per mile** grows **less in proportion to the greater distance**, while the aggregate of the rate increases in proportion to such greater distance; but this is **not** found to exist **in the case of the local rates** of a railroad, where the stations are occasionally grouped, but more usually graded according to distance, except as an incident of rare and highly exceptional conditions of the transportation service.
2. The method of **testing the freight rates** of a railroad **by the rate per ton per mile** is one by which these rates may be brought down to the narrowest point of scrutiny, and in this sense is valuable, but it is like looking at them with a microscope, for it ignores all other tests except that which it alone furnishes, and does not take into consideration any of the surrounding circumstances and conditions that enter into the making of the rate, no matter how compulsory or imperious these may be, and for this reason it cannot be considered a controlling rule in determining the **reasonableness of rates**.
3. To determine the **reasonableness and justness of any freight rate** made by a railroad company, all the surrounding circumstances and conditions must be considered as well as the rights of the shipper, and if these circumstances and conditions are so compulsory or imperious that they fairly and justly exercise any controlling influence in the making of the rate, they cannot be disregarded in a proceeding in which the reasonableness and justness of the rate is presented for determination.
4. The words "**substantially similar circumstances and conditions**" as found in the second and fourth sections of the Act to Regulate Commerce, in certain important particulars define the rights and duties of carriers and the rights of shippers as well. For example: if the carrier claims to act under the compulsion of circumstances and conditions of his own creation or connivance in the making of an exceptional rate, then these will not avail him; or if the carrier claims to act under a compulsion of circumstances and conditions in the making of an exceptional rate which he could obviate by reasonably fair and just exertion on his part, then they will not avail him. But if the carrier is in good faith acting under a compulsion of circumstances and conditions beyond his

control, not of his own connivance, and which he could not obviate by any reasonably fair and just effort on his part, and to avoid large loss adopts exceptional rates on a portion of his line, not unreasonable in themselves, and forced upon him by the action of an independent state railroad, which is not subject to the Act to Regulate Commerce, and which is operating a slightly shorter and competing line with his own, these are circumstances and conditions under the operation of the statute which justify him in adopting such **exceptional rates** thus forced upon him on this portion of his line.

5. When a carrier, acting in good faith, has adopted an **exceptional rate**, not unreasonable in itself, on a portion of its line, because that rate has been forced upon it by an independent state railroad company in direct competition with it and not subject to the Act to Regulate Commerce, the **reasonableness and justness of rates on other portions of the carrier's line**, extending into a far interior region of the country where no such conditions exist, cannot be measured, alone, by the standard thus furnished, but must be governed by considerations which fairly and justly apply to them.

6. The **exceptional conditions of railroad transportation in proximity to the waterways of the Great Lakes**, Michigan and Superior, and of rival competing railway lines operating between the ports on these lakes, as to the method of grouping stations under the combined effect of the competition of these waterways and of the fourth section of the Act to Regulate Commerce, are found and stated by the Commission in this proceeding, citing and approving *Manufacturers' & Jobbers' Union of La Crosse v. Chicago, Milwaukee & St. Paul R. Co.* 1 Inters. Com. Com. Rep. 632, 2 Inters. Com. Rep. 9.

7. The **conditions of transportation** on that portion of defendant's lines in a broad extent of far interior country, where it is in competition with other great rival railway lines extending to Lake Michigan ports, while that of the defendant extends to Lake Superior ports, and the relation of each, arising therefrom, examined, found and considered by the Commission.

8. The **Act to Regulate Commerce** was **not enacted to destroy competition**, and the establishment of the **rule of the rate per ton per mile**, insisted upon by the complainant, would have very much the effect of practically making the rates charged for a long distance at the stations along the line of the defendant and its great rivals, the Chicago, Milwaukee & St. Paul Railway and the Minneapolis & St. Louis Railway, in the nature of strict mileage rates, thereby destroying competition to a large extent at these stations, unsettl-

ing the business of their shippers, conferring upon them no practical benefits, and loading the business of the carrier and the shipper at every such station with a multitude of infinitesimal fractions nowhere known in the business of railroads.

9. **Elaborate tariffs of rates, the result of competition**, made by one of several great railway systems, all competing for the business of a large extent of territory, are examined and considered in connection with those of its competitors, and with a view not to break down the legitimate competition thus existing, whereby rates are cheapened to the public generally and these railways are correspondingly benefited in performing the work for which they were chartered and constructed.

(Heard at Omaha March 19; Decided June 20, 1888.)

COMPLAINT alleging unjust and preferential rates, etc. *Dismissed.*

See pleadings, 1 Inters. Com. Rep. 591.

Mr. J. M. Burlingame, for complainant.

Mr. J. D. Howe, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The complaint in this proceeding avers that petitioner is an Association consisting of the several boards of trade, business men's associations, and farmers' organizations of the State of Minnesota, and that the object of the organization is to secure equal and reasonable rates for the transportation of persons and property in accordance with state and national legislation.

It avers that the Chicago, St. Paul, Minneapolis & Omaha Railway Company is an organization duly incorporated under the laws of the State of Wisconsin, and owning and operating lines of railway, and doing business as a common carrier in the transportation for hire of passengers and property in the States of Wisconsin, Minnesota, Iowa and Nebraska.

It avers that the defendant railway company, for its services as such common carrier in carrying merchandise of all kinds and classes from Superior, Ashland, Washburn, Bayfield and Duluth, Lake Superior ports, to stations on its line of road above indicated, has established and published a tariff of freights and charges, as it of right ought to do, which establishes and makes a reduced rate per ton per mile for the greater distance from said lake ports for all stations on its line of road between them and St. Paul, Minnesota, an average distance of 185 miles, while in the same tariffs for a continuous transportation of the same freights, over the same line and from the same points of origination, it establishes and makes a higher through rate per ton per mile for the stations west and south of St. Paul. In support of this charge the petitioner makes part of its petition a table of extracts from said tariff, wherein the rate per ton per mile is figured from the rates and distances as above stated, showing, as it is claimed, the results averred by the petitioner.

That on the first four classes of freight all

stations in the State of Minnesota south of Henderson and on said line of the said defendant railway are charged an unreasonable rate and rate per ton per mile.

That on the fifth class (the most important class of general merchandise) all stations in the State of Minnesota south of St. Paul on the said line of road are charged an unreasonable rate and rate per ton per mile.

That on Classes A and B all stations south of Henderson on said line are charged an unreasonable rate and rate per ton per mile.

That on Class E all stations south of Mankato on said line are charged an unreasonable rate and rate per ton per mile.

That on Classes C and D all stations on said line south of St. Paul are charged an unreasonable rate and rate per ton per mile.

That on the classes of coal and grain (staples of vital importance) all stations on said line of road are charged an unreasonable rate and rate per ton per mile.

That such charges are unjust and unreasonable and in violation of section 1 of an Act to Regulate Commerce, approved February 4, 1887.

That by such charges such common carrier gives an undue and unreasonable preference and advantage to several certain stations and localities along the line of the said route, and to the same extent subjects the certain other stations and localities to undue and unreasonable prejudice and disadvantage, in violation of section 3 of said Act.

The prayer of the petition is that the charges made in it may be investigated, and, if established, that an order shall be made to said common carrier to amend its tariffs of rates and charges so that it shall not now nor at any time in the future charge as high a rate per ton per mile for the longer as for the shorter haul aforesaid, and that such proportionate rates may be recommended as shall be just and reasonable, and as shall prevent all undue preferences and advantages, and all undue and unwarranted prejudices and disadvantages.

The defendant railway company, answering this complaint, admits that it is a corporation chartered under the laws of the State of Wisconsin, and owns and operates lines of railway and is doing business as a common carrier over such lines in the transportation for hire of passengers and property in the States named in the complaint.

It neither admits nor denies the averment in the complaint that petitioner is an association consisting of the several boards of trade, business men's associations, and farmers' organizations of the State of Minnesota or the objects of said Association.

It admits that as such common carrier it has established and published the tariff of freights and charges from Superior and other Lake Superior ports to stations on its line in the State of Minnesota and to other stations mentioned in the complaint.

It avers that even if it be true, as charged in the complaint, that defendant "establishes and makes a reduced rate per ton per mile for the greater distance from said lake ports for all stations on its lines of road between them and St. Paul, Minnesota, an average distance of 185 miles, while in the same tariffs for a con-

tinuous transportation of the same freights, over the same line and from the same point of origination, it establishes and makes a higher through rate per ton per mile for stations south and west of St. Paul," yet, if such statements are true, the defendant has not thereby violated any law of the United States.

The answer further denies all the other averments of the complaint.

On the hearing, the evidence adduced in this proceeding by the petitioner consisted of the tariffs in force upon the railroad and those proposed to be put in force March 26, 1888, of which notice had been given to that effect, and also oral testimony in relation to these tariffs and tables, showing the relative rates per ton mile on freight between stations along its line. It was admitted at the hearing by the petitioner that as to the first four classes of freight there was no serious ground of complaint, and that these would not have been embraced in the complaint but for the other matters complained of.

The evidence in support of the complaint was mainly directed at Class 5, Class A, and the commodity tariffs on coal and grain.

The chief articles in the fifth class, car loads, are: apples, beans or peas, dried beef, canned meats and fish, cider in wood; coffee—green; crockery and earthenware; fish—dried; glucose; hides—green; hollow ware—iron; axle—wagon; iron—bar, band, boiler, rod; car wheels and axles; castings—iron, machinery, chain in casks, nails and spikes, nuts, bolts, rivets, washers, hinges; kraut, meats, and vegetables—dried or desiccated; molasses in barrels, kits, or kegs; oil—coal, carbon, crude petroleum, petroleum, lubricating, naphtha, gasoline, in tank cars; oil—coal, in wood or iron barrels; oil—cotton seed, in barrels; oil—linseed, in barrels; oysters—cove or pickled; rice, rice flour, rice meal, and broken rice; rubber, roofing material; shot in bags, kegs, or boxes; soap—common; soap powder and washing and scouring compounds; stoves, furnaces; furnace castings, grate bars and castings, rocking grates and iron thimble collars; also stove plate and stove furniture; sugar—except maple or lemon, syrup N. O. 5, in barrels or kegs; tallow; tile roofing; vinegar in wood; wire cable; wire—fence, barbed, and telegraph.

The chief articles in Class A, car loads, are: agricultural implements; broom corn, in bales; fire engines; bedsteads, chair stuff, and tables; handles—wood; machinery; mantels—iron, marble, or slate; mills—cider; mills—bark, cane, cob, grain, hominy, or paint; mills—saw; mill stones; potatoes—sweet; poultry—alive; presses—broom corn, cheese, cider, copying, hay; pumps—chain; pumps—iron; pumps—steam; safes—cheese; scrapers—road; seed—Alfalfa, Lucerne, clover, timothy, cane, broom corn, Hungarian, and rape; sheep dip; stump pullers; trucks—logging; vehicles; carts—mining, dump, or hand; wagon wheels, wheelbarrows, wire binding for harvesters' boxes.

On this evidence petitioner contended that these rates were unjust and unreasonable in the particulars averred in the petition. The evidence was also directed to the coal and grain rates made in these tariffs.

On the part of the defendant railway company the evidence at the hearing consisted of

its tariffs in force and to be put in force March 26, 1888, of which notice had been given as required by the statute, with notations upon each of these of the rate per ton per mile on freight transported over its line to its different stations; oral testimony as to how and upon what reasons all its different rates were made; tables of comparison, tending to show that those rates were as low as, and in most instances lower than, those on neighboring and competing lines upon the same articles of freight; and that the increase of the rate per ton per mile on most of its articles of freight south and west of St. Paul was justified by its condition and circumstances, had long been in force, had never been complained of by any shipper before, and was not in conflict with the rule of making rates by other railroad lines of the country similarly situated; and that its increase of rate per ton per mile was caused by its grading its rates between stations according to distance. Upon this evidence it insisted that all of its rates were just and reasonable.

Without enumerating at length all the details of the evidence thus submitted, all of which we have carefully examined and considered, we deem it necessary to state only our findings upon the facts shown by this evidence, which are material to the merits of the controversy, and to the conclusions we have reached. These findings of fact we now state.

The petitioner is an Association consisting of the several boards of trade, business men's associations, and farmers' organizations in the State of Minnesota, and the object of the Association is to secure equal and reasonable rates of transportation of persons and property in accordance with state and national legislation. The Chicago, St. Paul, Minneapolis & Omaha Railway Company is a corporation incorporated under and by virtue of the laws of the State of Wisconsin. It owns and operates a large system of lines of railway, and does business as a common carrier in the transportation of persons and property in the States of Illinois, Wisconsin, Minnesota, Iowa and Nebraska. Its rates assailed in this proceeding are upon shipments over the line from Washburn, Bayfield and Ashland, each a Lake Superior port, to points south and west of St. Paul. The complaint relates to its rates at the following stations: Henderson, Le Sueur, St. Peter, Mankato, Medalia, St. James, Windom, Worthington, Lorne, Pipestone, Sioux Falls and Sioux City. Its shipments south and west from Lake Superior ports are chiefly from Washburn. Its rates as between Washburn and St. Paul, a distance of 188 miles, are conceded to be reasonable and just. These last named rates are made by the St. Paul & Duluth Railroad, a much shorter line from St. Paul to Duluth—a large and important Lake Superior port—which line is wholly within the State of Minnesota, 152 miles in length, not within the superintending control of the Act to Regulate Commerce, approved February 4, 1887, and are thus forced upon the Chicago, St. Paul, Minneapolis & Omaha Railway Company, which must make the same rates between Washburn, Bayfield and Ashland on the one hand, and St. Paul, on the other, or else go out of the business, or sustain very great financial loss. By a branch of its line ex-

tending from Superior Junction to Superior, a port on Lake Superior, and reaching to Duluth, the defendant also has a line extending from St. Paul to Duluth, and by this line the distance from St. Paul to Duluth is 178 miles. The rate per ton per mile on these rates from all these Lake Superior ports by defendant's lines to St. Paul is one that continually grows less as the distance increases, while the aggregate charge grows greater with the distance the freight is transported, as between these Lake Superior ports and St. Paul. It is one of the necessities of the present situation that rates from and to these Lake Superior ports from St. Paul must be substantially the same. The rates from Washburn to St. Paul are not remarkably low rates.

From St. Paul to stations on its line south and west, such as Henderson, Le Sueur, St. Peter, Mankato, Medalia, St. James, Windom, Worthington, Lorne, Pipestone, Sioux Falls and Sioux City, as to the first four classes of freight the rates are graded, usually, according to distance, in some instances grouped so as to make the same rate at contiguous stations. These rates are conceded to be substantially reasonable by the petitioner, and we do not find from the evidence that they are unreasonable or unjust. We mention these stations because they are those that are named in the complaint.

From and to these stations rates are graded in much the same manner on articles in the fifth class, in the A class, and upon coal and grain as in the first four classes named, except that at some of the stations the rate per ton per mile increases somewhat more in proportion to distance than does the rate per ton per mile upon articles embraced in other classes of freight, while in other instances they do not, and there is also the same occasional grouping of stations. The increase of the rate per ton per mile at the stations south and west of St. Paul results from the grading of the rates at these stations according to distance.

The defendant's line from Duluth and Washburn through St. Paul to the stations in the State of Minnesota and Territory of Dakota and into western Nebraska is crossed fifteen times, at about an average distance of twenty-seven miles apart, by lines of railroad which lead directly to ports on Lake Michigan. There is a sharp competition for business on defendant's line south and west of St. Paul, between business seeking the Atlantic coast by way of Lake Michigan, during the season for navigation, and the trunk lines at all times, and such business seeking the same destination over defendant's line by way of Lake Superior, during the navigable season, and the lines of railway connecting with the Canadian systems at all times. A fixed relation of rates to meet this condition of affairs exists, and these rates appear to have been established after numerous rate wars between the great competitive lines. To illustrate: The rate from Sioux City to Duluth, which is the same as to Washburn, is the same as the rate from Sioux City to Chicago, and the rate from Mankato to Duluth or Washburn is the same as the rate from Mankato to Chicago. This is because Chicago is the eastern terminus of the Chicago & Northwestern Railway, as Washburn is the northwestern terminus of the Chicago, St. Paul,

Minneapolis & Omaha Railway for Lake Superior business, and Mankato is the crossing point of these great rival lines, where freight could be made to go either to Chicago or Washburn, according to difference in rates. The rates made on defendant's lines at these points are so arranged as to meet this competition, and at the same time are so graded and grouped as to avoid a violation of the fourth section of the Act to Regulate Commerce, approved February 4, 1887.

A large portion of the traffic of the defendant's road, commencing at Washburn and destined for points south and west of St. Paul, is through freight. A large portion of its east bound traffic is wheat that is dropped at Minneapolis and is therefore local freight. There is no evidence as to the amount of defendant's shipments south and west from Superior and Duluth.

For a considerable distance south and west of St. Paul the defendant's railway line runs somewhat parallel to the Chicago, Milwaukee & St. Paul Railway and the Minneapolis & St. Louis Railway. Stations upon these several lines are frequently competitive, but in no instance is the distance exactly the same from the points of origin of the freight. To require a constant decrease in the rate per ton per mile as the distance increases over which freight is transported would have much the same effect upon the business of these railroads at these stations as would an equal mileage distance tariff. An equal mileage distance tariff for each of these stations on each of these railways would destroy competition, and so would the establishment of an equal rate per ton per mile. The establishment of rates to such stations based upon an equal rate per ton per mile would also result in a system of infinitesimal fractions in the rates at these stations, nowhere known in the railroad business, and which would result in constant confusion in the carriers' business as well as the business of shippers, accomplishing no substantial and practical benefits to the communities surrounding these stations.

A result of the competition of the water lines, afforded by Lakes Superior and Michigan, on the one hand, which are not subject to the provisions of the Act to Regulate Commerce, and in connection with these the operation of the fourth section of the Act to Regulate Commerce upon the railroads, has been a phenomenally low standard of rates diffused over a very large section of country situated between the rival ports on these lakes and the lines of railway extending from them to St. Paul and Minneapolis. Before the enactment of the Act to Regulate Commerce this existed as to only a very few stations, but since then, from the causes named, it has prevailed over a large extent of country, and numerous stations on these railroads, widely distant from each other, have the same groups of rates. The same results have not reached into the interior south and west of Mankato to anything like the same extent. The interior points on the lines south and west of Mankato are indeed greatly benefited by this condition of affairs in their through rates to and from distant markets, although not to the same extent as points situated along the railway lines between these rival lake ports. In the one instance, grouping of

stations so as to give them the same rates is a present peculiarity of the situation; and in the other, owing to greater distance from these waterways, interior locality, a much lighter volume of freight, large increase of cost of transportation and expense of maintaining operation in proportion to this less volume of business, and the much greater absence of competition, it results that the grading of the rates at stations according to distance becomes also, to a considerable extent, a necessity of the situation, though in some instances these are grouped.

These findings of fact are such as we make upon the complaint, as made, and the evidence in reference to it; and, as required by the statute, we now proceed to state our conclusions.

The questions involved in this proceeding are of an important character to the public in a large section of the country as well as to the carriers. Features of some of these questions as then presented we have had occasion to consider and discuss in other proceedings, but others of them have not heretofore been presented in any controversy for our determination.

Substantially there are two specific charges in the complaint. One is that the rates are unreasonable and unjust; the other is that the rates per ton per mile is unreasonable and unjust. These two charges are made against the rates to all of a certain class of stations named under six different heads in the complaint. The stations thus specifically named in the complaint are Henderson, Le Sueur, St. Peter, Mankato, Medalia, St. James, Windom, Worthington, Lovern, Pipestone, Sioux Falls and Sioux City. But intermediate stations not specially mentioned are also included in the general terms of the complaint.

The complaint, after averring that the rates charged by the defendant between Washburn, Bayfield, Superior, Ashland, and Duluth, Lake Superior ports, to St. Paul are reasonable rates, and that in making them the rule is observed of making a reduced rate per ton per mile from these lake ports to all stations on the line of railroad for the greater distance to St. Paul, which, it is alleged, is the correct rule on the subject, proceeds to charge that as to stations south and west of St. Paul this rule is violated, and not only much higher rates are charged on freight in consequence of this violation, but also in the manner in which the rates are graded at many of these stations.

At the outset we find it necessary to examine and consider the primary proposition involved in petitioner's complaint, which is that as to rates between the above named Lake Superior ports and St. Paul, which are conceded to be reasonable, fair and just, and as following the rule that the rate per ton per mile must be less for the greater distance, and that these should furnish the rule for making all other rates on defendant's line south and west of St. Paul. But little of the freight brought by defendant south from these lake ports comes from Ashland, Superior, and Bayfield. Nearly all of it originates at Washburn. There was no evidence as to the amount of freight it brings from or carries to Duluth. The distance between this point and St. Paul

by defendant's line is 178 miles. The distance from Washburn to St. Paul by defendant's line is 188 miles. The distance from St. Paul to Duluth—another large and important Lake Superior port, not far distant from Washburn, and rival and competitive with it—by way of the St. Paul & Duluth Railroad is 152 miles. The St. Paul & Duluth Railroad is a state road, having both its termini in the State of Minnesota, and, so far as its business is concerned, which is not interstate, is not governed by the provisions of the Act to Regulate Commerce. The rates made by the St. Paul & Duluth Railroad between Duluth and St. Paul are considerably lower than any rates which the defendant has on its line of railway anywhere, except between Washburn and St. Paul, and Superior and Duluth and St. Paul, and are adopted by the defendant as to freight between Washburn and St. Paul, because it is obliged to carry this freight at the same rate that the St. Paul & Duluth Railroad carries freight from Duluth to St. Paul or else virtually go out of the business, or, if remaining in it, to lose a great part of this business and thereby sustain large financial loss. At the same time these rates between Washburn and St. Paul are not exceptionally low rates. If it were true that the defendant, without being coerced into making these rates between Washburn and St. Paul by a state railroad not subject to the provisions of the Act to Regulate Commerce, had made these rates of its own choice, then there might be much force in the ground assumed by the petitioners. As it is, however, the fact that the defendant railway company adopts these rates, not as a matter of choice, but because it is compelled to do so in consequence of the rates made by the St. Paul & Duluth Railroad from Duluth to St. Paul, or else sustain large and irreparable loss from failing to do so, is a factor in the situation that cannot be disregarded. Upon business principles it is clear that the defendant railway company would proceed on a management that would be greatly prejudicial to those who have invested their money in its corporate enterprise, if it did not adopt the same rates from Washburn to St. Paul that the St. Paul & Duluth Railroad has made from Duluth to St. Paul, provided it can do so consistently with law. At stations on its line south and west of St. Paul this carrier does, indeed, in many instances, have to meet competition, but it is the competition of carriers which, like itself, are subject to the provisions of the Act to Regulate Commerce, and as against them it has the protection afforded by the statute. Nowhere else, except between Washburn and St. Paul, does it encounter the competition of a line of railroad having its termini exclusively within the limits of one State and operating a shorter line of road, which makes rates that it is compelled to adopt.

The question then arises, Do these conditions and circumstances justify the defendant in adopting the rates it does between Washburn and St. Paul? The words "substantially similar circumstances and conditions," as found in the second and fourth sections of the Act to Regulate Commerce, as we understand and construe them, in certain important particulars define the duties and rights of carriers,

and the rights of shippers as well. If the carrier claims to act under a compulsion of circumstances and conditions of his own creation or connivance in the making of an exceptional rate, then these will not avail him. If the carrier claims to act under a compulsion of circumstances and conditions, which he could obviate by reasonably fair and just exertion on his part in the making of an exceptional rate, then they will not avail him. But if the carrier is in good faith acting under the compulsion of circumstances and conditions, beyond his control, not of his connivance, and which he could not obviate by any reasonably fair and just effort on his part, and to avoid overwhelming loss adopts exceptional rates forced on him by the action of an independent state road which is not subject to the Act to Regulate Commerce, and which is operating a shorter and competing line with his own, these are, in our opinion, under the operation of the statute, circumstances and conditions which justify him in doing so.

Can it then be said to be a fair basis of comparison to take these rates between Washburn and St. Paul as the standard for what should be reasonable rates at stations on defendant's line south and west of St. Paul? We think not. The rates of defendant between Washburn and St. Paul are not made by the defendant upon the ground that they are reasonable, but are adopted from the necessity of the situation, and as forced upon it by the St. Paul & Duluth Railroad Company. It results from what we have stated that the rates of the defendant at its stations south and west of St. Paul on shipments from Washburn, Bayfield and Ashland, as to their reasonableness and justness, must be determined by other considerations than the mere fact that, as between these Lake Superior ports and St. Paul, the defendant is compelled to adopt comparatively lower rates made by the St. Paul & Duluth Railroad Company.

The stations south and west of St. Paul on the defendant's line, as we have found, are occasionally graded, and in other instances grouped, so as to avoid violating the fourth section of the Act to Regulate Commerce by making a greater aggregate charge for the transportation of property for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance. The manner in which these stations are grouped, where they are grouped, does not appear to work injuriously by giving to the shippers of one community relatively better rates than another in the shape of unjust discrimination. The stations, on the other hand, that are graded, appear to be so graded according to distance as to make the aggregate charge relatively higher, though not so in such proportion as to injuriously prejudice the shippers in any locality, so far as we can see from the evidence adduced in this proceeding. The method of grouping stations and grading stations for a continuous haul of freight by a railway carrier is one that is very common in this country and is not necessarily illegal, unless the results that flow from it are illegal. (*La Crosse Mfrs. & J. Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Com. Rep. 631; 2 Inters. Com. Rep. 9.

The rates thus made at stations south and west of St. Paul are, in nearly every instance, relatively higher than the rates between stations of the same distance on the line of defendant's railroad between Washburn and St. Paul; but, at the same time, when these rates are compared with those of other lines, they appear to be as low as, and in most instances lower than, those of other neighboring and competing lines of railroad. According to the largely preponderant weight of evidence in this proceeding they are reasonable rates.

The conclusions we have reached as to the manner in which the rates of the defendant are made between Lake Superior ports and St. Paul show that they cannot be adopted as a just and fair basis for the operation of the rule insisted upon by the petitioner as to the rate per ton per mile to points south and west of St. Paul. It is very true that unless exceptional conditions exist modifying such a rule, in the case of joint rates, the rate per ton per mile usually grows less in proportion to the greater distance, and that examples of this may be seen in the tariffs of railroads generally in the United States upon long hauls of freight. This result does not usually occur in the local tariffs of railroads where the stations are graded occasionally and in other instances grouped. The rates of the defendant are not joint rates. They are its own local rates made for stations along its line between and to and from Washburn and Sioux City, Washburn and Pipestone, and Washburn and Sioux Falls, and all intermediate stations on its road over a main line of railroad 455 miles in length.

We referred to this subject in the case of *Furrar & Company v. East Tennessee, Virginia & Georgia R. Company*, and *Norfolk & Western Railroad Company*, 1 Inters. Com. Rep. 487, 1 Inters. Com. Rep. 764. That was a case of joint rates on lumber. We there said: "It is a familiar rule in the transportation of freight by railroads, and has become axiomatic, that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time, unless there be exceptional conditions modifying this rule. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles, arising out of the character and nature of the services performed and the cost of the service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country." We were then considering and discussing *joint rates*, but even as to these we recognized that there might be "exceptional conditions" modifying the rule.

These exceptional conditions are found to exist in this very case. These are seen most notably in the case of the rates between Washburn and St. Paul, which we have already discussed. Other exceptional conditions are seen in the differences which exist between a large section of the country situated between rival ports on two great lakes, at a large number of stations necessarily grouped upon rival and competing lines of railroad near to and operating between these ports, and under the oper-

ation of the long and short haul clause of the Act to Regulate Commerce, and, on the other hand, a large interior section of the country adjoining this, where the circumstances and conditions are substantially different, and as to which the shipper must look largely to the benefits arising from competition of railroads alone and the reasonableness of rates required by that statute, and is not aided in these by large waterways, which afford much cheaper transportation and rates that are not subject to the Act to Regulate Commerce. In the one case the carrier groups stations covering a considerable section of country, because he is forced to do so from a variety of controlling circumstances, such as water competition and the operation of the long and short haul clause of the Act to Regulate Commerce, and others that might be named. In the other case, to meet the competition of lines that, like its own, are subject to the Act to Regulate Commerce, the carrier, in making its tariffs, occasionally groups stations, and in other instances grades stations, so as to keep up to something like a systematic and fair uniformity the aggregate rate to the different stations along its line.

In the cases of *Evans and Reed v. Oregon Railway & Navigation Company*, 1 Inters. Com. Com. Rep. 336, 1 Inters. Com. Rep. 641, we had occasion to consider the subject of comparing the rates established on railroads in one portion of the country with those in another, operated under substantially different circumstances and conditions, and we there held that such comparisons are not fair tests. That is equally true of the present case of comparisons between rates made in that proportion of the country so near as to be dominated by the water rates on Lake Superior, and, on the other hand, rates in the far interior made under substantially different circumstances and conditions. And, again, in the case of *La Crosse Manufacturers' & Jobbers' Union v. Chicago, Milwaukee & St. Paul Railway Company*, we said; "Many circumstances fairly entitle, and sometimes compel, the carrier to make rates on one line proportionately less than are made on another." Some of these circumstances are there enumerated. 1 Inters. Com. Com. Rep. 632, 2 Inters. Com. Rep. 11.

The rule that the rate per ton per mile must be less for the greater distance is one of the tests by which the rates can be carefully scanned in themselves. It is, however, like looking at them with a microscope. It ignores all other tests except that which it alone furnishes. It ignores all surrounding circumstances and conditions and every factor of every kind and description that enters into the making of the rate, no matter how compulsory or imperious that factor may be. It serves in itself a valuable purpose, not only as a close test of what a rate really is, but also as a basis in the cases to which it can be made to justly apply as a rule; but to determine the reasonableness and justness of a rate, all surrounding circumstances and conditions, and the factors which enter into the making of the rate, if there are any that are compulsory or imperious, must be considered as well as the rights of the shipper. That is apparent in the present case. This rule, as invoked in this pro-

ceeding, ignores the circumstances and conditions which surround the making of the rate by the defendant from Washburn to St. Paul. It also ignores the circumstances and conditions which surround the defendant railway for a long distance south and west of St. Paul, where the stations along the defendant's line are so near the stations upon the Chicago, Milwaukee & St. Paul Railway and those upon the line of the Minneapolis & St. Louis Railway as to be competing lines and stations with each other. To establish it as a rule for these stations would have very much the effect of the establishment of mileage rates for the same stations. It would destroy all competition between them, because none of them are exactly the same distance from the point of origin of freight, or else, on the other hand, it would load the business, both to the carrier and the shipper, with a multitude of infinitesimal fractions nowhere known in the business of railroads.

We had occasion in the case of *Evans and Reed, supra*, to consider and state some of the considerations which enter into the reasonableness of freight rates, and in connection with the enumeration we there said: "A variety of considerations of a very practical nature must always enter into the making of freight rates by a railroad company, and these also go very far in every instance to determine the question of whether such rates are reasonable and unreasonable. It would be very dangerous to the successful existence of such companies if they had to make or were required to make freight rates upon mere theories or conjectures. They have to deal with business as they find it." The same idea is expressed in different language in the first annual report of the Interstate Commerce Commission to the Secretary of the Interior, where it is said: "It is quite impossible to deal with this subject on mathematical principles." [1 Inters. Com. Rep. 671.]

The conclusions we have already expressed are decisive of this proceeding; but there is another feature of it which we think deserves to be noticed in connection with them, arising upon the evidence and our findings upon the facts. There is a fixed relation of freight rates existing from and to points south and west of Mankato on the line of the Chicago, St. Paul, Minneapolis & Omaha Railway Company on business going to, or coming from, the East, by the competition which exists between this railway and the lines reaching Chicago and other Lake Michigan ports from this section of the country. This is clearly indicated in the evidence. It appears to be the difference of rates between Buffalo and the Lake Michigan and Lake Superior ports, respectively, and this difference, it seems, is usually $2\frac{1}{2}$ cents per 100 pounds lower on freights from Lake Superior ports, this being the longer route, than from Lake Michigan ports, though the difference has been as great as five cents per 100 pounds. There is between these lines a strong competition for the business of this portion of the country. The rates established have been the result of this competition. This competition has served a valuable purpose in the cheapening of rates in the section of country south and west of Mankato, and thus has done the public a great benefit.

It is beneficial and important to the public as well as to the railroads that this competition should not be broken down. A change, large, far reaching, and sweeping, in this system of rates, such as is sought to be accomplished by the complaint in this proceeding, would involve great and corresponding changes in the system of rates upon rival competitive lines reaching Lake Michigan ports from this section of the country, and would not only completely unsettle the carrying trade, but would greatly disturb and unsettle business, in many instances causing financial wrecks of business men, as well as entailing great losses upon this carrier which might have the effect of forcing it into bankruptcy. Consequences like these could be justified only upon the ground that in the administration of the statute they were the necessary and unavoidable results of correcting serious abuses, and such abuses we do not find to exist from the evidence in this proceeding.

The order of the Commission is that the petition be, and the same is hereby, dismissed.

BUSINESS MEN'S ASSOCIATION OF the State of MINNESOTA

v.

CHICAGO & NORTHWESTERN R. CO.

(No. 74.)

1. The **circumstances and conditions** as to the transportation of freight on the line of the defendant between Chicago and St. Peter, on the one hand, and between St. Peter and Pierre, on the other, found, examined and considered by the Commission, and held to be **substantially dissimilar** upon the facts set forth in the report and findings in this proceeding.
2. The **rule of the rate per ton per mile decreasing for the greater distance** while the rate is increasing in the aggregate, examined and discussed by the Commission in its application to the present proceeding, and held to be **inapplicable**.
3. The **difference between the cost of service by which the local business of this railroad and its through business** are done relatively, examined and considered by the Commission so far as they are involved in this proceeding.
4. **Comparisons of rates charged by railroad companies under circumstances and conditions substantially dissimilar**, really prove nothing, and cannot be adopted as standards in arriving at the **reasonableness and justness of rates**.
5. **Exceptional cases of rates made lower than other rates by a carrier on one portion of its line by the action of a competitor, and in which it is without fault itself under the operation of the Act to Regulate Commerce, can not be adopted as the standard as to other rates** upon a far distant portion of its line

where no such exceptional conditions exist, and the reasonableness of its rates must be determined by altogether different considerations.

6. **Where the evidence adduced in a proceeding like this fails to establish the grounds relied upon, as stated in the complaint,** and upon which it is heard and tried before the Commission by the parties and their counsel, and to which the evidence is directed, but shows that upon a portion of its line, as for example, between St. Peter, in the State of Minnesota, and Pierre, in the Territory of Dakota, that the rates are made upon a basis which seems to grade them with large differences between stations contiguous to each other, and the grounds assigned for this by the carrier are the additional cost of service incident to operating a new line through a thinly inhabited and but little cultivated country, with very light traffic, and in which the transportation is seriously impeded by snow blockades, and where the coal used for fuel in operating the trains has to be brought by the carrier a distance of nearly five hundred miles, **but the evidence is not given with that fullness of detail which should sustain such extra rates of charge, the Commission,** while it will not hold the rates to be unreasonable, will, also, not hold that they are reasonable, **but will investigate this question in a separate proceeding under the Statute,** by which all the parties in interest will have an opportunity to be fully heard and can bring forward all the evidence upon a subject that is important and involving valuable rights, alike to the public and to the carrier.

7. When, in a proceeding such as this, **evidence is introduced by a party and he is permitted to do so for the single purpose of the bearing it may have upon the reasonableness of the rate, which would be inadmissible for any other purpose, and it tends to show a difference of rates of the carrier by which a combination could be made of those rates upon the different tariffs that would be improper and unjust, the carrier not being allowed to controvert it upon the hearing, as to any other feature, except so far as it had a bearing upon the reasonableness of rates, because it would involve a collateral inquiry,** the Commission will not determine this collateral inquiry or question it presents until an opportunity has been furnished the parties to be heard in a **proceeding such as is provided for by the Statute.** For example: where the complaint of the petitioner makes no allegation that under the tariffs of the carrier freight may be shipped from Chicago to St. Peter at one rate, there unloaded, and then subsequently re-shipped from St. Peter to each of the stations between St. Peter and Pierre at a rate which added to the rate from

Chicago to St. Peter is considerably less than the direct rate from Chicago to each of these stations, but on the hearing the complainant is allowed to introduce evidence upon this subject simply for the purpose of showing that the rates between St. Peter and Pierre are unreasonable and for no other purpose, the carrier having at the time the complaint was made a number of tariffs, as follows: a distance tariff for the State of Illinois, a distance tariff for the State of Wisconsin, a distance tariff for the State of Minnesota, a distance tariff for the Territory of Dakota, local tariffs to and from all points on its line in each of the States through which it passes and the Territory of Dakota, and a tariff from and to Chicago and all points along its line, extending to Pierre, a distance of 781 miles.

(Heard at Omaha, March 19; Decided June 20, 1888.)

COMPLAINT alleging unjust and preferential charges, etc. *Dismissed.*

See pleadings, 1 Inters. Com. Rep. 589.

Mr. J. M. Burlingame, for petitioner.
Mr. W. C. Goudy, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The petition in this proceeding avers in substance that petitioner is an Association consisting of the several boards of trade, businessmen's associations, and farmers' organizations in the State of Minnesota, and that the object of the Association is to secure equal and reasonable rates of transportation of persons and property in accordance with state and national legislation.

It also avers that the Chicago & Northwestern Railway Company is a corporation duly incorporated under the laws of the State of Illinois, and is a common carrier engaged in the transportation for hire of passengers and property, and owning and operating a railroad that runs through the several States of Illinois, Wisconsin, Minnesota and the Territory of Dakota to and from the City of Chicago, in the State of Illinois, between and through the various stations on its said line of road, including Winona, Janesville, Mankato, St. Peter, Nicollet, Newell, Sleepy Eye, Sanborn, Tracy, and Lake Benton, in the State of Minnesota, and Huron and Pierre, in the Territory of Dakota.

It avers that the defendant railway company, for its services as such common carrier in carrying merchandise of all kinds and classes from Chicago and Lake Michigan ports to stations on its line of road, as above indicated, has established and published a tariff of freights and charges which, as of right it ought to do, establishes and makes a reduced rate per ton per mile for the greater distance from Chicago for all stations on its said line of road between Chicago, Illinois, and Janesville, Minnesota, a distance of 412 miles, while in the same tariff for a continuous transportation of the same freights, over the same line and from the same point of origination, it establishes and makes a higher through rate per

ton per mile for all stations west of Janesville. In support of this last averment the petitioner sets forth in its petition a table of extracts from said tariff wherein the rates per ton per mile are figured from the rates and distances as stated by the defendant railway company for the purpose of showing the charges to be true as made in the complaint.

It avers that such charges are unjust and unreasonable and in violation of section 1 of the Act to Regulate Commerce, approved February 4, 1887, and that by such charges, such common carrier gives an undue and unreasonable preference and advantage to the several certain stations and localities along the line of its route, and to the same extent subjects the several other certain stations along its line to undue and unreasonable prejudice and disadvantage in violation of section 3 of said Act.

The petition prays that an investigation of these charges may be made, and, if the facts are found to sustain them, that said common carrier may be ordered to amend its tariff rates and charges so that it shall not now, or at any time in the future, charge a higher rate per ton per mile for the longer than for the shorter haul aforesaid, and that such proportionate rates may be recommended as shall be just and reasonable and as shall prevent all undue preferences and advantages and all undue prejudices and disadvantages.

To so much of this petition as states facts alleging unjust discriminations and which are found in the first, second, and third paragraphs of the complaint, the defendant railway company demurs upon the ground that there is no provision in the Act of Congress of February 4, 1887, requiring the railway carrier to transport freight at a rate fixed by the ton and mile, as supposed in said complaint, and that said complaint shows the fact to be that the Chicago & Northwestern Railway Company does not charge or receive a greater compensation for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance, and that it has fixed this tariff in accordance with the several provisions of said Act. To all the portion of the complaint which avers that the charges of the Railway Company are unreasonable and unjust and in violation of section 1 of the Act to Regulate Commerce, or section 3 of said statute, the Railway Company enters a general denial and demands that complainants shall be required to make proof of these allegations.

The only issue presented by the petition in this proceeding is whether the rates of the Chicago & Northwestern Railway Company on its main line, extending from Chicago through Winona, Janesville, St. Peter, Nicollet, New Ulm, Sleepy Eye, Sanborn, Tracy and Lake Benton, in the State of Minnesota, and Huron and to Pierre, in the Territory of Dakota, as established, are just, fair and reasonable rates, according to the rule asserted in the petition as the correct rule, namely: that of making a reduced rate per ton per mile for the greater distance from Chicago to these stations in the State of Minnesota and Territory of Dakota, as is alleged has been done between Chicago and St. Peter, in the State of Minne-

sota. To the inquiry involved in this issue our findings of fact must be directed. Other collateral questions were suggested at the hearing in the evidence for the first time, but these can now be considered only so far as they bear, if at all, upon the reasonableness of the rates as tested by the above rule.

The Chicago & Northwestern Railway Company is a corporation incorporated under and by virtue of the laws of the State of Illinois. It owns and operates a large system of railroads extending through the States of Illinois, Wisconsin and Minnesota, and through the Territory of Dakota. One of its lines, the rates of which are involved in this proceeding, extends from Chicago, Illinois, to Pierre, in the Territory of Dakota, a distance of 781 miles. This Company, for this portion of its line, has what is called a distance tariff for the State of Illinois. It also has a distance tariff for the State of Wisconsin. It also has a distance tariff for the State of Minnesota. It also has a distance tariff for the Territory of Dakota. It also has tariffs to and from all points on this line in each of the States through which it passes and the Territory of Dakota. It has a general tariff from Chicago to all points along its line extending to Pierre. The distance from Chicago to Janesville, Minnesota, is 412 miles; to Mankato, 430 miles, and to St. Peter, 442 miles.

In consequence of the combined operation of the water competition afforded by Lakes Michigan and Superior and the near proximity to each other of large and rival lines of railway, extending to and from important points on these lakes, often crossing each other, and the competition thus existing, on the one hand; and, on the other hand, the operation of the long and short haul clause of the fourth section of the Act to Regulate Commerce, the consequence has been, as we have had occasion to find in several cases before us, the rates are grouped in a large extent of this territory along the lines of these railroads. For instance, the rates are the same at La Crosse or Winona that they are at Mankato, about 200 miles west of La Crosse. The facts in relation to these conditions of transportation were found and considered in the case of *La Crosse Manufacturers' & Jobbers' Union v. Chicago, Milwaukee & St. Paul Railway Company* [ante, 9], and also in the case of *Business Men's Association of the State of Minnesota v. Chicago, St. Paul, Minneapolis & Omaha Railway Company* [ante, 41], heard at the same time as the present case and recently decided by us. In this last named case we also had occasion to find the facts existing in the interior section of the country adjoining that bounded upon the west by Duluth, Minneapolis, St. Paul, Mankato, and other points that might be named. Substantially the same state of facts that we there found we find again in this proceeding as to rates existing between Chicago, Janesville, Mankato and St. Peter, and it is unnecessary here to repeat them.

Rates are much lower in proportion to distance from Chicago to Janesville, Mankato and St. Peter than they are west of St. Peter upon the line of this railroad, arising from the facts we have stated. Rates between Chicago, Janesville, Mankato and St. Peter are consid-

erably lower than the mere distance tariffs of the railroad in the States of Illinois and Wisconsin. The rates west of St. Peter on the line of this railroad in the State of Minnesota and the Territory of Dakota, by the general tariff of the railroad, are lower than they would be by the mere distance tariffs in Minnesota and Dakota. In quite a number of instances it has been developed by the evidence in this proceeding offered by complainant against the objection of the defendants and received by the Commission, simply so far as it might bear upon the question of the reasonableness of the rates to stations on the line of this railroad in the State of Minnesota and in the Territory of Dakota west of St. Peter, that a lower rate might be obtained by a combination of the general tariff of the Company from Chicago to St. Peter, with the addition of its local rate to the station named, than by its general tariff from Chicago to that station; and this we refer to, not as being a matter that is involved in this issue, or that can be corrected in this proceeding, and is entitled to be considered only so far now as it has a bearing, if any, upon the question of the reasonableness of these rates.

After leaving St. Peter, going west on the line of this railroad, its rates are graded according to distance. Very few of them appear to be grouped at stations. The usual and unavoidable result of this is that the aggregate of the rate, according to distance, grows progressively higher and the rate per ton per mile, instead of decreasing for the greater distance, increases to a considerable extent. Between the stations, as graded, according to distance, west of St. Peter in the direction of Pierre, the rate increases upon first class freight in the following proportions:

| | | |
|---------------|----------------------------|----------|
| St. Peter, | 435 miles from Chicago.... | 50 cts. |
| Courtland, | 457 " " " " " " " " | 59 " |
| New Ulm, | 469 " " " " " " " " | 62 " |
| Sleepy Eye, | 479 " " " " " " " " | 68 " |
| Sanborn, | 500 " " " " " " " " | 80 " |
| Walnut Grove, | 518 " " " " " " " " | 92 " |
| Tracy, | 525 " " " " " " " " | 94 " |
| Balaton, | 538 " " " " " " " " | 96 " |
| Lake Benton, | 560 " " " " " " " " | 99 " |
| Elkton, | 573 " " " " " " " " | \$1 00 " |
| Brookings, | 590 " " " " " " " " | 1 02 " |
| Volga, | 596 " " " " " " " " | 1 03 " |
| Iroquois, | 644 " " " " " " " " | 1 15 " |
| Huron, | 662 " " " " " " " " | 1 20 " |
| Wolsey, | 675 " " " " " " " " | 1 20 " |
| Miller, | 702 " " " " " " " " | 1 35 " |
| Highmore, | 724 " " " " " " " " | 1 50 " |
| Pierre, | 751 " " " " " " " " | 1 50 " |

The different classes of rates as to other articles are in much the same proportion.

The rates offered in evidence in this proceeding were the tariff taking effect February 14, 1888; the rates in force March 5, 1888, and the tariff taking effect October 28, 1887, afterwards discontinued, and of which notice had been given by the defendant, as provided by the statute, that it proposed to restore this tariff, to take effect March 26, 1888. From these tariffs, tables were made and offered for our consideration by the contending parties, and we have carefully examined them, as well as the tariffs complained of.

The case of petitioner rests upon the difference of the rate per ton per mile between Chicago and St. Peter and each of the successive stations west to Pierre. This method of com-

parison shows, of course, a great deal higher rate per ton per mile between each of the stations west of St. Peter and extending to Pierre than exists upon the distance between Chicago and St. Peter, relatively; and it is still further heightened by taking the extreme low cut rate of twenty cents per hundred pounds on first class freight, which existed for a short time, from Chicago to Mankato, and adding to this the local rate west, in tables of rates furnished for our consideration by petitioner, and also in insisting upon a comparison of the rate per ton per mile on this low cut rate of twenty cents per 100 pounds between Chicago and Mankato and the respective distances between each of the stations west from St. Peter to Pierre.

The evidence shows that defendant is obliged to bring coal from the vicinity of Chicago to be used as fuel in running its trains over its lines between Chicago and Pierre. As to the country between St. Peter and Pierre, owing to the greater distance, this entails upon the defendant a very considerable larger cost of transportation in operating that portion of its road than exists upon that part of its line between Chicago and St. Peter.

The defendant's road between St. Peter and Pierre is a new road. That portion of its road between Mankato and Tracy has been built since 1875. That part of its line between Tracy and Pierre has been built and in operation about seven or eight years. Its main line west from St. Peter to Pierre is operated through a country sparsely settled and where the volume of business is light. There is a great falling off in the volume of business over this road west of St. Peter, going in the direction of Pierre, to what it is east of St. Peter. The towns and stations along this railroad west of St. Peter indicate to some extent its scanty population. In Rand, McNally & Co's Business Atlas for 1887 the population of Pierre, Sanborn and Highmore, each, is so small as not to be given at all, while the population of Huron is 164, Walnut Grove, 153, Nicollet, 99, Tracy, 322, Sleepy Eye, 1,373, and New Ulm, 3,335.

That part of defendant's railway between St. Peter and Pierre is more subject to snow blockades than the portion of it east of St. Peter. The expense of keeping the road in condition and open on the portion of the line west of St. Peter in proportion to the business done is far greater than on any other part of the road. The station expenses are higher relatively on that portion of the line in proportion to the business done, and the expense, of course, is much greater in proportion as there is less amount of traffic. So far as the evidence shows, the principal articles of freight on this portion of its road are agricultural implements, wheat, and articles of that description. It is largely an uncultivated and thinly settled country.

The defendant can charge no more than it does charge to Mankato and the group of stations east of that, on its line, on account of the charges made by other competing railroads running through the same section of country between Chicago, St. Paul, Minneapolis and Lake Superior ports.

We find that the rates established by the de-

defendant on its line between Chicago and Pierre are neither joint nor through rates, but are local rates. We find that these rates, owing to the causes named, are, generally speaking, reasonable rates from Chicago as far west as St. Peter. We find that west of St. Peter, and between that point and Pierre, the rates are relatively much higher, such as are often usual with railway carriers in a country thinly inhabited and but little cultivated, where the volume of traffic is light, and the cost of service in proportion to the business done is much greater than in more thickly settled sections of the country in which the volume of business is heavy.

The conclusions we have reached in this proceeding remain to be stated.

The comparison attempted by petitioner between the rates of this carrier on that portion of its line between Chicago and St. Peter, on the one hand, by a constantly decreasing rate per ton per mile, and that part of its line between St. Peter and Pierre, on the other, is one that, for obvious reasons, cannot be sustained. The circumstances and conditions are substantially dissimilar. The rates between Chicago and St. Peter are made by this defendant, as the shorter line from Chicago, to meet the lower rates of longer competing lines for the same business. It is compelled to meet this condition of affairs in this way or else lose the business, or sustain great financial loss. Those rates are made so low as they are by other carriers, some of which are longer lines, competing with the defendant between the ports of Lakes Superior and Michigan for business at junction points and near competing stations on the respective competing lines. The defendant has to meet these rates by accepting them, or, in case of refusing to meet them, must sustain a large loss in losing the business they would afford, and to a share of which under any just system of rates it is fairly entitled. The volume of business here is relatively much larger than at stations from St. Peter to Pierre. All the conditions of transportation are much more favorable. The cost of transportation is far less. The snow blockades are far less frequent, and do not last so long. The coal used for operating trains by defendant is transported a much shorter distance than is done to stations from St. Peter to Pierre.

In all that section of country along defendant's line from St. Peter to Pierre these conditions are materially reversed. The conditions of transportation are very unfavorable. The cost of transportation is much greater. The volume of business is light. Local rates graded according to distance are largely a result of the situation. The subject of comparing rates in one portion of the country with rates in another, and rates upon one line with rates upon another, operated under substantially different circumstances and conditions, has repeatedly been before us, and we have uniformly held that they do not constitute a fair basis of comparison. See *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Com. Rep. 336, 1 Inters. Com. Rep. 641; *Business Men's Assn. of Minnesota v. Chicago, St. Paul, Minneapolis & Omaha R. Co.* recently decided *ante*, 41; *La Crosse Mfrs. & Jobbers' Union v. Chi-*

cago, Milwaukee & St. Paul R. Co. 1 Inters. Com. Com. Rep. 629, 2 Inters. Com. Rep. 9.

We have also had occasion to consider the subject of the rate per ton per mile decreasing for the greater distance, as insisted on here, and we have held, as we have found, that while this is one of the incidents or elements, and, indeed, may be said to be a rule in the case of joint rates on long hauls or through rates on long hauls, unless modified by exceptional conditions of transportation, yet that it cannot, as a rule, be considered as a test in railroad operations in the case of local rates. The rates in question are the local rates of the Chicago & Northwestern Railway Company at all its stations from Chicago to St. Peter. *Farrar & Co. v. East Tennessee Va. & Ga. R. Co.* 1 Inters. Com. Com. Rep. 487, 1 Inters. Com. Rep. 764; *Business Men's Assn. of Minnesota v. Chicago, St. Paul, Minneapolis & Omaha R. Co.* 2 Inters. Com. Com. Rep. —, *ante*, 41.

Exceptional instances may, indeed, be found in the case of local rates upon one part of the line of a railroad and as between given points, which will show a decreasing rate per ton per mile for the greater distance, while the aggregate rate is higher. Such a case was that of the local rates of the Chicago, St. Paul, Minneapolis & Omaha Railway Company between Washburn and St. Paul, as found in the complaint of the *Business Men's Association of the State of Minnesota v. Chicago, St. Paul, Minneapolis & Omaha Railway Company*, *supra*. Such a case is the present as to the rates by the Chicago & Northwestern Railway Company between Chicago, Mankato, and St. Peter. But every such instance is rare and exceptional, and the circumstances and conditions surrounding the transportation and causing these rates are unusual and extraordinary. In every such case as that the fact that the rate per ton per mile decreases for the greater distance, is itself an exceptional incident of an exceptional condition of affairs, and not a rule which can safely be applied to other conditions of transportation substantially different.

As to local rates, substantially different conditions generally exist, and other rules usually prevail. Local rates are as a rule graded at stations, according to distance, and occasionally stations are grouped where this can be done by giving relatively fair rates to all and without unjust discrimination. The transportation agencies of the country are made to meet each of these substantially different conditions of transportation. Where joint rates prevail on long hauls, or through rates upon long hauls, there are usually fast freight lines; there are car loads and often train loads, and there is a large volume of business. In the usual local business of a railroad, without regard to what its length may be, it has to properly serve all its stations, however small, and all its patrons, no matter how light or unremunerative their business may be. For this business it has its local way freight trains, in which there is a considerable increase of expense, with their slow speed, with their stopping at every station, with their handling and delivering freight in small quantities, in packages and in parcels. The rule that the rate per ton per mile must decrease relatively for the greater distance, insisted upon in this

proceeding, taking the rate from Chicago to St. Peter as the basis and carrying it through as the standard to Pierre, is one that is inapplicable. The reasonableness or the unreasonableness of the rates between St. Peter and Pierre must be determined by considerations that are different.

The considerations that must govern in a test of the rates between St. Peter and Pierre must be such as will fairly apply to the substantial conditions and circumstances attending the service performed. They must be such as are applicable to a new railroad, recently built in a new, thinly inhabited, and largely uncultivated country, where the traffic is light and the freight is all local. It is a far interior section of the country. Freight brought to it is upon long expensive local hauls. The conditions of transportation by which it is reached are far more expensive than in localities near to the water competition of the Great Lakes. And under such circumstances the rates, as a rule, must generally be higher in proportion to distance.

The question that has given us most difficulty has been whether the rates at the stations between St. Peter and Pierre were not graded too high—that is, whether they would not be more reasonable if they were graded lower. On this feature of the case the evidence furnishes us so little light that we are unable to proceed to any intelligent determination. There is no evidence before us as to what the volume of traffic is on this portion of the line, except that it is light. How light, the evidence does not show. The inference is irresistible that it must be comparatively light when contrasted with the volume of traffic between Chicago and St. Peter. Then we are told that the country is thinly inhabited and but little cultivated. In the same connection the evidence informs us that two of its chief articles of freight are wheat and agricultural implements, each of which are articles of prime necessity, usually hauled in car load lots and at low rates. The additional cost of service by having to transport coal from Chicago used in operating the trains is not shown. The additional cost of maintaining stations to the amount of business done is not shown. The additional cost of service arising from snow blockades is not shown. We are unable, and, at the same time, we are unwilling, to pass upon the reasonableness of these rates between St. Peter and Pierre upon the meager evidence before us.

We have instituted an elaborate comparison between the rates prevailing upon this line of the defendant and that of its leading rival and competitor, the Chicago, Milwaukee & St. Paul Railway Company, supposing that such comparison might throw some light upon this subject. For the purposes of such comparison we took that line of the Chicago, Milwaukee & St. Paul Railway Company, extending from La Crosse, by way of Winnebago City, to Woonsocket, in Dakota Territory, south of and near Huron, and connecting at Woonsocket with another line of the same company which crosses the Chicago & Northwestern Railway at Wolsey 106 miles east of Pierre and extending thence northwest to Edgely, in Dakota Territory. This line is constructed and

operated much of its way through a country that would seem to be similar in many respects to that on the line of the Chicago & Northwestern Railway between St. Peter and Pierre; for a long distance it runs south of, not greatly distant from, and parallel with the defendant's line between St. Peter and Pierre, and upon its line the conditions of transportation might naturally be supposed to be in many respects substantially similar.

We found that this comparison threw no light upon the subject. On this line of the Chicago, Milwaukee & St. Paul Railway we found that the Chicago rates to points of the same distance as those on the Northwestern Railway between St. Peter and Pierre were relatively considerably lower, while on the other hand its local distance rates between stations were considerably higher than those of the Northwestern Railway; and the combination of the two makes a higher rate on the Chicago, Milwaukee & St. Paul Railway to these points than is made by a like combination of the rates on the defendant's line. We therefore will be obliged to make this matter the subject of another and separate investigation, such as is provided for by the statute.

Another feature of the rates on defendant's line between St. Peter and Pierre, as developed at the hearing of this proceeding at Omaha, was that there was evidence offered by the petitioner tending to show that by a combination of the rate from Chicago to St. Peter, added to the local rates between St. Peter and several of the stations between St. Peter and Pierre, a lower total rate would be obtained than on the direct rate from Chicago to each of these stations. These stations are, upon first class freight, Walnut Grove, Tracy, Balaton, Lake Benton, and Highmore; upon fifth class freight, Sleepy Eye, Sanborn, Walnut Grove, Tracy, Balaton, Lake Benton, Elkton, Huron, Miller, Highmore, and Pierre, and upon class A, Sanborn, Walnut Grove, Tracy, Balaton, Lake Benton, Iroquois, Wolsey, Miller and Highmore. On branches of this line there was evidence of the same character as to rates on first class freight at Marshall and Canby; on fifth class freight at Marshall, Canby, and Gettysburg, and on freight of class A at Marshall, Canby, and Watertown.

This evidence is corroborated by the tariffs of the defendant on file with us, which show this condition of affairs to exist. According to these, freight may be shipped from Chicago to St. Peter at one rate, unloaded, and then subsequently reshipped from St. Peter to each of these stations at a rate which, added to the rate from Chicago to St. Peter, is considerably less than the direct rate from Chicago to each of these stations. No reason, that we are aware of, exists that could justify this anomalous condition of affairs. Still some such reason may exist under the peculiar conditions of transportation at St. Peter, and before condemning it and ordering its discontinuance we will give the defendant an opportunity to be heard respecting it in an investigation which we will inaugurate. The same condition of affairs may exist as to other classes of freight, and this investigation, as made by us, will embrace all classes of freight. The reason for our taking this course is that the evidence

upon this subject was admitted only for the purpose of the bearing it might have, if any, upon the reasonableness of rates at stations from St. Peter to Pierre, and the matters to which it directly related were not made the subject of complaint, so that the defendant could have an opportunity to answer them, but were brought forward collaterally in the evidence at the hearing for the first time.

By section 15 of the Act to Regulate Commerce it is provided that if in any case in which an investigation shall be made by the Commission, it shall be made to appear to the satisfaction of the Commission, either by testimony of witnesses or other evidence, that anything has been done, or omitted to be done, in violation of the provisions of the statute by any common carrier, it shall be the duty of the Commission to take the proper proceedings to put an end to such violation of law. In the case of *Smith v. Northern Pacific Railroad Company*, 1 Inters. Com. Com. Rep. 209, 1 Inters. Com. Rep. 611, where the company in its answer admitted what was a violation of law, although the petitioner failed upon the proof to establish his complaint, yet, as the company in its answer had deliberately confessed as to another matter a violation of the statute, this established such violation clearly to our satisfaction, and we ordered the company to cease and desist from such further violation. The present case differs from that, in this, that here the Company has not admitted the violation of the statute. It may be acting upon some conditions of transportation as it exists at St. Peter, which may or may not justify its action as to the differences made on direct rates from Chicago to points west of St. Peter, and the combination of the Chicago rate to St. Peter with the local rates to stations added between St. Peter and Pierre. For these reasons we will give the Company a hearing on this, and the reasonableness of its rates between St. Peter and Pierre and its branch roads west of St. Peter, in a separate investigation of these matters.

All that we can decide in this proceeding now is that the rule insisted upon by the petitioner, that the rate per ton per mile, taken as a basis between Chicago and St. Peter, must be adopted as the standard at stations between St. Peter and Pierre, and that the latter rates must decrease relatively for the greater distance in the same proportion as from Chicago to St. Peter, is one that in the existing conditions of transportation along the line of this railroad, upon the evidence in this proceeding, cannot be sustained. As the complaint is based upon this ground alone, and was so tried by the parties and heard by the Commission, *it results from the views we have expressed that this petition must be dismissed.*

ATLANTA CHAMBER OF COMMERCE
v.
SOUTHERN RAILWAY & STEAMSHIP
ASSO. *et al.*
(No. 136.)

ABSTRACT of answer of the Southern Railway & Steamship Association, filed May 29, 1888, to complaint given *ante*, 17.

Mr. Edward Baxter, for Louisville & Nashville R. Co.

Messrs. East & Fogg, for Nashville, Chattanooga & St. Louis R. Co.

Messrs. Lawton & Cunningham, for Georgia Central R. Co.

Messrs. Jos. B. & Bryan Cumming, for Georgia R. Co.

The answer sets forth that the object of the Association is to secure such co-operation on the part of the transportation lines within its territory as is absolutely necessary to a strict compliance with the Act to Regulate Commerce, and "to secure a proper correlation of rates such as will protect the interests of competing markets without unjust discrimination in favor of or against any city or section." If therefore any unjust discrimination results from the present adjustment of rates by this Association it is unintentional.

This Association is not responsible for the reshipping or rebilling of freights from Nashville, Tennessee, or any other point, because the agreement between its members does not authorize or forbid the same, but all practices of its members are subject to scrutiny and any member can demand their discontinuance which will be determined by arbitration, and the question whether such rebilling practice at Nashville is in conflict with the obligations of its members is now under consideration by the board of arbitration of this Association. Complainants asked the authorization by this Association of the reshipment or rebilling of freights from Atlanta at rates equivalent to the proportions of the through rates which was declined because it would involve discrimination against Atlanta manufacturers in violation of the Interstate Commerce Law.

Answering the second charge defendant says that the joint tariff or rates complained of do not make or give any undue or unreasonable preference or advantage to any city competing with Atlanta nor do they discriminate against Atlanta. Defendant does not deny that the rate per ton per mile on grain from Louisville to Atlanta is higher than to Montgomery, Birmingham, Charleston, Savannah, Augusta or Macon, nor that the rates on traffic hauled through Atlanta to Charleston are considerably less than to Atlanta, although the distance is greater, but this is not a violation of the third section of the Interstate Commerce Law, as charged.

The rate of twenty-seven cents on grain from Louisville to Atlanta is just and reasonable and does not discriminate against Atlanta in favor of Birmingham which is reached from Louisville by a continuous road under one management and is eighty miles shorter than the line from Louisville to Atlanta, which is composed of several roads, each entitled to exact as its proportion of the through rate what is just and reasonable for the additional cost per ton per mile of a short haul and the cost of transfers from one road to another: and the rates on grain from Louisville to Montgomery, Charleston, Savannah, and Augusta are made unreasonably low from necessity on account of water competition which controls the rates from the West in connection with northern trunk lines.

The rate of twenty-nine cents on grain,

Louisville to Macon allows the carrier two cents for the additional distance of ninety miles beyond Atlanta as is believed to be as high as is practicable in view of the proximity of Macon to Savannah and the grain rates of the Georgia Railroad Commission.

The rates on grain, Chattanooga to Atlanta, and Chattanooga to Charleston, Savannah, Augusta and Macon, are just and reasonable and do not discriminate against Atlanta.

Grain rates are adjusted with a view to allow as much of the grain producing district to compete for the trade of each southern city, where grain is consumed or distributed to consumers, and in determining the rates from Chattanooga or Louisville to Augusta the rates from other Western points to Augusta are considered, rather than the rates from either Chattanooga or Louisville to Atlanta; and likewise in fixing the rate from Louisville or Chattanooga to Atlanta it is rather the object to enlarge the district which Atlanta draws from, than to increase the area it distributes to, by making low rates to Atlanta from one or more points as compared with Augusta.

The rates of the Georgia Railroad Commission necessarily influence the adjustment of rates between points in that State and extend the water competition influence to inland points and the requisite concessions to meet these complex influences, make it impracticable to conform to any strictly fixed scale of differentials between points of shipment and points of delivery or distribution.

The rate Chattanooga to Augusta, while only $3\frac{1}{2}$ cents higher than to Atlanta and not as much as could be reasonably charged for the additional 171 miles, yet in view of the circumstances and conditions it is just and reasonable.

Grain can be, and has been shipped from the West to Augusta through North Atlantic ports at very low rates by means of sailing vessels to Savannah and thence by Savannah River boats, and if Chattanooga is to compete for the trade at Augusta it must be at rates which would be considered unnecessarily low under the circumstances and conditions which exist at Atlanta.

The additional charge of $3\frac{1}{2}$ cents to Macon as compared with the additional distance of ninety miles is just and reasonable, but if it makes any unjust discrimination it is against Macon rather than Atlanta.

The proportions of the through rates on grain from Chattanooga are a matter of agreement between the several roads and are not controlled by this defendant association.

If Atlanta is at any disadvantage as compared with other cities it is by reason of its location or other causes not within the control of this Association.

The foregoing answer sets forth the main features of all the answers filed in the case.

Re CHICAGO, ST. PAUL & KANSAS CITY R. CO.

ORDER for hearing as to violation of the fourth section of the Act to Regulate Commerce.

At a session of the Interstate Commerce Commission held in the City of Washington, June 20, 1888.

Present, All the Commissioners.

In the Matter of the Chicago, St. Paul & Kansas City Railway Company.

Whereas, A communication has been received from the Chicago, St. Paul & Kansas City Railway Company, informing the Commission that rates have been put in effect upon its line between Chicago and St. Paul which are less than the rates in effect from said cities to intermediate points on the same line, the same being a *prima facie* violation of the fourth section of the Act to Regulate Commerce:

It is, therefore, ordered, That said Company be notified that a public session of the Commission will be held at the United States Court House in the City of Dubuque, in the State of Iowa, on the 25th day of July, A. D. 1888, at 11 A. M., at which time and place said matter will be investigated, and an opportunity will then and there be given to said Company to introduce evidence and be heard in justification of said rates; and

Whereas, The citizens of the several localities upon said line which are affected by the aforesaid rates are entitled to be heard upon said matter;

It is further ordered, That an opportunity be given them for that purpose at said time and place, and that they be notified thereof by publication of a copy of this order in certain newspapers published in said localities to be hereafter designated for that purpose; and

Whereas, Other railroad companies engaged in traffic between St. Paul and Minneapolis are also interested in the matter above stated and in the basis upon which rates may lawfully be made in respect to said traffic;

It is further ordered, That an opportunity be also given them at said time and place to be heard thereon, and that notice thereof be given by mailing a copy of this order to the following named companies, to wit: The Chicago, Milwaukee & St. Paul Railroad Company, The Wisconsin Central Railroad Company, The Chicago, St. Paul, Minneapolis & Omaha Railroad Company, The Chicago & Northwestern Railroad Company, The Chicago, Burlington & Northern Railroad Company, The Minneapolis & St. Louis Railway Company; and

It is further ordered, That any other persons or corporations interested in the matter aforesaid by reason of residence upon any of said lines of road or otherwise, may also be heard thereon at the time and place above designated.

A true copy.

Edw. A. Moseley,
Secretary.

UNITED STATES SUPREME COURT.

ROBERT K. DOW ET AL., *Plffs. in Err.*,
v.

JOHN W. BEIDELMAN.

(From Lawyer's ed. U. S. Reports, Bk. 31.)

1. **Railroad companies** are subject to **legislative control** as to their **rates of fare and freight**, unless protected by their charters.
2. In the absence of any legislative regulation upon the subject, the courts must decide for the company, as they do for private persons, when controversies arise, **what is reasonable**.
3. **Where property** has been **clothed with a public interest**, the **Legislature** may fix a limit to that which in law shall be reasonable for its use. This **limits the courts as well as the people**. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change.
4. The Memphis and Little Rock Railroad Company, as reorganized by the purchasers in 1877, at the sale under mortgage foreclosure, if a lawful corporation of Arkansas, was not the same corporation as that chartered by the Legislature in 1853, but was a **new corporation**, subject to the Constitution and laws in force when it came into existence.
5. The **Legislature**, in the exercise of its power of regulating fares and freights, **may classify the railroads** according to the length of their lines. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.
6. There being no proof in this case of the amount invested by the reorganized corporation or its trustees, this court has no means, if it had the power, to determine that the **rate** of three cents a mile, **fixed as the fare of passengers by the Legislature**, is unreasonable; and it does not appear that there has been any such confiscation as amounts to a taking of property without due process of law, because the income of the road, at that rate of fare, will pay only one and one half per cent on the original cost of the road.
7. If the **classification made by the Legislature** operates uniformly, this court cannot decide whether it was the best that could have been made.

(Submitted Nov. 21, 1887. Decided April 16, 1888.)

IN ERROR to the Supreme Court of the State of Arkansas, to review a judgment of that court affirming a judgment of the State Circuit Court for the statutory penalty for the taking of illegal fare by the agent of a railroad company for the carriage of a passenger. *Affirmed.*

The case sufficiently appears in the opinion. **Mr. U. M. Rose**, for plaintiffs in error:

The Act of Arkansas, entitled "An Act to Regulate the Rates of Charges for the Carriage of Passengers by Railroad," approved April 4, 1887, was repugnant to the Fourteenth Amendment to the United States Constitution which provides that "No State shall deprive any person of life, liberty or property without due process of law."

Santa Clara County v. Southern Pac. R. R. Co. 118 U. S. 394 (30: 118); *Railroad Commission Cases*, 116 U. S. 331 (29: 644); *Ex Parte Koehler*, 23 Fed. Rep. 529; *Cooley*, Const. Lim. 578; *Miller v. New York & E. R. R. Co.* 21 Barb. 519; 2 Morawetz, Corp. § 1075 c; *Black*, Const. Prohibitions, § 26; *Holyoke Water-power Co. v. Lyman*, 82 U. S. 15 Wall. 500 (21: 183).

The court erred in holding that said Act was not repugnant to that clause of the Fourteenth Amendment of the United States Constitution which declares that "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

U. S. v. Cruikshank, 92 U. S. 555 (23: 592); *Missouri v. Lewis*, 101 U. S. 31 (25: 992); *Barbier v. Connolly*, 113 U. S. 31 (28: 924); *Yick Wo v. Hopkins*, 118 U. S. 368 (30: 225); *New Brunswick v. Fitzgerald*, 8 Cent. Rep. 310, 48 N. J. L. 457; *State v. Wood*, 5 Cent. Rep. 345, 49 N. J. L. 85; *McCarthy v. Com.* 1 Cent. Rep. 111, 110 Pa. 243; *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *State v. Winsor*, 2 Cent. Rep. 259, 48 N. J. L. 95; *State v. Bloomfield*, 1 Cent. Rep. 442, 47 N. J. L. 442; *Van Riper v. Parsons*, 40 N. J. L. 1; *Passaic County v. Stevenson*, 46 N. J. L. 173; *Gibbs v. Morgan*, 39 N. J. Eq. 126; *Ernest v. Morgan*, Id. 391; *Woodard v. Brien*, 14 Lea, 520; *Smith v. Warden*, 80 Ky. 608; *State v. Herrmann*, 75 Mo. 341; *Commonwealth v. Patton*, 88 Pa. 258; *Devine v. Cook County*, 84 Ill. 590; *Dougherty County v. Boyt*, 71 Ga. 484; *Seranton School District's Appeal*, 1 Cent. Rep. 626; *S. C.* 4 Cent. Rep. 311, 113 Pa. 176; *People v. Haselwood*, 3 West. Rep. 538, 116 Ill. 319; *Anderson v. Trenton*, 42 N. J. L. 486; *Zeigler v. Gaddis*, 44 N. J. L. 363.

Mr. John H. Rogers, for defendant in error:

It was decided by the Supreme Court of Arkansas in *Searcy v. Yarnell*, 47 Ark. 269, that private individuals cannot rightfully operate a railroad in this State, this prerogative of sovereignty being accorded to corporations only.

Chief Justice Marshall, in *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316 (4: 579) said: "The power to tax involves the power to destroy." The *Chief Justice*, in *Railroad Commission Cases*, 116 U. S. 331 (29: 644) said that "The power to regulate is not the power to destroy."

The right to regulate railroad fares is no longer an open question. It was settled by the *Railroad Commission Cases*, 116 U. S. 307 (29: 636); *Stone v. Wisconsin*, 94 U. S. 181 (24: 102); *Munn v. Illinois*, Id. 113 (24: 77); *Chicago, B. & Q. R. R. Co. v. Iowa*, Id. 155 (24: 94).

To classify railroads by length for the pur

pose of rates has been generally adopted in the Western States.

See 1 Rev. Stat. Mo. 1879, p. 146; Howell, Anno. Stat. Mich. 1882, p. 840, § 3323, sub. secs. 7, 9; Laws Pa. 1876, No. 87, p. 116; Hittell, Code & Stat. Cal. § 5489; Com. Laws Kan. 1879, p. 225, § 57; Acts Wis. 1874, 600, § 4.

Opposing counsel have cited a number of cases from Pennsylvania and New Jersey to show that such a classification is unconstitutional. We call attention to the following cases *contra* from the same States:

Wheeler v. Philadelphia, 77 Pa. 338; *Kilgore v. Magee*, 85 Pa. 401; *Commonwealth v. Patton*, 88 Pa. 258; *Morrison v. Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *Davis v. Clark*, 106 Pa. 377; *Van Riper v. Parsons*, 40 N. J. L. 1; *State Board of Assessors v. Central R. R. Co.* 48 N. J. L. 310. See also *Cincinnati, W. & Z. R. Co. v. Clinton County*, 1 Ohio St. 85; *Cooley*, Const. Lim. 5th ed. 154, note.

If the classification be such that the Act complained of operates uniformly on each class, this is all the Constitution requires.

Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155 (24: 94); *Little Rock & Ft. S. R. R. Co. v. Hanniford*, 5 S. W. Rep. 294.

Mr. Justice Gray delivered the opinion of the court:

The general rule of law that governs this case has been clearly stated and developed in opinions of this court, delivered by the late Chief Justice.

In *Munn v. Illinois*, 94 U. S. 113 [24:77], decided at October Term, 1876, after affirming the doctrine that by the common law carriers or other persons exercising a public employment could not charge more than a reasonable compensation for their services, and that it is within the power of the Legislature "to declare what shall be a reasonable compensation for such services, or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable," the Chief Justice said: "To limit the rate of charges for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one." Pp. 133, 134 [86, 87].

In *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, 94 U. S. 155 [24: 94] decided at the same time, a corporation having a perpetual lease of the railroad of another organized under the general Corporation Law of Iowa of 1851, chapter 43, with the same powers as private individuals to make contracts, as well as the power to establish by-laws and make all rules and regulations deemed expedient for the management of its affairs, in accordance with law, was held to be bound by the subsequent Statute of Iowa of 1874, chapter 68, entitled "An Act to Establish Reasonable Maximum Rates of Charges for Transportation of Freight and Passengers on the Different Railroads of This State," by which those railroads were classified according to the gross amount of their earnings per mile for the preceding year; and the compensation per mile, which those of each class might receive for the transportation of a passenger

with ordinary baggage, was limited to three cents, three cents and a half, and four cents, respectively. Iowa Laws 1874, p. 61. The Chief Justice said: "Railroad companies are carriers for hire. They are incorporated as such, and given extraordinary powers, in order that they may better serve the public in that capacity. They are, therefore, engaged in a public employment affecting the public interest and, under the decision in *Munn v. Illinois*, 94 U. S. 113 [24: 77], subject to legislative control as to their rates of fare and freight; unless protected by their charters." "This company, in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons, when controversies arise, what is reasonable. But when the Legislature steps in and prescribes a maximum of charge, it operates upon this corporation the same as it does upon individuals engaged in a similar business." 94 U. S. 161, 162 [24: 95].

The same rule was affirmed and acted on in several other cases decided at the same time, in the first of which the Chief Justice, in answering "the claim that the courts must decide what is reasonable, and not the Legislature," said: "Where property has been clothed with a public interest, the Legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts, as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change." *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 178 [24: 97, 98]; *Chicago M. & St. P. R. R. Co. v. Ackley*, Id. 179 [24: 99]; *Winona & St. P. R. R. Co. v. Blake*, Id. 180 [24: 99]; *Stone v. Wisconsin*, Id. 181 [24: 102].

Upon like grounds, in *Ruggles v. Illinois*, 108 U. S. 526 [27: 812], and *Illinois Central Railroad Company v. Illinois*, Id. 541 [27: 818], decided at October Term, 1882, the Statute of Illinois of April 15, 1871 (Illinois Laws of 1871, p. 640), which classified the railroads in the State according to their gross annual earnings per mile, and put different limits on the compensation of the different classes per mile for carrying a passenger and his baggage, was adjudged, in opinions delivered by the Chief Justice, to be constitutional and valid, in restricting to the limit of three cents a mile existing corporations, whose charters gave them power to make all by-laws, rules and regulations not repugnant to law, and gave their directors power to establish such rates of toll as they should by their by-laws determine. And two justices who did not assent to those opinions concurred in the judgments, because it was not shown that the rate prescribed by the Legislature was unreasonable.

In *Stone v. Farmers Loan & Trust Company*, 116 U. S. 307 [29: 636], decided at October Term, 1885, the obligation of a contract created by a charter granting similar powers to a railroad corporation and its directors, was held not to be impaired by a Statute of Mississippi, establishing a board of railroad commissioners charged with the duty of preventing the exac-

tion of unreasonable or discriminating rates upon transportation done within the limits of the State; and the Chief Justice said: "It is now settled in this court that a State has power to limit the amount of charges by railroad companies for the transportation of persons and property within its own jurisdiction, unless restrained by some contract in the charter, or unless what is done amounts to a regulation of foreign or interstate commerce." P. 325 [642]. He added, however: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy; and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad company to carry persons and property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law." P. 331 [644]. The opinions of the two dissenting justices were grounded upon the provisions of the charter, and upon its not having been expressly made subject to alteration or repeal by the Legislature. The cases, decided at the same time, of *Stone v. Illinois Cent. R. R. Co.* 116 U. S. 347 [29:650] and *Stone v. New Orleans & Northeastern Railroad Company*, Id. 352 [29:651] were substantially similar.

As applied to freights and fares for transportation not extending beyond the limits of the State by which the railroad company is incorporated, the authority of the Legislature is not affected by the later decision in *Wabash, St. Louis & Pacific Railway Co. v. Illinois*, 118 U. S. 557 [30:244].

The case at bar is quite clear of any of the questions upon which the members of the court have heretofore differed in opinion.

If the Memphis and Little Rock Railroad Company, as reorganized by the purchasers at the sale under the decree of foreclosure of the previous mortgages, was a lawful corporation of the State of Arkansas, it was not the same corporation as that chartered by the Legislature in 1853, but was a new corporation, subject to the provisions of the Constitution and laws in force when it first came into existence, that is to say, in 1877. *Memphis & L. R. R. Co. v. Railroad Comrs.* 112 U. S. 609 [28:837].

The Constitution of Arkansas of 1874 contains the following provisions:

"Corporations may be formed under general laws, which laws may, from time to time, be altered or repealed. The General Assembly shall have power to alter, revoke or annul any charter of incorporation now existing and revocable at the adoption of this Constitution, or that may be hereafter created, whenever, in their opinion, it may be injurious to the citizens of the State, in such manner, however, that no injustice shall be done to the corporators." Art. 12, sec. 6.

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroad, canal and turnpike companies, for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures." Art. 17, sec. 10.

The Legislature of Arkansas, by the Statute of April 4, 1887, fixed the maximum fare that any corporation, trustees, or persons, operating a line of railroad, might charge and collect for carrying a passenger within the State, at eight cents a mile on a line fifteen miles long or less, five cents a mile on a line more than fifteen and less than seventy-five miles long, and three cents a mile on a line more than seventy-five miles long. The line of the road of the plaintiffs in error is more than seventy-five miles long, and they charged more than three cents a mile, and were therefore held to be subject to the penalty imposed by the statute for any violation of its provisions.

The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to three cents a mile. They argue that it is so in this case, by reason of the admitted fact, that with the same traffic that their road has now, and charging for transportation at the rate of three cents per mile, the net yearly income will pay less than $1\frac{1}{2}$ per cent on the original cost of the road, and only a little more than 2 per cent on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equalled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would under any circumstances have the power, of determining that the rate of three cents a mile fixed by the Legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law.

It is equally clear that the plaintiffs in error have not been denied the equal protection of the laws.

The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the amount of the business which they have done or appear likely to do. Whether the classification shall be according to the amount of passengers and freight carried, or of gross or net earnings, during a previous year, or according to the simpler and more constant test of the length of the line of the railroad is a matter within the discretion of the Legislature. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws.

A similar question was presented and decided in *Chicago, Burlington & Quincy Railroad Co. v. Iowa*, above cited. It was there objected that a statute regulating the rate for the carriage of passengers, by different classes of railroads, according to their gross earnings per mile, was in conflict with art. 1, sec. 4, of the Constitution of Iowa, which provides that "all laws of a general nature shall have a uniform operation," and "the General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens." In answer-

ing that objection, the Chief Justice said: "The statute divides the railroads of the State into classes according to business, and establishes a maximum of rates for each of the classes. It operates uniformly on each class, and this is all the Constitution requires." "It is very clear that a uniform rate of charges for all railroad companies in the State might operate unjustly upon some. It was proper, therefore, to provide in some way for an adaptation of the rates to the circumstances of the different roads; and the General Assembly, in the exercise of its legislative discretion, has seen fit to do this by a system of classification. Whether this was the best that could have been done is not for us to decide. Our province is only to determine whether it could be done at all, and under any circumstances. If it could, the Legislature must decide for itself, subject to no control from us, whether the common good requires that it should be done." 94 U. S. 163, 164 [24:95, 96].

Judgment affirmed.

FRANK RATTERMAN, Treasurer of Hamilton County, Ohio, *Appt.*,

v.

WESTERN UNION TELEGRAPH COMPANY.

WESTERN UNION TELEGRAPH COMPANY, *Appt.*,

v.

FRANK RATTERMAN, Treasurer of Hamilton County, Ohio.

(From Lawyers' ed. U. S. Reports, Bk. 31.)

1. **Where the subjects of taxation can be separated**, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the **court** will act upon this distinction, and **will restrain the tax on interstate commerce**, while permitting the State to collect that upon commerce wholly within its own territory.
2. The **telegraph** is an instrument of **commerce**.
3. A single **tax**, assessed under the **Statutes of Ohio, upon the receipts of a telegraph company** which were **derived partly from interstate commerce**, and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is **not wholly invalid**, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce.
4. The collection of the **taxes on that portion of the receipts derived from interstate commerce** should be **enjoined**, and the treasurer should be permitted to collect the other tax upon property of the company and upon the receipts derived from commerce entirely within the limits of the State.

(Argued March 21, Decided May 14, 1888.)

INTER S.

CROSS appeals from a decree of the Circuit Court of the United States for the Southern District of Ohio, on certificate of division in opinion in reference to the validity of a tax, assessed under the Statutes of Ohio, upon the receipts of a telegraph company, derived partly from interstate commerce and partly from commerce within the State, but which were assessed in gross and without separation or apportionment. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Wm. M. Ramsey, Willard Brown, Charles W. Wells and Lawrence Maxwell, Jr., for the Telegraph Company:

Under section 693, U. S. Rev. Stat. an appeal may be taken without respect to the amount involved.

Dow v. Johnson, 100 U. S. 158 (25: 632); *Watterville v. Van Slyke*, 116 U. S. 699 (29: 772).

Section 699, sub. 4, Rev. Stat. gives this court jurisdiction without regard to the sum or value in dispute.

Bowman v. Chicago & N. W. R. Co. 115 U. S. 611, 615 (29: 502, 504).

The tax is invalid as a regulation of interstate commerce.

Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 326 (30: 1200); *Fargo v. Michigan*, 121 U. S. 230 (30: 888); *W. U. Tel. Co. v. Texas*, 105 U. S. 460 (26: 1067).

It is not a tax on property; as such it would be invalid under the Constitution of Ohio.

State v. Hipp, 38 Ohio St. 225; *State v. Frame*, 39 Ohio St. 399, 414; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158); *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19: 357); *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1, 12 (24: 708, 711).

The entire law falls.

W. U. Tel. Co. v. Texas, *supra*; *State v. Perry County*, 5 Ohio St. 497, 506; *Warren v. Charleston*, 2 Gray, 84; *Allen v. Louisiana*, 103 U. S. 80, 84 (26: 318, 319); *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521.

The Western Union Telegraph Company is one of the postal agencies of the Federal Government. It is entitled, as such postal agent, to carry on its operations within the State of Ohio, and the State cannot prohibit it from so doing nor tax it for the privilege.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 436 (4: 608); *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 738, 867 (6: 204, 234).

A tax on internal receipts is invalid.

Union Pac. R. R. Co. v. Peniston, 85 U. S. 18 Wall. 5 (21: 787).

Complainant is a general postal agent of the government.

Pensacola Tel. Co. v. W. U. Tel. Co. 96 U. S. 1, 9 (24: 708, 710).

Messrs. David K. Watson, Atty-Gen. of Ohio, Wm. A. Davidson, County Solicitor, Hamilton County, and Thomas McDougall, for Frank Ratterman, Treasurer:

The constitutionality of a state tax is to be determined by the subject upon which the burden is laid.

State Freight Tax Case, 82 U. S. 15 Wall. 272 (21: 160); *Adler v. Whitbeck*, 7 West. Rep. 201, 44 Ohio St. 539; *Philadelphia & S. Steamship Co. v. Pennsylvania*, 122 U. S. 336 (30: 1201).

The State may tax business.

People v. Thurber, 13 Ill. 554; *State v. Hipp*, 38 Ohio St. 199; *W. U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *Delaware R. R. Tax*, 85 U. S. 18 Wall. 231 (21:896).

The States have authority to tax the estate, real and personal, of all their corporations, including carrying companies.

W. U. Tel. Co. v. Mayer, *supra*; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 (21:164); *Delaware R. R. Tax*, 85 U. S. 18 Wall. 206 (21:888); *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492 (22:595); *Kneeland v. Milwaukee*, 15 Wis. 691; *Fargo v. Michigan*, 121 U. S. 230 (30:888); *Philadelphia & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30:1200); *Moran v. New Orleans*, 112 U. S. 69 (28:653); *Welton v. Missouri*, 91 U. S. 275 (23:347); *Cook v. Pennsylvania*, 97 U. S. 566 (24:1015); *State Tonnage Tax Cases*, 79 U. S. 12 Wall. 204 (20:370); *Webber v. Virginia*, 103 U. S. 344 (26:565); *Pete v. Morgan*, 86 U. S. 19 Wall. 581 (22:201); *Cannon v. New Orleans*, 87 U. S. 20 Wall. 577 (22:417); *Inman Steamship Co. v. Tinker*, 94 U. S. 238 (24:118); *People v. N. Y. Tax Comrs.* 67 U. S. 2 Black. 620 (17:451); *Bank Tax Case*, 69 U. S. 2 Wall. 200 (17:793); *Society for Savings v. Coite*, 73 U. S. 6 Wall. 594 (18:897); *Provident Sav. Inst. v. Massachusetts*, Id. 611 (18:907).

The Legislature of Ohio intended to tax the business done wholly within the State. Its authority to tax the receipts from that business cannot be questioned.

Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 339 (30:1202); *Fargo v. Michigan*, 121 U. S. 241 (30:893); *W. U. Tel. Co. v. Texas*, 105 U. S. 465 (26:1068).

Mr. Justice Miller delivered the opinion of the court:

These are cross appeals from a decree of the Circuit Court for the Southern District of Ohio, Western Division.

The suit was begun by a bill of complaint, filed by the Western Union Telegraph Company against Frank Ratterman, Treasurer of Hamilton County, in the State of Ohio. As the bill is not very long, it is here presented in full:

"To the Judges of the Circuit Court of the United States for the Southern District of Ohio, Western Division:

"The Western Union Telegraph Company, a corporation duly organized and existing under the laws of the State of New York and a citizen of said State, brings this its bill against Frank Ratterman, Treasurer of Hamilton County, Ohio, and a citizen of the State of Ohio.

"And thereupon your orator complains and says:

"That its principal office is, and during the times hereinafter mentioned was, in the City of New York; that during said time it had been and now is engaged in the business of receiving and transmitting for hire telegraph messages between different points in the United States, and in the carrying on of said business has offices in the City of Cincinnati and at other points in the County of Hamilton and in the State of Ohio, and has been engaged in the transmission of messages between said offices

and other points both within and without the State of Ohio.

"That prior to 1869 your orator accepted in writing the provisions of the Act of Congress of July 4, 1866, 14 U. S. Stat. at L. 221; that your orator's wires, poles, batteries, office furniture and other property in the State of Ohio have been and are taxed like other property in said State; that your orator's telegraph lines cross nearly all of the States of the Union and occupy portions of British America, and that a large amount of the commercial transactions, business, and intercourse of the people is carried on by means of their wires.

"That in the month of May, 1887, your orator, under protest, delivered to the auditor of said county a statement, as required by Revised Statutes Ohio, section 2778, showing the entire receipts of your orator in said county for the year next preceding, which said gross receipts amounted to the sum of \$175,210.88, and were principally for business between points in the State of Ohio and points outside the State of Ohio—that is to say, the receipts of your orator for messages and business pertaining to commerce between the States, and not for messages between different points within the State of Ohio; that thereupon said auditor assessed a tax thereon amounting to five thousand two hundred and six and $\frac{9}{100}$ dollars.

"Your orator says that said tax is illegal and void and in violation of the Constitution of the United States.

"Your orator has offered to the defendant and is ready and willing to pay him the taxes chargeable against its personal property within said county, but the defendant refuses to accept payment thereof unless your orator also at the same time pays said total assessment for all of said gross receipts; and, unless restrained, the defendant will impose and enforce the penalties for nonpayment of said tax provided for by Revised Statutes of Ohio, section 2843, to the interference, stoppage, and destruction of your orator's business.

"Wherefore your orator prays that the defendant may be required to accept payment of so much of said tax assessment as covers the property of your orator in the said county, and that he may be enjoined by preliminary injunction and by final decree from levying or collecting the balance of said assessment.

"Your orator prays that a writ of subpoena may issue against the defendant, and that your orator may have such other and further relief as it is in equity and good conscience entitled to."

To this bill a general demurrer was filed, which was overruled by the court. The record then proceeds as follows:

"And thereupon it was agreed by and between the complainant and the defendant that the cause be submitted to the court on the bill without further pleading to the same by the defendant, upon the following facts:

"That of the entire receipts mentioned in the bill \$142,154.18 were for business done by the plaintiff between its officers in said county and points outside of the State of Ohio—that is, for messages and business pertaining to commerce between the States and not for messages between different points within the State of Ohio,—and that the balance of said receipts, to wit,

\$33,056.70 was for business between the offices of the plaintiff in said county and other points within the State of Ohio; and that if said receipts had been so separated and apportioned, and said tax had been separately assessed on the basis of such separation and apportionment the amount of said total tax of \$5,206.90 apportionable to said receipts for interstate commerce would be \$3,931.51, and the amount apportionable to said receipts for business between the offices of the complainant in said county and other points within the State of Ohio would have been \$910.40; and that the remainder of said sum of \$5,206.90, viz., \$364.99, was for tax assessed upon the personal property of the said complainant within the said County of Hamilton aforesaid, namely, upon its instruments, wires, poles and other chattel property which were returned by said complainant to the auditor of said county at a valuation of \$18,059.

"That Exhibit 'A,' hereto annexed and made a part of this stipulation, is a copy of the return made by complainant to the auditor of said county in pursuance of the law of the State of Ohio, and that said complainant made no other return and furnished no other information to said auditor at the time of said return, save what is contained in said return.

"That Exhibit 'B,' hereto annexed and made a part hereof, is a copy of the return of the chattel property of said complainant made at the same time to said auditor.

"It is further agreed that the auditor of said county placed on the tax duplicate of said county said sums of \$175,210.88, and \$18,059 as the personal property of said complainant, to be assessed for taxation in said County of Hamilton, and that the rate of taxation assessed thereupon was the same as was assessed against the personal property listed for taxation by the citizens of said county.

"It is further agreed that complainant, prior to December 20, 1887, offered to pay the tax properly assessable against said return of \$18,059 for personal property, but the defendant refused to accept payment of said assessment of \$5,206.90 unless the whole were paid. The plaintiff did not disclose to said auditor at the time it made said return what portion, if any, of the gross receipts of its said offices in said county was for interstate commerce.

"It is further agreed that neither said auditor nor said Treasurer had any actual knowledge that any portion of the returns of said gross receipts was for interstate commerce business, but said officers knew that plaintiff's said business included interstate commerce.

"And the only knowledge said auditor and said Treasurer had of the business of said Company and what said receipts were derived from was from the returns hereto annexed, marked Exhibit 'A,' and from their knowledge as aforesaid of the plaintiff's business.

"The cause being thus submitted to the court on the foregoing stipulation of facts and the argument of counsel, the court is of the opinion that said receipts and tax may be separated and apportioned, and that said tax, so far as so separated and apportioned to said receipts derived from the interstate commerce, is unconstitutional and void, but valid apportionable to said receipts derived from state business.

INTER S.

"It is thereupon ordered by the court, adjudged and decreed that the defendant is hereby forever enjoined from collecting on said assessment of \$5,206.90 more than the sum of \$1,275.39, and an injunction is refused as to the balance of said tax. It is further ordered that the defendant pay the costs of this suit."

The judges of the circuit court, upon this state of facts, made the following certificate of a difference of opinion:

"This is to certify that at the hearing of the above entitled cause before Hon. Howell E. Jackson, circuit judge, and George R. Sage, district judge, said judges differed in opinion upon the following question of law, to wit:

"Whether a single tax, assessed under the Revised Statutes of Ohio, section 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce.

"And the district judge being of the opinion that such a tax is wholly invalid, and the circuit judge being of the opinion that it is invalid only to the extent and in the proportion that the receipts upon which it is based were derived from interstate commerce, said question is hereby certified to the Supreme Court of the United States for its opinion.

"HOWELL E. JACKSON, *Circuit Judge*.

"GEO. R. SAGE, *District Judge*."

The case has been very fully argued before us upon all the matters properly presented by the record, and it seems probable from the amicable nature of the proceedings and the agreement as to a statement of facts upon which the case was to be tried, without any answer being filed to the bill, that the purpose was to obtain the judgment of this court upon the general subject of the liability of the Corporation to taxation upon the amount of its receipts, and that the certificate of a difference of opinion has been used for that purpose.

With regard to the question which is certified to us as dividing the opinions of the judges of the circuit court, we do not think that there is any difficulty, and can hardly see how it arose in the present case. That question is "whether a single tax, assessed under the Revised Statutes of Ohio, section 2778, upon the receipts of a telegraph company, which receipts were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is wholly invalid, or invalid only in the proportion and to the extent that said receipts were derived from interstate commerce."

We do not think this particular question is material in this case, because the state of facts agreed upon by the parties makes this separation, and presents the matter to the court freed from the point raised by the question that the tax was not separable. Nor do we believe, if there were allegations either in the bill or answer setting up that part of the tax was from interstate commerce and part from commerce wholly within the State, that there would have

been any difficulty in securing the evidence of the amount of receipts chargeable to these separate classes of telegrams, by means of the appointment of a referee or master to inquire into that fact and make report to the court. Neither are we of opinion that there is any real question, under the decisions of this court, in regard to holding that so far as this tax was levied upon receipts properly appurtenant to interstate commerce that it was void, and that so far as it was only upon commerce wholly within the State that it was valid.

This precise question was adjudged in the case of the *State Freight Tax*, 82 U. S. 15 Wall. 232 [21:146]. That was a case in which a Statute of the State of Pennsylvania was examined which provided for a tax upon every ton of freight transported by any railroad or canal in that State, at certain rates,—two cents for one class of freight, three cents for another, and five cents for still another class. The payment of this tax was resisted by the Reading Railroad Company upon the ground that it was levied on interstate commerce. The company made returns to the accounting officers of the Commonwealth, in which they stated separately the amount of freight whose transportation was wholly within the State, and also the amount of the transportation of freight brought into or carried out of that State. This court held that the tax upon the former class, being upon commerce wholly within the State, was valid under the law of Pennsylvania by which it was imposed, but that the latter classes, being commerce among the States, were not subject to such taxation.

This ruling shows that where the subjects of taxation can be separated so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within the State, the court will act upon this distinction, and will restrain the tax on interstate commerce while permitting the State to collect that arising upon commerce solely within its own territory.

In *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 [24:703], it was decided by this court that the telegraph was an instrument of commerce; that telegraph companies were subject to the regulating power of Congress in respect to their foreign and interstate business, and that such a company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods.

In *Western Union Tel. Co. v. Texas*, 105 U. S. 460 [26:1067], the same question presented in this case was before the court,—that of the power of the State to tax telegraphic messages received and delivered by the same Corporation which is now before us. In that case no distinction was made by the statute between what we now call interstate messages and those exclusively within the State. This court, therefore, in reviewing the decision of the Supreme Court of the State of Texas, which had allowed no deduction for taxes on messages sent out of the State, or by government officers on government business, said: "It follows that the judgment, so far as it includes the tax on messages sent out of the State, or for the government on public business, is erroneous. The rule that the regulation of commerce which is confined

exclusively within the jurisdiction and territory of a State, and does not affect other nations or States or the Indian tribes,—that is to say, the purely internal commerce of a State,—belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress. Any tax, therefore, which the State may put on messages sent by private parties, and not by the agents of the Government of the United States, from one place to another, exclusively within its own jurisdiction, will not be repugnant to the Constitution of the United States. Whether the law of Texas, in its present form, can be used to enforce the collection of such a tax is a question entirely within the jurisdiction of the courts of the State, and as to which we have no power of review."

The court reversed the judgment of the Supreme Court of Texas, and remanded the cases with instructions for such further proceedings as justice might require. Evidently, the purpose of this was to permit the Supreme Court of that State, if it could separate the taxes upon the two classes of telegrams, to do so, and to render judgment accordingly.

In the recent case of the *Western Union Tel. Co. v. Attorney-General of Massachusetts*, 125 U. S. 530 [31:790], decided at this term, a tax was levied upon that Corporation, apportioned under the laws of Massachusetts upon the taxable value of its capital stock. The ratio which should have been allotted to that Commonwealth may be supposed to have been properly apportioned to it, ascertaining that portion by means of the length of the lines of the Company in relation to the entire mileage of its lines in the United States. The payment of the tax was resisted, however, partly upon the ground that it was levied upon interstate commerce, but mainly because it was asserted to be a violation of the rights conferred on the Company by the Act of July 24, 1866, now title LXV, sections 5263 to 5269 of the Revised Statutes. It was alleged that the defendant company, having accepted the provisions of that law, was entirely exempt from taxation by the State. This court, however, held that this exemption only extended under that law to so much of the lines of the Telegraph Company as were, in the language of section 5263, "through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States."

It was shown in that case that, of the 2,833.05 miles of the lines of the defendant corporation within the boundaries of Massachusetts, more than 2,334.55 miles came within the terms of that section, being over or along post roads, made such by the United States, or over, under, or across its navigable streams or waters, leaving only 498.50 miles not within such description, on which the Company offered to pay the the proportion of the tax assessed against it according to mileage by the state authorities.

We refer to this now only for the purpose of showing how easily the subject of taxation which is forbidden by the Constitution may be

separated from that which is permissible in this class of cases. The court held in that case that this tax, being in effect levied upon the capital stock or property of the Company in the State of Massachusetts, which was ascertained upon the basis of the proportion which the length of its lines in that State bore to their entire length throughout the whole country, and not upon its messages or upon the receipts for such messages, was a valid tax. The question of interstate commerce, as affecting the tax in that action, was very little pressed by counsel for the Company, but they relied upon the privilege granted by section 5263, already cited, to companies which accepted its provisions, and upon the fact that a large proportion of the lines of the defendant telegraph company were over or along post roads, or over, under, or across the navigable streams or waters of the United States.

In the present case counsel for the Telegraph Company have argued that this statute secures the Corporation from taxation of any kind whatever, and especially as to receipts arising from messages sent over its lines; but that question does not arise in this action, because there is no allegation or averment, either in the bill itself or in the statement of facts, that any part of the lines of the Telegraph Company in the State of Ohio is built over or along a post road, or comes within the provisions of section 5263.

The only reference to this subject is in the following allegation of the bill: "That prior to 1869 your orator accepted in writing the provisions of the Act of Congress of July 4, 1866, 14 U. S. Stat. at L. 221." Under this allegation the complainant can, of course, claim no benefit from the provisions of that section, for it does not appear that any part of the Company's line comes within the description of this section of the Revised Statutes.

Under these views, we answer the question, in regard to which the judges of the circuit court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is *not* wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. Concurring, therefore, with the circuit judge in his action, enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the Treasurer to collect the other tax upon property of the Company and upon receipts derived from commerce entirely within the limits of the State, this decree is *affirmed*.

SUPREME COURT OF NEW JERSEY.

STATE, Nathaniel WATERBURY, *Prosecutor*,
v.
William R. NEWTON, State Dairy Commissioner.

(From Central Reporter, Vol. 12.)

- *1. The **form of conviction prescribed** by the supplement of the Oleomargarine Act which went into effect **May 1, 1887** (P. L. 1887, p. 192), may be **used** in prosecutions instituted after that date **for offenses previously committed**.
2. Under section 5 of the Oleomargarine Act approved March 22, 1886 (P. L. 1886, p. 107), it is **not essential to the guilt of a person** selling oleomargarine colored with annatto, that he **should know** that the **oleomargarine** was so colored.
3. The legislative design in enacting this section, was to secure to dairymen and to the public generally a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with the view of deceiving those purchasing it and of obtaining thereby an improper advantage over rival commodities offered for sale. Hence it is **immaterial that the prohibited commodity is a wholesome food**, since it would be equally wholesome if prepared without the deceptive ingredient.
4. The Legislature may forbid the sale of **counterfeits**.

5. **Law passed by the individual States**, under their general authority over internal concerns, **may incidentally affect foreign and interstate commerce**, without conflicting with the Constitution of the United States, provided they do not discriminate against such commerce and are not inconsistent with the Acts of Congress.

6. The Act of March 22, 1886 (P. L. 1886, p. 107), **rendering penal the sale of oleomargarine colored with annatto, is valid as applied to a sale made in this State by the agent of the manufacturer in Indiana**, although the package sold here was that which had been sent by the manufacturer from Indiana to this State for sale.

(Decided June 7, 1888.)

CERTIORARI to the District Court of Jersey City, to review a judgment in favor of plaintiff in an action to recover a penalty for the violation of the Act to prevent deception in the sale of oleomargarine, etc. *Affirmed*.

Argued before Van Syckel, Knapp and Dixon, JJ.

The facts are sufficiently stated in the opinion of the court.

Mr. J. D. Bedle, for plaintiff in *certiorari*:

The law does not interdict the sale of oleomargarine as defined in section 6, of the Act of March 22, 1886, and if the compound itself is not colored there is no violation of the Act or supplement.

If the object of the Act was to absolutely prevent the manufacture and sale of oleomargarine as recognized in section 6 then the pur-

*Head notes by DIXON, J.

pose would be unlawful as a prohibition against the sale and use of a wholesome and valuable article of food. This is very different from a mere regulation.

Re Jacobs, 98 N. Y. 99; *People v. Marx*, 99 N. Y. 377. See also *People v. Arensburg*, 7 Cent. Rep. 247, 105 N. Y. 123, through which runs the distinction between a mere coloring of the article, and resemblances which are inherent in the article itself.

It cannot be supposed that the Legislature intended to prevent the making of oleomargarine in part out of natural butter, as such butter is ordinarily sold in the market, or out of cotton seed oil, or milk or cream. If so intended, it is an unreasonable exercise of power. The police power of the State is useful and valuable, yet it is always subject to the control of the courts, so as to keep it within reasonable limitations. Property and trade cannot be unduly interfered with under color of its exercise. Whenever this power is maintained the courts can always see that the health, morals or peace of the community require it.

See *Mugler v. Kansas*, 123 U. S. 623 (31 U. S. 205).

The charge was April 13, 1887. The supplement of 1887, which provides a form of conviction, did not go into effect until May 1, 1887. There is no form of conviction given in the Act of 1886, and the Act of 1887 does not apply. No offense is found in the conviction. The record does not show any specific offense or any offense within the provisions of the Act of 1886, the Supplement of 1887 having no application thereto.

See *Hoeberg v. Newton*, 8 Cent. Rep. 623, 20 Vroom, 617.

Mr. W. H. Corbin, for defendant in *certiorari*.

Dixon, J., delivered the opinion of the court: The plaintiff in *certiorari* having, on April 13, 1887, in Jersey City, sold to George W. McGuire a package of oleomargarine colored with annatto, was convicted, before the district court of said city, of thereby violating section 5 of the "Act to prevent deception in the sale of oleomargarine, butterine, or any imitation of dairy products, and to preserve the public health," approved March 22, 1886 (P. L. 1886, p. 107). This conviction is now before us for review.

One objection made by the plaintiff is that the record of conviction is not in the form generally required for summary proceedings of this nature. The form adopted is that prescribed in the amendatory Act which went into effect May 1, 1887 (P. L. 1887, p. 192). The sale was made before May 1, but the prosecution was instituted after that date. The Legislature has the right to regulate the mode of procedure in prosecutions for antecedent offenses, so long as the substantial protections with which the existing laws surround the accused are not impaired. *Cooley*, Const. Lim. 272. The mere form in which the technical record should be made up is not one of these substantial protections, and if the Legislature of 1887 has indicated a purpose to make their form applicable to previous sales, that purpose should be enforced. We think the language of the supplement expresses such a design.

Another objection is that it was neither aver-

red nor proved below that the plaintiff in *certiorari* knew that the oleomargarine was colored with annatto, and without such knowledge he could not, it is urged, be guilty of a penal act.

In *Halsted v. State*, 12 Vroom, 552, the court of errors laid down the principle, that, in regard to statutory offenses, the defendant's knowledge of all the physical facts which go to constitute the offense is not essential to guilt, unless made so by a proper construction of the statute itself. The briefs in that case refer to many decisions illustrating the principle. On recurring to the statute now under review it is plain that there are no words in the enactment showing a purpose to make knowledge a constituent of the penal Act. The prohibition is in clear and simple terms against the sale of oleomargarine colored with annatto. Unless therefore there be discoverable, in what may be deemed the general design of the Legislature, an intention to limit this language to cases where the seller is shown to be cognizant of the character of the article sold, the terms of the statute should be effectuated. This general design, as declared both in the title and in the body of the Act, is to prevent deception in the sale of oleomargarine, and, if we have regard to the public sentiment out of which the law sprung, it was, we think, not only to avoid, for the sake of purchasers, the danger of their buying oleomargarine under the belief that it was butter, but also, thereby to secure to the manufacturers of butter those advantages which fair and open competition would afford. The object was not to punish acts intrinsically wrong, but to prevent acts which, in their results, operated unjustly upon others. This object would be thwarted, if sales could be made with impunity by those ignorant of the ingredients of the article sold. This interpretation of the law does not savor of undue severity. No doubt it may impose some hardship upon some innocent vendors. But the means, which dealers in these products generally have, of informing themselves as to the substances of which they are compounded, are so ample that but few will suffer save through design or negligence, while no practicable degree of caution would protect purchasers; and it is manifest that the Legislature has thought proper to incur the slight risk of injustice to the few, in order to escape the greater risk of injustice to the many.

The plaintiff further objects that as oleomargarine, although colored with annatto, is a wholesome article of food the Legislature has no power to prohibit its sale.

If the sole basis for this statute were the protection of the public health, this objection would be pertinent, and might require us to consider the delicate questions, whether and how far the judiciary can pass upon the adaptability of the means which the Legislature has proposed for the accomplishment of its legitimate ends. But, as already intimated, this provision is not aimed at the protection of the public health. Its object is, to secure to dairymen and to the public at large a fuller and fairer enjoyment of their property, by excluding from the market a commodity prepared with a view to deceive those purchasing it. It is not pretended that annatto has any other function in the manufacture of oleomargarine than to

make it a counterfeit of butter, which is more generally esteemed and commands a higher price. That the Legislature may repress such counterfeits does not admit, I think, of substantial question. Laws of like character have of late years been frequently assailed before the courts, but always without success. A reference to many of them will be found in *Powell v. Commonwealth*, 5 Cent. Rep. 890, 114 Pa. 265; *S. C. U. S. Supreme Court*, Bk. 31 L. ed.—and *People v. Arensburg*, 7 Cent. Rep. 247, 105 N. Y. 123. The validity of the present Act was recognized in this court in *Carter v. Camden District Court*, 8 Cent. Rep. 624, 20 Vroom, 600.

Another objection suggested by counsel is that the application of the statute to the present case, is a violation of the provision of the Federal Constitution which empowers Congress to regulate commerce among the several States.

The plaintiff in *certiorari* was an agent of the manufacturer in Indiana, and sold the oleomargarine in the package in which it had been sent to him by his principal for sale. The package contained ten pounds only, and there is nothing in the testimony to indicate that it was sold here for the purpose of being transported out of the State or otherwise than it would have been sold directly to a consumer. Whether the State can prevent such a sale seems not yet entirely settled under the decisions of the Supreme Court of the United States.

As far back as *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6 L. ed. 678], that court decided that a state law, requiring an importer to take a license before he should be permitted to sell imported goods in the original package, was in conflict with the constitutional clause prohibiting States from levying duties on imports, and also with that giving Congress the power of regulating commerce with foreign nations and among the several States. And as recently as last March, in *Boeman v. Chicago & Northwestern Railway Company*, 125 U. S. 465 [31 L. ed. 700], Mr. Justice Matthews, delivering the judgment of the court, that a statute of Iowa, forbidding common carriers to bring intoxicating liquors into the State, except on consignment to persons licensed to sell the same, was contrary to the commerce clause of the Constitution, expressed his purpose to refrain from rendering any opinion on that point, whether the right of transportation from one State to another includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates. Between these cases there are many decisions, and still more numerous judicial discussions, upon this large and complex theme of commercial regulation, and it is difficult to gather from them all what rules are to control the subject. But so far as I have been able to analyze them, I think these principles are deducible:

First. The power to pass laws which directly regulate foreign or interstate commerce is vested in Congress exclusively, except that, in particular instances, where it would be impracticable to enforce rules uniform throughout the country, the individual States may pass such laws, provided they be not inconsistent with the Acts of Congress. Of

this exceptional character have been considered laws relating to pilots (*Cooley v. Wardens of Port of Phila.* 53 U. S. 12 How. 299 [13 L. ed. 996]); port regulations (*The James Gray v. The John Fruser*, 62 U. S. 21 How. 184 [16 L. ed. 106]); ferries (*Conkey v. Taylor*, 66 U. S. 1 Black, 603 [17 L. ed. 117]; *Marshall v. The Adriatic*, 107 U. S. 365 [27 L. ed. 497]); bridges over navigable waters (*Gilman v. Phila.* 70 U. S. 3 Wall. 713 [18 L. ed. 96]; *Cardwell v. Am. River Bridge Co.* 113 U. S. 205 [28 L. ed. 959]); liens upon vessels (*Rood v. Heartt*, 88 U. S. 21 Wall. 558 [22 L. ed. 654]); the improvements of harbors, bays and rivers (*Mobile Co. v. Kimball*, 102 U. S. 691 [26 L. ed. 238]); wharfage (*Cincinnati etc. Packet Co. v. Trustees Catlettsburg*, 105 U. S. 559 [26 L. ed. 1169]); *Quachita etc. Packet Co. v. Aiken*, 121 U. S. 444 [30 L. ed. 976]); and quarantine (*Morgan R. & Steamship Co. v. Louisiana*, 118 U. S. 455 [30 L. ed. 237]).

Second. Laws passed by the individual States, in pursuance of their general authority over internal concerns, may incidentally affect foreign and interstate commerce, provided they do not discriminate against such commerce and are not inconsistent with the Acts of Congress. On this principle, state laws were maintained with respect to their incidental effect upon commerce in *The License Cases*, 46 U. S. 5 How. 504 [12 L. ed. 256]; *Woodruff v. Parham*, and *Hinson v. Lott*, 75 U. S. 8 Wall. 123, 148 [19 L. ed. 382, 387]; *Phila. & R. R. Co. v. Pa.* 82 U. S. 15 Wall. 284 [21 L. ed. 164]; *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 [21 L. ed. 470]; *Chicago etc. R. Co. v. Fuller*, 84 U. S. 17 Wall. 560 [21 L. ed. 710]; *Sherlock v. Al-ling*, 93 U. S. 99 [23 L. ed. 819]; *Munn v. Illinois*, and *Chicago etc. R. Co. v. Iowa*, 94 U. S. 113, 135 [24 L. ed. 77, 94]; *Machine Co. v. Gage*, 100 U. S. 676 [25 L. ed. 754]; and *Smith v. Alabama*, 124 U. S. 465 [31 L. ed. 508]; but in *Welton v. Mo.* 91 U. S. 275 [23 L. ed. 347]; *Hannibal etc. R. Co. v. Husen*, 95 U. S. 465 [24 L. ed. 527]; *Cook v. Pennsylvania*, 97 U. S. 566 [24 L. ed. 1015]; *Guy v. Baltimore*, 100 U. S. 434 [25 L. ed. 743]; ; *Webber v. Virginia*, 103 U. S. 344 [26 L. ed. 565]; and *Wal-ling v. Michigan*, 116 U. S. 446 [29 L. ed. 691], state regulations were adjudged inoperative against foreign or interstate commerce, on account of their unfavorable discrimination.

The difficulty of determining whether a state law amounts to an attempt to regulate foreign or interstate commerce directly, and is therefore invalid, under the principle first stated, or only incidentally affects such commerce and so may be sustained upon the second principle, will be readily surmised, and the fluctuations of the supreme court itself, in endeavoring to observe the demarcation, may, I think, be perceived, on comparing *Reading & R. R. Co. v. Pennsylvania*, 82 U. S. 15 Wall. 284 [21 L. ed. 164], with *Phila. & S. Steamship Co. v. Pa.* 122 U. S. 326 [30 L. ed. 1200]; *Munn v. Illinois*, 94 U. S. 113 [24 L. ed. 77], and following cases, with *Wabash etc. R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244], and *Machine Co. v. Gage*, 100 U. S. 676 [25 L. ed. 754], with *Robbins v. Shelly Co. Taxing Dist.* 120 U. S. 489 [30 L. ed. 694]. Such a comparison will justify the remark of Mr. Justice Miller in *Fargo v. Michigan*, 121 U. S. 230,

240 [30 L. ed. 888, 893]: "With reference to the utterances of this court until within a very short time past, as to what constitutes commerce among the several States, and also as to what enactments by the State Legislatures are in violation of the constitutional provision on that subject, it may be admitted that the court has not always employed the same language, and that all the judges of the court who have written opinions for it may not have meant precisely the same thing."

Adopting these principles as *criteria*, the present statute seems valid with regard to the transaction now under consideration. Bearing in mind what had been said as to the purport of this law, and noting the declarations of the Supreme Court of the United States in reference to the scope of the police power of the States, the enactment appears to come within this department of legislative authority. "The police power," says *Mr. Justice Field*, in *The Slaughter House Cases*, 83 U. S. 16 Wall. 87 [21 L. ed. 412], "undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety of society." So *Mr. Justice Bradley*, in *Beer Company v. Massachusetts*, 97 U. S. 33 [24 L. ed. 992]: "There seems to be no doubt that the police power extends to the protection of the lives, health and property of the citizens, and to the preservation of good order and the public morals;" and *Mr. Justice Harlan*, in *Guy v. Baltimore*, 100 U. S. 443 [25 L. ed. 746]: "In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people." A statute forbidding the sale of an article manufactured with the view of deceiving purchasers and in a manner likely to accomplish that result, is within the power thus described.

The application of this statutory prohibition to sales of oleomargarine brought from other States, and not intended for further transportation, produces only an indirect and incidental effect upon interstate commerce. It may be conceded that, according to the views expressed in *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6 L. ed. 678], goods imported for the purpose of sale continue to be the subjects of foreign or interstate commerce until the imported package is broken up or sold by the importer, and, until they become thus incorporated with the mass of property in the State, traffic in them is free from all legislative regulations except such as Congress may prescribe, whose silence would only evince a purpose to have the traffic untrammelled. But later judicial opinions depart somewhat from these views. Thus *Chief Justice Taney* in *The License Cases*, 46 U. S. 5 How. 586 [12 L. ed. 293] said, "Although the gin sold" (being in the original package), "was an import from another State, and Congress has clearly the power to regulate such importations under the grant of power to regulate commerce among the several States, yet as Congress has made no regulations on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which

the State may suppose to be its interest or duty to pursue."

So in *Hinson v. Lott*, 75 U. S. 8 Wall. 148 [19 L. ed. 387], *Mr. Justice Miller*, speaking of a state law which imposed a tax of fifty cents a gallon on liquors introduced into the State for sale (a like tax being levied upon liquors manufactured in the State) said: "As the effect of the Act institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the States." So in *Brown v. Houston*, 114 U. S. 622 [29 L. ed. 257], coal in New Orleans, transported thither from Pennsylvania by its owners, who resided in Pittsburgh, was decided to be subject to taxation in common with other property under the laws of Louisiana, *Mr. Justice Bradley* saying, "the coal had arrived at its destination and was put up for sale—it was a commodity in the market of New Orleans—it had become a part of the general mass of property in the State." Likewise in *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 497 [30 L. ed. 697], *Mr. Justice Bradley* said: "When goods are sent from one State to another for sale or in consequence of a sale, they become part of its general property and amenable to the laws, provided that no discrimination be made against them as goods from another State."

Having thus held that goods brought into one State from another become subject to the general jurisdiction of the former State as soon as they are deposited at their final destination; the court in *Coe v. Errol*, 116 U. S. 517 [29 L. ed. 715], decided that goods, intended for transportation to another State, did not pass beyond the general jurisdiction of the State in which they were, and into the exclusive jurisdiction of Congress, as articles of interstate commerce, until they were shipped, or entered with a common carrier for transportation to another State, or were started upon such transportation in a continuous route or journey.

In conformity with these later cases, it seems proper to conclude that the package of oleomargarine, with which we are now dealing, became, on its delivery to the consignee in Jersey City, subject to our laws relating generally to all articles of that nature in the State, unless those laws are opposed to the legislation of Congress. The only federal law with reference to the selling of oleomargarine is that passed August 2, 1886 (24 U. S. Stat. at L. p. 209), regulating the manufacture, etc., and imposing a special tax on those dealing in it. This law incorporates with itself section 3243 of the Revised Statutes, which expressly repels the inference that the payment of such a tax will legalize the traffic, and implies that the prohibition of such traffic by state legislation is permissible. *McGuire v. Com.* 70 U. S. 3 Wall. 387 [18 L. ed. 226]; *License Tax Cases*, and *Pervear v. Com.* 5 Wall. 462, 475 [18 L. ed. 497, 608].

Our opinion is that the state law is constitutional.

None of the objections presented by the plaintiff can prevail, and his conviction should be affirmed.

THE INTERSTATE COMMERCE COMMISSION.

William C. SCOFIELD *et al.*

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

(No. 81.)

1. Upon the facts of this case it is found, and held, that there is an **unlawful preference** given by the carrier, in **favor of oil shipments in tank car lots**, as against like shipments in barrels car load lots, which is ordered to be corrected, and the mode prescribed by which this must be done, giving equal rates on each per pound.
2. It is a common-law and charter **duty of every railway carrier** subject to the Act to Regulate Commerce to **furnish** a proper and **adequate car equipment** for all the reasonable needs of the business it advertises and undertakes to do, and if the carrier fails to do this, to the wrongful injury of the shipper, it is liable in damages therefor, but the Statute has not clothed the Interstate Commerce Commission with the jurisdiction to order the carrier to furnish any particular equipment of cars, or in fact any cars at all. It is the duty of such carrier to select and furnish its own equipment of cars, under all the responsibility which the law requires of it in so vital and important a matter, for the public has not undertaken to divide responsibility with the carrier in this respect.
3. The law does not forbid a carrier from **obtaining cars** for the transportation of freight over its line **from other carriers**, or car furnishing companies, but in every such instance the **rates of freight** must be exactly the same, and none other, as they would be if such cars were owned by the carrier so using them.
4. The law does not forbid a carrier from **obtaining cars from a shipper** for the **transportation of such shipper's freight** over its line, but in every such instance, after deducting a reasonable rent published in the tariff as part of the rate and paid by the carrier to the shippers for the use of such cars, the **rates** must be exactly the same, and none other, as upon freight transported in the same service in the carrier's own cars; and in every such transaction the carrier at its peril, must see to it that a shipper furnishing his own cars, receives no other or different rates than other shippers who use the cars of the carrier for a similar service.
5. To render a **preference** of one over another **unlawful, under the Act to Regulate Commerce**, it is not necessary that it should be accomplished by any "device;" and it is equally true that the ingenuity of man cannot invent a "device" for the perpetration of an unlaw-

ful preference on the part of a carrier engaged in interstate commerce, without incurring the penalties prescribed by the Statute.

6. In this particular instance, on account of the phenomenal **differences in expense of service rendered**, the exceptionally high rates on oil in barrels less than car load lots as compared with oil in car load lots, are sustained; but the defendant and all other carriers engaged in interstate commerce, are notified that there seems to be too great a tendency on their part, to make **excessive differences in favor of all shipments generally in car load lots**, as against shipments of similar articles in less than car load lots, and that it would be well for each of them to look to their tariffs in this respect, before the Commission takes further action on this subject.

(Heard January 18, Decided July 19, 1888.)

COMPLAINT alleging the imposition of unjust rates and classification for the transportation of petroleum, with the object of giving a preference to the Standard Oil Company. See complaint, 1 Inters. Com. Rep. 593.

Messrs. Blanden & Buell, for petitioners.
Mr. George C. Greene, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The complaint contains the following averments: that William C. Scofield, Daniel Shurmer, John Teagle, and Charles W. Scofield are partners under the name and style of Scofield, Shurmer & Teagle; that James R. Timmins and Andrew R. Timmins are partners under the name and style of James R. Timmins & Company; that Christian Wurwage is doing business under the name and style of the Manufacturers' Oil Company; that John W. Fawcett and Thomas F. Wright are partners under the name and style of J. W. Fawcett & Company; that Alfred Whitaker is doing business under the name and style of the Brooks Oil Company; that William T. Vliet, Willard L. Nutt, and Martin P. Case are partners under the name and style of Vliet, Nutt & Company; that W. Carroll Lawrence, Felix Burgert, Henry C. Meyers, and August C. Schade are partners under the name and style of the Merchants' Oil Company; that the Excelsior Refining Company is a corporation duly organized under the laws of the State of Ohio; that the Globe Oil Company is a corporation duly organized under the laws of the State of Ohio; that the Cleveland Refining Company is a corporation duly organized under the laws of the State of Ohio, and that Louis C. Carran is doing business under the name and style of L. C. Carran & Company.

The defendant, the Lake Shore & Michigan Southern Railway Company, is a corporation organized under the laws of the State of Ohio, and has its principal office in the City of Cleveland in said State; that it is consolidated

with corporations duly organized in the States of New York, Pennsylvania, Indiana, Michigan, and Illinois, respectively; that as thus consolidated it owns and operates a continuous line of railroad from the City of Buffalo, in the State of New York, through said City of Cleveland, in the State of Ohio, to the City of Chicago, in the State of Illinois; that said continuous line extends through and reaches places hereinafter named and others in the States of New York, Pennsylvania, Ohio, Indiana, Michigan, and Illinois; that said Railway Company is a common carrier upon said line of railroad, engaged in the transportation of passengers and property to and from said City of Cleveland, from and to places without said State of Ohio.

Complainants are all engaged in the business of refining, manufacturing, and dealing in petroleum and its products at said City of Cleveland, and in pursuance of said business ship their goods over defendant's said line of railroad to places without said State of Ohio reached by said line of road, its branches and connections.

1. The defendant has established and published a schedule showing the rates and charges for the transportation of petroleum and its products in barrels upon its said railroad, in car load lots and in less than car load lots, and which is now in force thereon. Said rates and charges for less than car load lots are excessive, unjust, and unreasonable; and, as evidencing and illustrating said allegations of excessiveness, injustice, and unreasonableness, they show that said rates in car load lots and in less than car load lots from said City of Cleveland to the places named are as follows, viz.:

| | In car load lots, per barrel. | Less than car load lots, per barrel. |
|---|-------------------------------------|---|
| To Chicago, in the State of Illinois..... | 50 cts. | 1 00 |
| To Grand Rapids, in the State of Michigan..... | 50 " | 1 00 |
| To Kalamazoo, in the State of Michi- gan..... | 40 " | 92 |
| To Detroit, in the State of Michigan..... | 30 " | 64 |

2. The defendant has established and published a schedule showing the rates and charges for the transportation of petroleum and its products in barrels in car load lots, and in bulk in tank cars upon its said railroad, which is now in force thereon. Said rates and charges for transportation in barrels in car load lots are excessive, unjust, and unreasonable; and, as evidencing and illustrating said excessiveness, injustice, and unreasonableness, they show that said rates and charges in barrels in car load lots and in bulk in tank cars from said City of Cleveland to the places named are as follows, viz.:

| | Car load lots in bulk in tank cars, per bbl. | Car load lots in barrels, per bbl. |
|--|---|--|
| To Chicago, in the State of Illinois..... | 38 cts. | 50 cts. |
| To Detroit, in the State of Michigan..... | 22 cts. | 30 cts. |
| To Buffalo, in the State of New York..... | 25 cts. | 34 cts. |
| To Kalamazoo, in the State of Michigan..... | 35 cts. | 46 cts. |

3. The defendant has established and pub-

lished a schedule of rates and charges for the transportation of petroleum and its products in barrels in car load lots and in less than car load lots upon its said railroad, and which is now in force thereon. Said rates and charges constitute and are an undue and unreasonable preference and advantage to the said traffic in car load lots, and an undue and unreasonable prejudice and disadvantage to said traffic in less than car load lots; and, as evidencing and illustrating said undue and unreasonable preference and prejudice and disadvantage, respectively, they show that the said rates and charges in car load lots and in less than car load lots, respectively, from said City of Cleveland to the places named are as follows, viz.:

| | In car load lots, per bbl. | Less than car load lots, per bbl. |
|---|----------------------------------|---|
| To Chicago, in the State of Illinois..... | 50 cts. | \$1 00 |
| To Grand Rapids, in the State of Michigan..... | 50 cts. | 1 00 |
| To Kalamazoo, in the State of Michigan..... | 40 cts. | 92 |
| To Buffalo, in the State of New York..... | 34 cts. | 56 |
| To Detroit, in the State of Michigan..... | 30 cts. | 64 |
| To South Bend, in the State of Indiana..... | 42 cts. | 92 |

4. Defendant has established and published a schedule of rates and charges for transportation of petroleum and its products in bulk in tank cars and in car load lots in barrels, and in less than car load lots in barrels upon its said railroad, and which is now in force thereon. Said rates and charges constitute and are an undue and unreasonable preference and advantage to the said traffic in bulk in tank cars, and an undue and unreasonable prejudice and disadvantage to said traffic in car load lots in barrels and in less than car load lots in barrels; and, as evidencing and illustrating said undue and unreasonable preference and prejudice and disadvantage, respectively, they show that the said rates and charges in bulk in tank cars and in car load lots in barrels and in less than car load lots in barrels, respectively, from said City of Cleveland to the places named are as follows, viz.:

| | In tank cars, per bbl. | In barrels in car load lots, per bbl. | In barrels less than car load lots, per bbl. |
|---|---------------------------|---|--|
| To Chicago, in the State of Il- linois..... | 38 cts. | 50 cts. | \$1 00 |
| To Buffalo, in the State of New York..... | 25 | 34 | 56 |
| To Detroit, in the State of Michi- gan..... | 22 | 30 | 64 |
| To Grand Rapids, in the State of Michigan..... | 38 | 50 | 1 00 |
| To Kalamazoo, in the State of Michigan..... | 35 | 46 | 92 |
| To South Bend, in the State of Indiana..... | 31½ | 42 | 92 |
| To Elkhart, in the State of In- diana..... | 31½ | 42 | 88 |
| To Erie, in the State of Penn- sylvania..... | 22 | 30 | 54 |

5. The defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in barrels in car load lots and in less than car load lots from said City of Cleveland to places without and beyond the State of Ohio, reached

by its said line of railroad, and which is now in force thereon; that as a part of said schedule of rates and charges it is provided that a minimum car load in barrels shall be sixty barrels. The rates and charges per barrel for less than car load lots as thus established is from 50 to 150 per cent higher than the rate in car load lots. The floor capacity of defendant's cars, in which said commodities are transported in barrels, is from forty-eight to not more than fifty-three of said barrels, and for the transportation of said commodities when transported in said cars to the full floor capacity thereof, and in quantities less than sixty barrels, defendant charges the less than car load rates for each barrel. In order to transport in each of said cars sixty barrels of said commodities it becomes and is necessary that those barrels in excess of the floor capacity be placed upon the top of those upon the floor which cause leakage and damage to the barrels thus placed above and below, which said leakage and damage is by said schedule entirely at the risk of the owner. Said regulation of said schedule, fixing sixty barrels as a minimum car load, is unjust and unreasonable; and the charge per barrel at said less than car load rates on the full floor capacity of the car when that is less than sixty barrels is excessive, unjust, and unreasonable.

6. Defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in bulk in tank cars, and that it transports a large quantity of said commodities at said rates in said tank cars; that defendant fails and refuses to furnish to complainants the tank cars necessary to ship said commodities at said rates, according to said schedule, and defendant refuses to furnish the apparatus, facilities, and appliances needful to load and unload said commodities transported and to be transported in bulk in said tank cars; that said defendant rebates from its said schedule rates and charges to shippers furnishing said tank cars a mileage allowance of three fourths of a cent for each and every said tank car so furnished by shippers. Said defendant in its said schedule charges for the transportation of said commodities in said tank cars a less amount than it charges for the transportation of said commodities in barrels, and that said less amount, in combination with said mileage allowance, constitutes and is an undue and unreasonable preference and advantage to the said traffic in bulk in tank cars over the said traffic in barrels, and constitutes and is an undue and unreasonable prejudice and disadvantage to said traffic in barrels.

7. The Standard Oil Company is a corporation duly organized under the laws of the State of Ohio, with its principal office in the City of Cleveland and in said State, and is engaged in the business of refining, manufacturing, and dealing in petroleum and its products, and ships said commodities in tank cars in the manner aforesaid over defendant's said railroad from said City of Cleveland to places thereon without the State of Ohio at said rates.

That the facts, acts, and omissions of defendant hereinbefore set forth in the complaints numbered, respectively, from 1 to 7, inclusive, separately and in combination, all

and singular, constitute and are, and by defendant are designed to be, a device whereby defendant charges, demands, collects, and receives from said Standard Oil Company a less sum for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions than it charges, demands, collects, and receives from complainants therefor; and whereby defendant makes and gives, and intends to make and give, an undue and unreasonable preference and advantage to said Standard Oil Company in the transportation of said commodities, and subjects, and intends to subject, complainants to an undue and unreasonable prejudice and disadvantage in the transportation of said commodities.

By way of general averment, and as additional and supplementary to each and every of the above stated and numbered complaints, and for brevity of statement, complainants attach hereto the several schedules of rates and charges of the defendant above referred to and make the same a part hereof and of each and every of said complaints stated and numbered as aforesaid.

That petroleum and its products herein referred to are, by the classification adopted by the defendant and in force upon its said line of railroad, classed as third class and charged accordingly upon a computation of 400 pounds weight for each and every barrel when transported in less than car load lots.

The prayer of the petition is that the Commission investigate the charges and complaints herein preferred, and if said acts and omissions complained of are found to exist and to be unlawful the Commission will order and direct said defendant to desist from and cease such unlawful acts and omissions, and for all such further action, order, and finding in the premises as to the Commission may seem just and right.

To the foregoing complaint the Lake Shore & Michigan Southern Railway Company answered as follows:

1. It admits the allegations contained in the petition touching the complainants, copartnerships, and incorporations and the incorporation of the respondent, and that respondent owns and operates a railroad as a common carrier, as alleged in said petition, and that complainants are engaged in business and ship some of their goods as alleged.

2. It admits that it has established and published schedules showing the rates and charges for the transportation of petroleum and its products in barrels upon its railroad in car load lots and in less than car load lots and in bulk in tank cars, as alleged in the complaints numbered 1 to 4, both inclusive, in said petition; but it denies that said rates and charges for less than car load lots or for the transportation in barrels in car load lots are excessive, unjust, or unreasonable, or that said rates and charges or any of them constitute or are an unjust or unreasonable preference and advantage to the traffic in car load lots, or that said rates and charges constitute, and are an undue and unreasonable preference and advantage to said traffic in bulk in tank cars or an undue and unreasonable prejudice and disadvantage to the said traffic in car load lots in barrels. On

the contrary, it alleges that the rates aforesaid are just and reasonable and are fixed and adjusted fairly and equitably; that the circumstances and conditions under which such transportation is made in barrels in less than car load lots, in barrels in car load lots, and in tank cars, are essentially dissimilar and unlike, and warrant and justify the difference in rates and charges which has been made in the tariffs of respondent.

3. It admits that it has established and published a schedule of rates and charges, as alleged in the fifth complaint in said petition, and that it has provided that a minimum car load in barrels shall be sixty barrels, and alleges that the rates and charges for less than car load lots are fixed and established by the tariffs and schedules, a copy of which is attached to said petition, and not other or different.

It alleges that the capacity of respondent's cars, in which said commodities are transported in barrels, is ample for the proper loading and transportation of sixty barrels and upwards, and that if properly loaded the placing of some of the barrels upon others does not produce leakage or damage to the barrels.

It denies that the regulations fixing sixty barrels as a minimum car load is unjust or unreasonable, or that the charge per barrel at less than car load rates on the full floor capacity of the car, when that is less than sixty barrels, is excessive, unjust, or unreasonable.

4. It admits that it has established and published a schedule of rates and charges for the transportation of petroleum and its products in bulk in tank cars, as averred in the sixth complaint in said petition, and that it transports a large quantity thereof at the said rates in tank cars. It alleges that it does not now and never has owned and supplied to any shipper any of such tank cars since the year 1880, or the apparatus, facilities, and appliances needful to unload said commodities transported and to be transported in said tank cars, and that none of the complainants has ever applied to or requested this respondent to furnish such cars, or such apparatus, facilities, or appliances for their use, nor has respondent refused to furnish the same; that all tank cars hauled over respondent's road have been furnished by shippers who own and maintain the same, and the facilities, apparatus, and needful appliances for loading and unloading the same, and that respondent has allowed to such shippers for the use of such tank cars a reasonable sum, viz.: a mileage of three fourths of a cent a mile for each mile each such car is hauled over respondent's road by this respondent, and is and ever has been ready and willing to afford said complainants the same facilities and upon the same terms receive and haul tank cars for them and transport for them therein petroleum and its products in bulk, and has never refused to do so.

It denies that the less amount it charges for such transportation in tank cars in combination with said mileage allowance constitutes or is an undue or unreasonable preference and advantage to the said traffic in bulk in tank cars, over the said traffic in barrels, or is an undue and unreasonable prejudice and disadvantage to said traffic in barrels.

5. It admits, in answer to the seventh complaint contained in said petition, that the Standard Oil Company is a corporation engaged in business, and ships said commodities in tank cars, as alleged, and that said Standard Oil Company also ships over respondent's railroad from Cleveland to places within and without the State of Ohio petroleum and its products in barrels in car load lots and in less than car load lots. It admits that the several schedules of rates and charges attached to said petition are those referred to in said petition, and are correct and true, and that petroleum and its products are by the classification adopted by this respondent and in force on its road classed as third class freight and charged accordingly upon a computation of 400 pounds for each barrel when transported in barrels in less than car load lots.

The respondent denies each and every allegation in said seventh complaint contained which is not herein specifically answered or admitted.

And respondent prays that the petition may be dismissed.

Statement of Facts Found.

The defendant has established and published a schedule of rates and charges for the transportation of petroleum and its products in car load lots in barrels, in less than car load lots in barrels, and in tank cars from points to points named in the complaint at the rates therein specified. According to these schedules it is provided that a minimum car load in barrels shall be sixty barrels.

There are as many as twenty or more different kinds of oils produced at Cleveland. These oils are divided into two general classes, namely, illuminating oils and lubricating oils. The bulk of lubricating oils is worth in the market at Cleveland from twenty-five to seventy-five cents per gallon, according to quality, and illuminating oils are worth in the same market from seven to eleven cents per gallon, according to quality. There is a very large market for lubricating oils in Kansas, Nebraska, and and other northwestern States, though these oils are also shipped in large quantities to other portions of the country. The illuminating oils find a general market in this country. Lubricating oils are used chiefly in the late spring, and during the warm weather in the summer and early fall, and illuminating oils are used principally in the winter and during the cold weather. Shipments of these oils are made chiefly at and for the seasons when they are most used, respectively.

Cleveland, Ohio, a station on the line of defendant's railroad, situated upon Lake Erie, is the initial point of shipment of nearly all the petroleum oil and products thereof carried on defendant's road. The quantity of such oil and products shipped over defendant's road in a westerly direction from Cleveland is at the rate of 800,000 barrels annually, and eastward about 6,000 barrels annually. Nearly all of this oil and its products are refined and manufactured at Cleveland. Petroleum and its products herein referred to are, by the classification adopted by the defendant and in force upon its line of railroad, when transported in barrels in less than car load lots, classed as third

class and charged accordingly upon a computation of 400 pounds weight for each and every barrel. When shipped in car load lots, whether in tanks or in barrels in stock cars, it is practically sixth class.

The Standard Oil Company is a corporation organized under the laws of the State of Ohio and has its principal office in the City of Cleveland, in said State, and is engaged in the business of refining, manufacturing, and dealing in petroleum and its products on an extensive scale. It ships these commodities, to a large extent, in tank cars from the said City of Cleveland to places that are without the State of Ohio at the rates prescribed in defendant's schedules for tank cars. About 80 per cent of said Standard Oil Company's west bound and less than 3 per cent of its east bound shipments over defendant's road are in tank cars furnished by said Standard Oil Company, which also furnishes its own facilities and appliances for loading and unloading. The mileage allowed by defendant to all shippers furnishing tank cars or stock cars for shipments of oil upon its road in car load lots is three fourths of one cent per mile per car for the use of these cars. This is the usual mileage paid by the railroads for the use of cars belonging to others. All of said tank cars, after being unloaded at their destination, are returned, as a rule, to Cleveland, empty, by the defendant, and the mileage of three fourths of a cent per mile is paid on such return, as is usual in other cases.

The petitioners, Scofield, Shurmer & Teagle, the Excelsior Oil Company, and J. W. Fawcett, three of the complainants, also ship oil and its products, in part, over defendant's road to some extent in tank cars owned and furnished by themselves, and they are allowed the same mileage therefor as above stated, and said tank cars are likewise returned empty and mileage paid on said return as aforesaid. From many points, but notably Chicago, the chief point to which oil is shipped from Cleveland, the tank cars have return loads a considerable portion of the time. The other petitioners own no tank cars.

Oil shipped in bulk in tank cars or in car load lots in barrels is loaded or unloaded in each instance by the shipper and consignee, and the carrier pays the switching charges in order to obtain this freight. Oil transported in less than car load lots is loaded and unloaded by the railway company. The weight of an empty oil barrel in summer when dry is sixty-three pounds; in winter it is sixty-five pounds. The average weight of oil in each barrel would be, if the barrel were full, about 335 pounds; but as there is some space allowed in each barrel for expansion, the usual average weight of oil in a barrel is estimated at 325 pounds. Bulk oil is usually unloaded from the tanks at the stations into receiving tanks, but occasionally is unloaded by pipes into barrels. The defendant provides no such receiving tanks at its stations. The Standard Oil Company has receiving tanks at the stations named in the schedule thereof mentioned in the complaint and at other points of importance, generally, where it does business; and these receiving tanks are furnished and maintained at its own expense and upon its own premises. Oil in barrels,

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whether in car load lots or in less than car load lots, is transported over defendant's road westwardly exclusively in cattle and stock cars. Oil in tank cars is rated at 315 pounds per barrel.

The average weight of a tank car is 22,100 pounds, which, with the average of ninety barrels, that being the lowest minimum hauled in tank cars on this road, makes 28,350 pounds, or a total of 50,450 pounds, for which the defendant receives from Cleveland to Chicago, a distance of 357 miles, \$34.20, being at the rate of \$1.86 per ton. The average weight of a stock car is 21,046 pounds, which, with sixty barrels of oil, that being about the average carriage, weighing 24,000 pounds, makes a total weight of 45,046 pounds, and the earnings upon such a car from Cleveland to Chicago over defendant's road is \$30, being \$1.33 per ton. The tank car, taking the gross weight of the car and the oil, pays slightly more to the defendant per ton than the stock car with the full load. The average number of barrels on west bound shipments of oil from Cleveland over defendant's road in stock cars is sixty-one, but on east bound shipments the number per car runs more than this, and sometimes reaches as much as eighty barrels per car. The average number of barrels of oil transported in a tank car is about ninety-six. The smallest of these tank cars carry about ninety and the largest about 120 barrels per car, and they are constantly being increased in size.

The complainant's aggregate shipments west bound over the Lake Shore Road are at the rate of 36,000 barrels annually, and east bound about 3,200 barrels annually. Between April 5, 1887, and October 1, 1887, the complainant's shipments of oil over the several roads from Cleveland were distributed as follows:

| | |
|-------------------------------------|----------------|
| Pennsylvania | 54.7 per cent. |
| C. C. C. & I. | 18.7 " |
| Lake Shore & Michigan Southern..... | 15.8 " |
| New York, Pennsylvania & Ohio..... | 10.8 " |

More than one fourth of the shipments made by those of the petitioners owning tank cars were made over the Pennsylvania Railroad in their own tank cars. The oil rates upon all the railroads from Cleveland to Chicago are the same.

During the period between April 1, and October 1, 1887, the Standard Oil Company shipped over defendant's railway in less than car loads in barrels 9,824 barrels; in car loads in barrels 75,075, and in tank cars 319,860 barrels. About 35 per cent. of these shipments by the Standard Oil Company in barrels was made to Chicago as compared with its shipments in tanks. During this period the Standard Oil Company shipped its 75,075 barrels in 1,226 car loads in stock cars and its 319,860 barrels in 3,579 tanks, while during the same period the independent refineries shipped 4,633 barrels in 55 tanks in tank loads. The total number of barrels shipped by the Standard Oil Company during this period over defendant's road appears to have been 395,919 barrels. During the same period all the other shippers shipped over defendant's road in less than car load lots 8,346 barrels. The oil shipped in barrels out of Cleveland during this period in less than car

load lots appears to have been an average of between sixteen and seventeen barrels per car west and 13 4-5 barrels per car east.

Since the business of refining oil at Cleveland commenced the business of defendant has changed very much. About ten days ago the volume of its business was east bound and the returning cars of the West were largely empty. There was very little in the way of loads for stock cars. The stock cars were thus practically used nearly altogether for oil. Now the conditions for shipments are largely reversed. East bound shipments of live stock on defendant's road are greatly less than they were then, and this decrease has been existing since 1879. In 1879 the shipments from Chicago were 279,058 tons over defendant's road; in 1880 it was 81,881 tons; in 1881 it was 62,057 tons; in 1882 it was 202,740 tons; in 1883 it was 208,167 tons; in 1884 it was 176,530 tons; in 1885 it was 189,530 tons, and in 1886 it was 193,547 tons. Taking the years 1879 and 1886 by way of comparison and it shows a decrease of 85,511 tons or 7,000 cars of live stock from Chicago alone. Besides oil there has also of recent years been an immense traffic developed in west bound freight over defendant's line in coal and coke.

While it is true that there has been a considerable falling off in the live stock shipments east over defendant's road in the last ten years yet, still, this is a large business. There is enough of it taken in connection with other freight, such as is usually shipped in stock cars, to furnish return loads to defendant's stock cars a large portion of the time on their return trips from Chicago to Cleveland. On the other hand, it does not appear that there are any return loads of freight from Chicago to Cleveland in tank cars.

When oil is shipped in barrels in less than car load lots there are but few articles that can be placed in the same car with it. Any other freight placed in the same car must be such as will not absorb the smell of the oil or be damaged by its leakage. There are four handlings of freight when oil is shipped in barrels in less than car loads. It is unloaded on the platform; it is loaded on the car and goes forward as way freight; it is handled at the different stations on the platform when taken from the train, and then from the platform to the team. A separate receipt, a separate bill of lading, and a separate way bill have to be made out for each barrel if shipped to only one consignee, and where there are several shipments all in a car in less than car load lots there is as much clerical work in the case of each shipper and each consignee as there would be in the case of only one shipper and one consignee for an entire car load. A car load of oil can go forward on any train, but is generally sent on a through train. Less than car load lots are always shipped in way freight trains, which stop generally at every station along the road.

The Standard Oil Company has stock cars of its own, as well as tank cars, which are used in the defendant's business, and upon which defendant's pays a milage rate as above stated. Whether any of the petitioners have such stock cars is not shown by the evidence. The average oil train on defendant's road consists of thirty stock cars or tank cars. The weight

of oil is based on the standard of 6½ pounds for refined oil and 5½ pounds per gallon for naphtha and gasoline, and seven pounds and upwards per gallon for lubricating or black oil. It does not appear from the evidence that any of the complainants have made any demand on the defendant for tank cars to transport their oil. No shipper seems ever to have made such demand upon the defendant until very recently, and, as we infer from the evidence, since the filing of this complaint.

The crude capacity of the petitioners Scofield, Shurmer & Teagle is about 250,000 barrels a year. Their daily capacity is about 1,200 barrels. The Standard Oil Company is by far the largest refiner and shipper engaged in this business at Cleveland, according to the evidence before us.

The evidence shows that the production of these oils can be made at a much less cost by a large refiner having a capacity of 1,000 barrels per day or more than by a small refiner having far less capacity. This difference is from one half to three fourths of a cent per gallon.

None of the petitioners have the capacity of making these oils at this minimum cost except Scofield, Shurmer & Teagle. The Standard Oil Company has the capacity to make, and does make, these oils at this minimum cost. Shippers of oils in barrels, car load lots, cannot compete successfully as against shippers in tank cars at the rates furnished by defendant to the principal points reached by its lines in the States of Illinois, Indiana, and Michigan.

The refiners are located at Newburg, a suburb of Cleveland, and when a stock car is furnished to them to be loaded with barrels of oil it takes five days, on an average, for it to be loaded, and returned to the defendant. This delay is caused by the switching over the Cleveland & Pittsburgh Railroad, an opposition line. Oils in barrels in less than car load lots is brought by the shippers to the oil sheds of the defendant and is loaded on the cars at once. Stock cars furnished by the defendant to the Standard Oil Company are loaded by that company at its refineries and returned to the defendant in from twenty-four to forty-eight hours. The differences in the rates of defendant upon these shipments are not based on any of these considerations.

Up to the time that the Act to Regulate Commerce went into effect the rate of the defendant on barrels of oil in car loads was sixty cents per barrel from Cleveland to Detroit, and on less than car loads seventy cents per barrel. The present rate is thirty cents per barrel on car loads, and on less than car loads sixty-four cents per barrel. Relatively much the same differences on oil in barrels in car load and in less than car load shipments are made to other points. The ground assigned for this by the carrier is that prior to April 5, 1887, it had been doing this business "in a haphazard sort of way, and after that it was necessary to make rates harmonious with the various interests and commodities along its road." It is also claimed by the carrier that this charge was made necessary by the fact that it had been carrying oil in barrels in less than car loads too low prior to April 5, 1887.

Small shipments of oil, less than car load

lots, are usually shipped by the defendant in single decked stock cars. As a rule, the defendant always ships promptly oil in less than car loads the day it is received, if it has cars, no matter how small the number of barrels may be; but if it has not enough cars, then on the next day. It takes about twice as long to get freight through to destination from point of shipment in less than car loads than in car loads.

The reasons assigned by the defendant for having no tank cars of its own are, in substance, that if it owned such tank cars the party who does the largest shipping over its road (the Standard Oil Company) would give it no work for such tank cars, and then it would be dependent on other shippers who get their crude oil over other roads than the defendant's, and in consequence give their shipments back to the companies to get their crude oil, and therefore that the defendant would have its equipment of tank cars on its lines for six months of the year doing nothing.

The crude oil used by the refineries at Cleveland is brought from the oil region of Pennsylvania. The estimate is that from 2,400,000 barrels to 3,000,000 barrels of this crude oil is thus brought from the oil fields of Pennsylvania annually to Cleveland to be refined. The greater portion of this crude oil is brought to Cleveland by a pipe line owned and controlled by the Standard Oil Company. A portion of this crude oil is brought from the oil fields to Cleveland by the Pennsylvania system of roads. The defendant has a railway line from Cleveland to Oil City, in the oil region of Pennsylvania, but for the last five years or more has not been engaged in the business of hauling crude oil from the Pennsylvania oil fields to Cleveland. All of the petitioners, except the Brooks Oil Company, receive their crude oil chiefly from the pipe line. The Brooks Oil Company receives its crude oil from the vicinity of Parkersburg and Oil City entirely by tank cars of the Valley Road. There has been a considerable demand upon the defendant for shipments of crude oil from the Pennsylvania oil fields to Cleveland. It makes a rate for this of twenty-five cents per barrel, while the pipe line only charges twenty cents a barrel. It was conceded by petitioners' counsel upon the hearing that this pipe line is not a common carrier.

The territory east of Cleveland receives its supply of refined oil chiefly from the east. There are refineries at Oil City, Buffalo, Philadelphia, Pittsburgh, and New York. There is a pipe line from the oil regions of Pennsylvania to the seaboard, and it is owned and controlled by the Standard Oil Company.

The shipments west over defendant's line in stock cars are largely made up of anthracite coal and pig iron from Buffalo, anthracite coal from Erie, and coke from Ashtabula. The shipments of these classes of freight over it, west, are so large that they often exceed the capacity of the defendant to furnish the requisite cars for their transportation.

Conclusions and Opinion of the Commission.

The questions arising upon this complaint (are several in number and) may be stated briefly and substantially in the following order:

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1. The difference between barrel rates in less than car load quantities and barrel rates in car load lots.

2. The difference in rates between oil in car load lots in barrels and oil in car load quantities in tanks, and whether the combination of the difference in favor of tank car rates with the mileage allowed the shipper for the use of the tank cars, operates to produce a prejudice and disadvantage to the shipper of oil in barrels in car load lots or less than car load lots that is obnoxious to the statute.

3. Whether or not it is the duty of the carrier to furnish tank cars as a part of its equipment which can be enforced by order of the Interstate Commerce Commission or upon its recommendation under the Act to Regulate Commerce.

I. Reasons that are substantial exist for making the rate lower per barrel in car load lots than in less than car load quantities. The cost of service is very considerably less in the case of shipments in car load lots than in less than car load quantities. We have had occasion to pass upon this frequently, but the evidence here requires us to do so again. The shipment by the car load goes direct to destination. It is loaded by the shipper and is unloaded by the consignee. The freight in it does not stop at the way stations to be handled in parcels to different consignees along the line. Only one bill of lading is made. It requires but one entry upon the way bill. The time occupied in transporting it to destination is far less than in the case of a shipment in less than car load quantities. There is but one collection of charges for freight. All of these reasons apply with the same force whether the shipment be in a tank or in barrel shipments in car load lots.

Where the shipment is made in less than car load quantities a separate receipt or bill of lading has to be given to every shipper for his parcel. A separate entry of every item has to be made on the way bill. The shipment is by a local freight train which stops at every station for which there is a package of freight. The freight has to be taken out in parcels and delivered at each of these stations. The freight is loaded and unloaded by the railroad company. There are as many collections of charges for freight as there are different parcels. The time occupied in transporting it is usually from two to three times as long as in the case of a car load shipment—according to distance. It occupies a whole car, and for the vacant space in that car the company is receiving no compensation. There is also a considerable element of danger attending the handling of barrel oil in small lots which are unloaded by the carrier and stand in the local station houses, whereas car load lots are usually unloaded by the consignee at a distance from the depot building and immediately removed from the premises of the railroad company. All these facts show that a reasonable difference can and should justly be made between shipments in car load lots and less than car load quantities. A reason, additional to these named, is urged by the carrier and sustained by the evidence in the present case. It is that there are very few articles of freight that can be shipped in the same car with oil in barrels. The force of this is seen

at a glance and it renders this a service that is phenomenal in its expensiveness to the carrier. As thus transported, oil in barrels less than car load lots is not ordinary but extraordinary freight. Taken in connection with all the features of this traffic, it is indeed an exceptionally expensive service on the part of the carrier, and high as the rates are on oil in barrels less than car load lots, and we must say that they are very high, almost so high that it seems to us that they are in their nature prohibitory, yet we cannot upon all the evidence say that they are unreasonable or excessive. This result, however, arises from the peculiar character of the freight stated. It is proper to say in this connection that the defendant as a carrier performs this service promptly at an exceptionally large cost of outlay, and that the rates charged for it cannot fairly be measured by the standard of other freights where substantially different conditions, to a very remarkable extent, exist.

The extraordinary differences made by this carrier between barrel shipments in car load lots and less than car load lots, which we have had occasion to consider and have sustained, require that we should notice this subject at more length in its general features. Since the Act to Regulate Commerce went into effect, carriers have generally reduced their rates in shipments in car load lots considerably and have made these rates lower than they were prior to April 5, 1887; while, on the other hand, shipment of articles in less than car load lots have, as a rule, shared no such corresponding reduction, and have in many instances been made higher. By means of this large shippers have advantages in rates over small shippers, if not to the same extent as they did by rebates and special rates before the enactment of the Act to Regulate Commerce, yet still to a very large extent. There is evidence in this case strongly tending to show that the defendant is no exception to this rule. Strong reasons exist, and these we have sustained, why the car load as a unit should be upheld, but there are equally strong reasons why carriers should not make the differences so great between shipments in car load lots and less than car load lots and why they should recognize equitable considerations in a subject of such great importance. The business of the country renders it necessary that a vast majority of the shipments of freight must be made in less than car load quantities, and rates amounting to a penalty upon this class of freight, and so high as to be almost prohibitory in their nature, cannot be sustained. These are the views of the Commission upon this general subject, and it would be well for every carrier subject to the Act to Regulate Commerce to forthwith consider its tariffs in this respect, and to carefully determine whether it has not gone too far in the differences it has made between car load lots and less than car load lots before the Commission shall take further action upon this subject.

II. The charge made by the carrier, as shown by the evidence in this proceeding, is not the same for a car load, whether it be in barrels or in tanks, without regard to weight. In this respect it differs to some extent from other cases that have been before us. It also

differs from other cases we have considered, in this: that it is admitted that there is no return load in tank cars from Chicago to Cleveland. The tank cars, after transporting the oil from Cleveland to Chicago and to other points named in the complaint, as shown by the evidence, are brought back empty to Cleveland by the carrier. These tank cars are not owned by this Railroad Company. They belong in every instance to the shipper, who is the refiner of the oil. Several of the petitioners own these tank cars in small numbers. The Standard Oil Company owns them in large numbers. Whether the oil is shipped in car load quantities, in tanks or in barrels, it is loaded by the shipper and unloaded by the consignee. The average number of barrels of oil hauled in a tank car is ninety-six barrels on west bound freight from Cleveland, and in an ordinary stock car the number of barrels is sixty-one to the same points. Besides its tank cars the Standard Oil Company owns a large number of stock cars, which are used by the defendant in this business, and for which it pays the Standard Oil Company, and to others who furnish such stock cars, three fourths of a cent per mile going to and returning from destination. This is the usual rate paid by railroads in this country for the exchange of cars. It appears from the evidence that the oil in a barrel in barrel shipments is rated by the carrier at 325 pounds of oil, while a barrel of oil in tank car shipment is rated at 315 pounds per barrel. We do not understand why this difference should exist, although no particular importance appears to attach to it either way, and certainly not in the conclusions that we have reached.

The charges made by the defendant in car load lots in tank cars per barrel and in car load lots in barrels per barrel are, from Cleveland:

| | Car load lots in bulk in tank cars, per bar'l. | Car load lots in barrels, per bar'l. |
|--|---|--|
| To Chicago, in the State of Illinois..... | \$0.33 | \$0.50 |
| To Detroit, in the State of Michigan..... | .22 | .30 |
| To Buffalo, in the State of New York..... | .25 | .34 |
| To Kalamazoo, in the State of Michigan..... | .35 | .46 |

The table on the next page shows the relative earnings and rates on oil shipped in barrels and in tank cars from Cleveland, Ohio, to various points named on the Lake Shore & Michigan Southern Railway in car load lots.*

It is thus seen from the subjoined table in the note that in every instance a large difference is made in the rate per barrel in favor of oil in tank cars as against oil in barrels in car load lots. This, too, when, as the evidence shows, there is frequently return freights from Chicago to Cleveland for stock cars and no such return load for tank cars. There is no just and substantial ground for this difference, so far as we can see. By this arrangement the carrier hauls in one tank car ninety barrels of oil as the lowest minimum, and in a stock car sixty barrels as the minimum. Beside the large differences made in favor of oil per barrel in the tank car as against oil per barrel in the stock car, each being in direct competition; whenever there is a return load for the stock

*Statement Showing the Relative Earnings on Rates on Oil Shipped in Barrels and in Tank Cars from Cleveland, Ohio, to Various Points on Lake Shore & Michigan Southern Railway.

| From Cleveland, O., to— | Distance from Cleveland, Miles. | Rates per Barrel. | | Freight Earnings per Car. | | | | | | Rates per 100 Pounds. | | | | | |
|----------------------------|---------------------------------|----------------------|-----------------------|-----------------------------------|---------------------------------|-----------------------|--|---|-----------------------------------|---------------------------------|-----------------------|--|--|--|--|
| | | In Tank Cars. | In Box or Stock Cars. | Tank Cars. | | | Differences | | | Tank Cars. | | Differences | | | |
| | | | | Milage Allowance Not Deducted. | Milage Allowance De- ducted. | In Box or Stock Cars. | Tank Cars in Excess when Milage is Not Deducted. | Tank Cars in Deficit when Milage is De- ducted. | Milage Allowance Not Deducted. | Milage Allowance De- ducted. | In Box or Stock Cars. | Box Car Rate in Ex- cess of Tank Car Rate Milage Included. | Box Car Rate in Ex- cess of Tank Car Rate Milage Deducted. | | |
| | | | | | | | | | | | | | | | |
| Chicago, Ill. | 357 | 38c. | 50c. | \$34 20 | \$28 84 | \$30 00 | \$ 2 20 | \$ 1 16 | 12.06c. | 10.17c. | 12.82c. | .76c. | 2.65c. | | |
| Buffalo, N. Y. | 183 | 35c. | 34c. | 23 50 | 19 75 | 20 40 | 2 10 | 65 | 7.94c. | 6.96c. | 8.72c. | .78c. | 1.76c. | | |
| Detroit, Mich. | 178 | 32c. | 30c. | 19 80 | 17 13 | 18 00 | 1 80 | 87 | 6.98c. | 6.42c. | 7.69c. | .71c. | 1.27c. | | |
| Grand Rapids, Mich. | 232 | 38c. | 50c. | 34 20 | 29 22 | 30 00 | 4 20 | 78 | 12.06c. | 10.31c. | 12.82c. | .76c. | 2.51c. | | |
| Kalamazoo, Mich. | 274 | 35c. | 46c. | 31 50 | 27 39 | 27 60 | 3 90 | 21 | 11.11c. | 9.66c. | 11.80c. | .69c. | 2.14c. | | |
| South Bend, Ind. | 320 | 31½c. | 42c. | 28 35 | 24 30 | 25 20 | 3 15 | 90 | 10.00c. | 8.57c. | 10.77c. | .77c. | 2.20c. | | |
| Elkhart, Ind. | 355 | 31½c. | 42c. | 28 35 | 24 52 | 25 20 | 3 15 | 68 | 10.00c. | 8.65c. | 10.77c. | .77c. | 2.12c. | | |
| Erie, Pa. | 46 | 32c. | 50c. | 19 80 | 18 37 | 18 00 | 1 80 | 37 | 6.98c. | 6.48c. | 7.69c. | .71c. | 1.21c. | | |

NOTES.—The bases for computation are as follows: milage deductions are on the basis of $\frac{3}{4}$ of one cent per mile, both directions; weight of barrel of oil, 390 pounds; weight of oil in barrel, 325 pounds; weight of barrel oil in tank, 315 pounds; number of barrels of oil in box or stock car, 60; number of barrels of oil in tank, 90.

car the actual revenue would be proportionately greater to the carrier upon the entire transaction from the stock car than from the tank car. The preference thus given to oil shipped in tank cars, as against oil shipped in stock cars in car load lots is, we think, unlawful, and must be regarded as forbidden by the Act to Regulate Commerce. The defendant should carry the same weight for the same price in the one car as in the other, and the rate should be made by the hundred pounds instead of by the barrel.

The element in this transaction that produces this large difference in rates is the tank. It confers an advantage upon the shipper who uses it, transporting from one third to twice as much oil more than is shipped by the shipper in the stock car, with but little difference in the aggregate car rate for this large excess of oil. The tank is indeed the car, but in renting it from the shipper to haul his own oil the carrier pays him for furnishing a package for the oil, charges him nothing for the increased dead weight of the tank over and above that of the stock car, which upon an average is 1,000 pounds, and pays him rental for hauling the empty tank car back to him as part of the transaction. The shipper of oil in car load lots in barrels pays for the full weight of the barrel in every instance, as well as the oil, and furnishes the barrels himself, and if his barrels are hauled back to him he has to pay for that service as upon other freight. The inequalities of the transaction are very great, and they are all on the side of the shipper of oil in tanks. The business of dealers, whether it be by shipments in tanks or in car load lots in barrels, is in direct and actual competition. It is obvious that where the Railroad Company does not furnish tanks one shipper cannot compete in all respects upon equal terms with another shipper who furnishes tanks for the transportation of his oil, unless he also furnishes tanks. The method of shipment of oil in tank cars seems now to be fully established, though very few of the railroads of the country own tank cars.

INTER S.

The Pennsylvania Railroad Company, it appears, does own such tank cars. The use of tank cars in the shipment of oil is of recent origin. It seems to be done chiefly by a few independent companies who own tank cars furnished to shippers for this purpose, but in a few instances they are owned by the shippers themselves.

The transportation of petroleum oils being a special traffic, as we had occasion to observe in the case of *Rice v. Louisville & Nashville Railroad Company and Others*, 1 Inters. Com. Com. Rep. 503, 1 Inters. Com. Rep. 722, it is properly the business of the carrier to supply the rolling stock for the freight he offers or proposes to carry, and if the diversities and peculiarities of the traffic are such that this is not always practical, and consignors are allowed to supply it themselves, the carrier must not allow his own deficiencies in this particular to be made the means of putting at an unreasonable disadvantage those who make use in the same traffic of the facilities he supplies. There appears to be no law that prevents a carrier in the course of his business from arranging with the shipper to furnish cars for the shipment of his own goods at terms agreed upon between him and the carrier, but in every such transaction the carrier, at his peril, must see to it that neither directly nor relatively must a better rate be given to such shipper than to others engaged in the same business, and making shipments of the same kind of goods, who are dependent on the carrier for cars. From this it follows, as we decided in *Rice's Case*, that this carrier must make the same rates on oil, whether shipped in car load lots in tanks or in car load lots in barrels. The carrier, of course, has the right to charge for the weight of the barrels as a part of the freight.

III. Among other relief sought, we are asked to require this carrier to furnish tank cars for petitioners and the public generally in the shipment of their oils, and the question arises whether, under the statute, we have this power. The power was supposed by the petitioners'

counsel, in the argument before us, to be found in the last subdivision of section 3 of the Act to Regulate Commerce. That subdivision is in these words:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

A careful consideration of this provision of the statute has brought us to the conclusion that it refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers. The term "facilities," as here used, does not embrace car equipment for the origination of and transporting of freight along the line of the carrier in the sense in which it is here contended for by the petitioners.

The power of the Commission to order the defendant to furnish tank cars for the shipment of oil over its line was also supposed by the able and learned counsel for the petitioners to be found in the first section of the Act to Regulate Commerce. The term "instrumentalities of shipment or carriage," as found in the first section of the statute, of course includes cars, but they are such cars as are provided by the carrier or used by it in interstate commerce, and the statute nowhere clothes the Commission with power to determine what kind of cars the carrier should use for this purpose and require the carrier to place upon its line for use in this business such kind and number of cars as the Commission may decide will constitute a proper and necessary equipment of car service. The duty of every such carrier is none the less obligatory at common law, and by its charter to furnish an adequate and proper car equipment for all the business of this character it undertakes and advertises in its tariffs it will do. The statute does not undertake to clothe the Interstate Commerce Commission with the power by summary proceeding of compelling a railroad company to perform all its common-law duties, but leaves many of these to be enforced in the courts by suits for damages and by other proceedings. This is apparent from the twenty-second section of the statute, in which it is declared that "nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by any statute, but the provisions of this Act are in addition to such remedies." It is also apparent from the enumeration of powers conferred upon the Commission in the statute. The statute contains no provision requiring the carrier to keep its road-bed, bridges, and trestles at all times in good repair for the safe transportation of persons and property, nor any provision clothing the Interstate Commerce Commission with the power of requiring the carrier to do these things, but it is none the less obligatory upon

the carrier by the common law and by its charter to do so. Other illustrations readily occur, but it is unnecessary to enumerate them.

The reference to "instrumentalities of shipment or carriage" in the first section of the statute proceeds upon the assumption that every railway carrier will, from self interest, as well as in obedience to the law, perform the plain duty to itself and to the public of providing proper and adequate car equipment for all the reasonable needs of its business. The power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business, would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require, and would be limited only by the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute.

The law-making power has not taken upon itself the responsibility, nor has it clothed the Interstate Commerce Commission with the power and the responsibility, of directing a carrier to supply itself with any particular equipment or cars, or, in fact, with any equipment or cars at all, for the transportation of freight over its line. The responsible duty of supplying itself with a sufficient and proper equipment of cars is left by the statute to rest with the carrier, to whom, alone, it rightfully belongs, and if the carrier fails to do this in such manner as it should, whereby others are injured or wronged, then that the carrier shall be liable for all the damages which result from such failure.

The provisions of the statute in this respect are explicit. If the carrier is so far unmindful of its plain duty as not to furnish a reasonable and proper equipment for the use of shippers over its line, and does this as a "device" to give one shipper who furnishes his own cars an unlawful preference in the rate, the carrier incurs a severe penalty provided by the statute for enforcement in the courts. It is also liable for the whole amount of damages sustained in consequence of the violation of the statute, together with a reasonable counsel or attorney's fee to be enforced in the courts, and the violation of the statute, so far as the rate is concerned, can be corrected by complaint to the Interstate Commerce Commission, whose duty it is to notify and order the carrier to cease such unjust discrimination and to give equal rates to shippers. In these several modes of procedure the statute has provided ample remedies for the enforcement of this duty on the part of the carrier in different tribunals without clothing either of these tribunals with the power of directing the carrier what equipment or cars it shall furnish for the transportation of freight over its line. The wide field covered by these several remedies, and the sufficiency of them in each instance, shows that this whole subject must have undergone the most thorough and mature consideration of Congress in the enactment of the statute.

IV. Another phase of the statute is presented by this proceeding, namely, that of the shipper furnishing in part his own cars. Long prior to and at the time the Act to Regulate Commerce was enacted there was a prevailing general custom and usage among railroads of the United States of renting cars from each other and from mere car furnishing companies, paying rent for the use of such cars. A like custom and usage then prevailed, and has since, of the carrier paying rent to the shipper for cars occasionally furnished by the shipper for the transportation of his own goods. This amount in each instance then was, since has been, and is now three fourths of a cent per mile. It is part of the legislative history of the country that Congress had pending before it for many years in various forms the general subjects which were afterwards enacted into the Act to Regulate Commerce, and that all these matters were made the subject of lengthy and thorough examination by committees of Congress. We must, therefore, presume, as we heretofore have done, that Congress must have known at the time the statute was enacted of the existence of each of these customs and usages on the part of carriers for obtaining cars, and neither of them are forbidden by the statute. If the carrier had been forbidden by the statute from transporting freight over its line otherwise than in its own cars, bulk would have necessarily been broken and cars unloaded by every railroad at the end of its line and there reloaded into the cars of its connecting line, resulting in greatly increased delays and expense in the transportation of freight; and we can well understand why the statute contains no provision requiring the carrier to transport freight only in its own cars.

The rule upon this subject, to which we have uniformly and steadily adhered, has been that the rate charged by the carrier must not be affected by either one of these customs and usages, but must be the same on all cars operated over its line, whether furnished by the carrier or by others, just as though no custom or usage existed whereby the carrier obtained any of its cars from shippers or from car companies. The rate of three fourths of one cent per mile paid for the exchange of cars has seemed to us, upon evidence repeatedly taken upon this subject, a reasonable allowance for the car's service, and has been the same very generally in all parts of the country. We have decided in other cases, as we do now in this proceeding, that the carrier at its peril must see to it in every transaction in which the shipper furnishes the car for the transportation of his freight that such shipper shall not thereby receive a lower rate than other shippers who use and have to use the cars furnished by the carrier in the shipment of their freight.

The violation of the statute by which higher rates are charged on car load lots in barrels than in tanks does not appear to have been accomplished by any mere "device." It seems to have been a lower charge on oil in tanks than in barrels, made directly without any "device" whatever, applying as well to the tank cars of the petitioners as to the tank cars of the Standard Oil Company. It was seriously and earn-

estly defended at the hearing before us by the defendant, and upon the testimony of learned and experienced witnesses, one of whom was its general freight agent, in whose judgment and intelligence the defendant had a right to rely in making these rates. That the error of the defendant in this respect resulted from a miscalculation of the elements that entered into the service of the two respective modes of shipment is apparent, and, although, as we have said, it was a violation of law, yet, upon the evidence it does not appear to have been accomplished with that intent, or by any "device" to reach that result. The evidence is strong and uncontroverted that while this result was occurring the defendant's agents and officers, under the repeated admonitions of its president, "to live up to the law and abide by it in all respects," were endeavoring to do so and believed they were doing so. In a business involving so many elements of complication, as that of transporting freight over railroads in cars wholly different from each other, mistakes of judgment and errors of calculation, may occur even under the best administration without any intent to violate the law, and this we find is a case of that description. The statute is one that may be violated without any "device" on the part of the carrier, and it is equally true that the ingenuity of man cannot invent a "device" by which a carrier, subject to its provisions, can give an unlawful preference without incurring the penalties and remedies provided by this statute. The failure of the defendant to furnish tank cars of its own appears to have resulted from its own business considerations entirely. As we have no jurisdiction to order or recommend the defendant to furnish tank cars we forbear making any comments upon the reasons it has assigned for not furnishing such tank cars for the transportation of oil over its line, and simply state these reasons because they arise as part of the evidence and were offered to negative the idea that the defendant failed to furnish such tank cars on account of any "device" to give one shipper a preference over others.

To enumerate the conclusions to which we have arrived in this proceeding, we state:

1. That so much of the complaint as alleges unjust discrimination in favor of oil shipped in tank cars is sustained, and that it is the duty of the defendant and it must give the same rates on oil shipped in barrels in car load lots that it charges upon oil in tanks.

2. That so much of the complaint as alleges unjust discrimination between oil shipped in barrels in car load lots and less than car load lots is not sustained.

3. That so much of the complaint as seeks an order from the Commission requiring the defendant to furnish tank cars for the transportation of oil for the petitioners and the public is not sustained.

The order of the Commission is that the defendant, the Lake Shore & Michigan Southern Railway Company, must from and after the receipt of this notice charge the same rates on oil shipped in barrels in car load lots in stock cars and other cars that it charges upon oil in tanks—by the pound and not by barrel.

John W. S. BRADY and George T. Parkhurst, Partners Trading under the Firm Name of J. Parkhurst & Co.

PENNSYLVANIA R. CO. Pennsylvania Co. and Pittsburgh, Cincinnati & St. Louis R. Co.

(No. 101.)

John Henry NICOLAI, Trading as Eagle Oil Works

PENNSYLVANIA R. CO., Pennsylvania Co. and Pittsburgh, Cincinnati & St. Louis R. Co.

(No. 100.)

1. **Through** and continuous lines imply through rates which must be **reasonable rates**.
2. When railroad companies make a **through and continuous line** and offer it for the use of the public, they cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of their line.
3. The **Pennsylvania Railroad Company** operates a part of a through line which it joins in making, and owns a controlling interest in the capital stock of the **Pittsburgh, Cincinnati & St. Louis Railway Company** by which the other part is operated. *Held*, that the Pennsylvania Railroad Company cannot free itself from the **responsibility of excessive through rates** by getting behind the corporate existence of the other company as a separate carrier.
4. The **apportionment of rates** to different parts of a through line do not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance.
5. The **danger from transportation of oil through Pittsburgh** when apportioned upon all the business is deemed so unimportant as **not to materially affect the rates** which should be charged.

(Heard Jan. 22, April 24, Decided July 23, 1888.)

COMPLAINTS alleging excessive rates on crude petroleum.

See abstracts of pleadings, 1 Inters. Com. Rep. 649, 810.

Messrs. **John Henry Keene, Jr., and Archibald Sterling**, for complainants.

Messrs. **James A. Logan and Bernard Carter**, for Pennsylvania Railroad Company.

Mr. **John Scott**, for Pittsburgh, Cincinnati & St. Louis Railway Company.

REPORT AND OPINION OF THE COMMISSION.

Morrison, Commissioner:

These cases were heard together by consent of the parties. In their facts, reasons, and the answers of the defendants they are substantially the same. In both complaint is made of the defendants that from April 15, 1887, they exacted and demanded and continued to

charge the plaintiffs fifty cents per barrel of forty-five gallons each of crude petroleum from Washington, Pennsylvania, to Baltimore, Maryland, in car load lots; that, while exacting fifty cents between the places named, the defendants carry such oil to Baltimore for forty cents, from Bradford and Clarendon, Pennsylvania, and Olean, New York, about the same distance as Washington, Pennsylvania, from Baltimore; that the said charge of fifty cents is unjust and unreasonable, and to the extent of ten cents per barrel excessive, and that complainants have paid, under protest, to defendants large sums for such unjust, unreasonable, and excessive charges, for which complainants ask reparation.

The Pennsylvania Railroad Company, answering separately, denies that it was a through carrier of oil from Washington to Baltimore, and avers that it was only a carrier from Pittsburgh to Baltimore, for which it received thirty-five cents per barrel; that the oil was carried from Washington to Pittsburgh over the lines of other companies for fifteen cents, and that the gross charge of fifty cents from Washington to Baltimore is just and reasonable, considered by itself, or as compared with the rates from Bradford, Olean, and Clarendon, because of the greater hazard in passing manufacturing plants and other buildings in Pittsburgh.

The Pittsburgh, Cincinnati & St. Louis Railway Company "denies that at a period named in the bill of complaint it was engaged in the transportation of passengers and property from the State of Pennsylvania to the State of Maryland," and avers that it charged a uniform rate of fifteen cents per barrel for all oil carried from Washington to Pittsburgh, which, it avers, is a reasonable and just rate.

The Pennsylvania Company denies that it was engaged or interested in the transportation of oil between any of the places, and during the period mentioned in the complaint, and denies the averments of the complaint, so far as they relate to this defendant.

The facts are found to be that:

1. The complainants, Parkhurst & Co., are dealers in crude and refined oil, and the complainant, Nicolai, is a refiner of oil, at Baltimore, Maryland. The defendants are common carriers of passengers and freight over the lines of road owned or operated by them, which are, severally, lines of the "Pennsylvania system." The lines of this system east of Pittsburgh are operated by the Pennsylvania Railroad Company; those west of Pittsburgh by some one of the other defendants. The Pennsylvania Railroad Company is owner of a majority of the capital stock and a controlling interest in the other defendant companies, each of which has a separate corporate organization.

2. The defendant companies have filed with the Commission the following:

Agreement for a Through Line.

"The Pennsylvania Railroad Company, the Pennsylvania Company, the Pittsburgh, Cincinnati & St. Louis Railway Company, and the Chicago, St. Louis & Pittsburgh Railway Company, common carriers, for the purpose of securing and promoting the continuous carriage

of freight within the meaning of the Act to Regulate Commerce, commonly known as the Interstate Commerce Law, do hereby agree that they will interchange freight traffic to be transported over the routes hereinafter specified, and that in the interchange of such traffic the routes described shall be considered continuous lines, and that the through rates over such routes shall be made in accordance with the provisions of said Act which govern two or more carriers associated for the purpose of continuous carriage.

"They further agree that all joint tariffs over the routes designated below shall be matters of agreement among said companies, and that when made they shall be filed with the Commission, as required by law.

"It is further agreed that the lines or routes covered by this agreement are as follows:

"Between all points on the roads of the companies named as parties to this agreement or on roads operated or controlled by any of them or on connecting roads with which any of the said parties may have or make auxiliary agreements for through lines, and between which points joint tariffs of through rates may be established by agreement of all the roads interested, it being understood that the filing with the Commission of such agreed joint tariffs shall be construed as establishing through lines between the points that may be named in such joint tariffs.

April 4, 1887.

The Pennsylvania R. R. Co.,
By F. H. Kingsbury,
Through Freight Agent.

Wm. Stewart,
General Freight Agent Pennsylvania Com-

pany,
P. C. & St. L. R. Co., C., St. L. & P. R. R.
Co."

3. The complainants, Parkhurst & Co., between April 15 and July 27, 1887, and complainant, Nicolai, between April 27 and September 1, 1887, purchased crude oil at Washington, Pa., and shipped the same—part from Washington, Pa., and part from Ewings Mills Station—to Baltimore. The oil was billed through from Washington to Ewings Mills Station to Baltimore by the defendant, the Pittsburgh, Cincinnati & St. Louis Railway Company, and carried by it in the Green Line tank cars of the Pennsylvania Railroad Company over the lines it (the P. C. & St. L. Railway Co.) operates to Pittsburgh, twenty-eight miles from Ewings Mills and thirty-two miles from Washington, Pa. From Pittsburgh the oil was carried to Baltimore by the Pennsylvania Railroad Company over its own line and the line of the Northern Central Railroad operated by it. The oil passed over none of the lines operated by the other defendant, the Pennsylvania Company.

4. The oil was billed at fifty cents per barrel of forty-five gallons. Freight was paid on it at that rate to the agent of the Northern Central Railroad Company at the place of destination, and all in excess of forty cents per barrel was paid under protest. The amount so paid under protest was by Parkhurst & Company, \$754.30; by Nicolai, \$1,108.90. The division of the fifty cents per barrel rate was fifteen cents to the defendant, the Pittsburgh, Cincinnati & St. Louis Railway Company, for the

haul to Pittsburgh, and thirty-five cents to the Pennsylvania Railroad Company for the haul from Pittsburgh to Baltimore.

5. The defendants frequently, without success, applied for a refund of the amounts of freight paid by them, respectively, in excess of forty cents per barrel, and at various times since, as well as before April 15, 1887, sought and failed to have the rate from the Washington, Pa., oil district reduced to forty cents. These applications and negotiations were to and with the Pennsylvania Railroad Company. In the correspondence on these subjects put in evidence in this refusal to refund:

Copy.

The Pennsylvania Railroad Company,
Office of the Gen'l Fr't Traffic Agent,
Philadelphia, September 26, 1887.
J. H. Nicolai, Esq., *Eagle Oil Works, Baltimore, Md.*

Dear Sir: I am in receipt of your favor of the 24th inst. covering claim for 10c. per barrel, rebate on oil shipped from Washington, Pa., and, after thorough consideration, we are compelled to return the claim.

We do not think your ground well taken, and, if our understanding of the Interstate Commerce Law is correct, we have a perfect right to charge the present tariff from Washington, Pa.

Yours very truly,

(Signed) John S. Wilson,
G. F. T. A.

And this in relation to the alleged excessive fifty cents rate:

The Pennsylvania Railroad Company,
General Freight Department,
Philadelphia, July 3, 1886.

Messrs. J. Parkhurst, Jr., & Co.,
78 South Street, Baltimore, Md.

Gentlemen: I am in receipt of your valued favor of the 1st inst. relative to the rate on oil from Washington County to Baltimore, and regret that our agreements on oil rates are such that I am unable to make any concession in the tariff. It is the opinion of most of our oil shippers that the Washington County oil is of such superior quality as to enable it to pay the agreed tariff rates.

Yours very truly, John S. Wilson,
G. F. T. A.

6. From the time of the discovery or development of the Washington County oil field in 1885 the rate on oil to Baltimore has been fifty cents per barrel. During the same period the rate has been forty cents over the lines operated by the Pennsylvania Railroad Company from points about the same distance from Baltimore, viz.: Warren, Clarendon, and Bradford, Pa., and Olean, New York. The distance to Baltimore from Washington is 363 miles; from Warren, 360; from Clarendon, 353; from Bradford, 333, and from Olean, 328. The oil from Olean and Bradford passes over the Western New York & Pennsylvania Railroad, and its proportions of the 40 cents rate is $7\frac{27}{100}$ cents for fifty-one miles' haul from Olean and $8\frac{16}{100}$ cents for seventy-four miles' (the most direct line is fifty-six miles) haul from Bradford.

7. The rate on the refined products of crude oil over the defendant's lines of road is forty-

five cents per barrel of fifty gallons for the same distances and between places for which the charge is forty cents per barrel of forty-five gallons of unrefined, or substantially the same price per gallon for crude and refined. The refined oil is worth \$7 or more per barrel; the crude less than \$1 per barrel.

8. Between Washington, Pa., and Pittsburgh, oil passes through tunnels, and, through Pittsburgh, is carried past and near to manufacturing plants and other buildings, and care is required to prevent accidents from "ignition," as shown by the great damage incurred by one of the defendants as the result of a collision on its line at Brunswick, N. J. No accident has yet occurred to the defendants in carrying oil from Washington. The recent discovery of natural gas and its partial substitution for coal and oil in Pittsburgh, witnesses believed, tends to lessen, not to increase, the liability to accident in carrying oil through the city. The general cost of transportation on the Pennsylvania system of railroads is decreasing, or, as one of its officers testified, is "getting down."

9. Previous to the year 1883 the rate on crude oil from the Olean and Bradford oil region to Baltimore was eighteen cents per barrel of forty-five gallons. Some time in the year 1883 the rate was raised from eighteen to, and since then maintained at, forty cents. For several days next after the Act to Regulate Commerce was in force crude oil was billed and carried from Washington to Baltimore by the defendants for thirty-six cents per barrel, but it was so billed and carried in the confusion attending the adjustment of rates upon the going into effect of said Act, and this was not a fixed or permanent rate.

The complaints in these cases were first made against the Pennsylvania Railroad Company. That Company answered, denying that it was a through carrier from Washington, Pa., to Baltimore, and averred that it was a carrier only from Pittsburgh to Baltimore, and that the oil was carried from Washington to Pittsburgh by and over the lines of other companies. After hearing the cases so presented, leave was given the complainants to amend their petitions by making the Pennsylvania Company and the Pittsburgh, Cincinnati & St. Louis Railway Company parties defendants.

On the final hearing it is shown that the Pennsylvania Company was not engaged in the transportation of oil at the period and between the places named in the complaints, and that the carrying in question was done by other defendants, the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company.

The claims of the plaintiffs for reparation in money present cases in which the Commission makes no award, for reasons assigned in the case of *Council v. Western & Atlantic R. Co.* 1 Inters. Com. Com. Rep. 339, 1 Inters. Com. Rep. 638, and case of *Heck & Petree v. East Tennessee, Virginia & Georgia R. Co. et al.* 1 Inters. Com. Com. Rep. 493, 1 Inters. Com. Rep. 775.

The route over the lines of the defendants from Washington, Pa., to Baltimore, if not so without it, is made a through and continuous line by their "agreement for a through line."

Each of these two defendants operates a separate part of this continuous line, and denies that it is a carrier over more than it operates. The complaint is of excessive and unreasonable charges for freight billed through and carried over the whole of this continuous line. If this through carriage is broken into parts east and west of Pittsburgh, by operation of law or otherwise, such breaking might and probably would deprive the complainants of their remedy for the grievance complained of. That part of this through and continuous line west of Pittsburgh is wholly within the State of Pennsylvania, and, when a separate or local line exclusively, not subject to the jurisdiction of this Commission. To this part the excessive charges complained of may be apportioned if the parties to the agreement for a through line may elect to constitute themselves carriers over distinct parts or sections of it.

The public has no interest in the division railroads make among themselves of their joint earnings from transportation over through lines. Nor have the complainants any interest in the division the defendants make between themselves of the through rate on oil. It is the reasonableness of the through rate, not of any division or part of it, that the complainants have a right to insist upon. It is true that part of the continuous line west of the City of Pittsburgh is operated by a separate corporation from the defendant, the Pennsylvania Railroad Company, which operates the part east. The same is true of all the lines of the Pennsylvania system west of that city. They are so operated for the convenience and profit of their owners. The Pennsylvania Railroad Company owns a majority of the capital stock and a controlling interest in all the companies or separate corporations by which the several lines of the Pennsylvania system west of Pittsburgh are operated. The correspondence and attempted negotiation by complainants for lower rates over the lines through from Washington, Pa., to Baltimore, were all with the Pennsylvania Railroad Company.

It conferred with complainants as to the reduction of such rates without any pretense of a want of authority to make and control them. The larger part, if not all, the earnings of all the lines of the Pennsylvania system of roads operated by separate corporations, including the part of the Washington, Pa., and Baltimore line west of Pittsburgh, goes to the treasury of the Pennsylvania Railroad Company. This is equally true whether the earnings are derived from reasonable or unreasonable charges. With the right to appropriate the earnings from rates and charges on lines it so largely owns, that it may control them, the Pennsylvania Railroad Company cannot be permitted to free itself from the responsibility of excessive charges by getting behind separate corporations.

By their agreement filed with the Commission, the defendants made this a through line and offered it to the public for continuous transportation from Washington, Pa., to Baltimore. Through carriage implies a through rate which must be a reasonable rate. The defendants, the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company, by their agreement, made

this a through line, and offered it to complainants and the public for continuous carriage over it. They billed and hauled the oil through over the line, and they cannot rid themselves from the responsibility of unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of the line they hold out to the public as a through line.

In support of their claim that the defendants' crude oil rate of fifty cents per barrel from Washington to Baltimore is unjust and unreasonable, the complainants show that the rate over the lines of the Pennsylvania system for like distances from other oil producing districts is forty cents. In their demand for reparation they, the complainants, ask that they be awarded ten cents per barrel, the amount paid by them to defendants, under protest, in excess of forty cents, which is thus conceded to be a reasonable rate.

The defendants justify the fifty cent rate as reasonable on the alleged hazard and liability to accident in carrying oil through Pittsburgh, and on this alone. They do not call to their aid any alleged difference in grades, volume of business, or other causes which affect the cost of transportation.

The correspondence between the plaintiffs and defendants, or one of the defendants, the Pennsylvania Railroad Company, put in evidence on the subject of this fifty cent rate, has been extensive and goes back two years or more, but in it there is no mention of the alleged danger of passing through Pittsburgh as a justification for this higher rate. Two years ago, as shown by the correspondence copied among the facts found, it was attempted to be justified in the superior quality (greater value) of the Washington oil, while the defendants were transporting crude and refined oil at equal rates for like quantities, and the relative value of the refined and crude was seven to one. Some of the places from which the oil is carried for forty cents, by the Pennsylvania Railroad Company to Baltimore, about equally distant as Washington, Pa., are Warren, Clarendon, and Bradford, Pa., and Olean, N. Y. The Olean oil passes fifty-one miles, and the Bradford oil seventy-four miles, to the line of the Pennsylvania Railroad Company over the line of the Western New York & Pennsylvania Railroad Company, which does not belong to the Pennsylvania system, and which receives $7\frac{22}{100}$ from Olean and $8\frac{17}{100}$ from Bradford out of the forty cent rate. This apportionment or division does not determine what the charge to the public should be, but it is not without significance in determining what are reasonable rates for the whole distance on the lines in question. The defendants so divide the fifty cent rate that the Pittsburgh, Cincinnati & St. Louis Railway Company, which is one of the lines of that system, receives fifteen cents for the twenty-eight to thirty-two miles over its line, or double as much as the Western New York & Pennsylvania Railroad Company receives for double the distance. The Baltimore rate was fixed at fifty cents soon after the development of the Washington County oil district, now several years ago, and at a time when the rate from other points on defendants' lines, equally distant from Baltimore and other

seaboard points, was but forty cents. The evidence shows it was made on other considerations than the dangerous character of the carriage through Pittsburgh, which was first assigned as a justification for a higher rate on the Washington oil by the answer of the defendants in these proceedings.

Any traffic in oil is attended with liability to accident, but none has occurred to the defendants in the transportation of Washington oil through Pittsburgh. The accident and consequent loss to them at Brunswick, N. J., insisted upon as evidence of the exceptional hazard and liability to accident from ignition in passing valuable manufacturing plants and other buildings in Pittsburgh, was the result of a collision of trains.

The danger from the necessary transportation through Pittsburgh must be very slight when apportioned upon all the business. It does not seem to the Commission so important that it can sensibly affect the rates which should be charged. The skill and intelligence of railroad management have considerably reduced the cost of transportation since the fifty cent rate was made, and the Commission is of opinion this rate has now become excessive and should be reduced to the extent claimed.

The order of the Commission is that the defendants, the Pennsylvania Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company, cease and desist from charging rates on crude oil from Washington, Pa., to Baltimore, Md., in excess of forty cents per barrel.

Frank L HURLBURT

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.

(No. 134.)

1. In a proceeding to correct a classification of freight made by the initial carrier, which freight, before reaching its destination, must pass over the roads of several carriers, it is proper to make all such carriers parties; but if the initial carrier alone is made defendant, the proceeding is not for that reason defective. An order requiring that carrier to make the correction will be effectual for the purposes of all subsequent consignments, and there is no difficulty in its being complied with, without asking the consent of others.
2. Persons having an interest in a question pending before the Commission will be allowed to appear and be heard when the case is being submitted, without their being made formal parties.
3. An assurance made by a carrier that if one will locate in business on the line of its road his property shall be taken for transportation as belonging to a specified class cannot bind the carrier so as to compel a classification accordingly. A right to special rates cannot be made out in this way; the classification must have the same construction in fa-

vor of all persons; the law requires uniformity and impartiality in the dealings of a carrier with all persons.

4. **The railway officials who have made a classification cannot testify to their understanding of its construction.** A classification sheet is put before the public for general information; it is supposed to be expressed in plain terms so that the ordinary business man can understand it, and, in connection with the **rate sheet**, can determine for himself what he can lawfully charged for transportation. The persons who prepared the classification have no more authority to construe it than anybody else, and they must leave it to speak for itself.

5. It is competent to prove by the testimony of witnesses in what sense **terms of art or terms peculiar to any occupation or business** are used by those engaged in such occupation or business. But when such terms are made use of in a classification sheet to designate the product of particular employment, they are supposed to be used as understood in that employment, and it is not competent for railroad experts, when the **meaning of the classification** is in question, to testify in what sense they are understood in transportation circles.

6. Under a classification which puts lumber in carload lots in the sixth class, and unfinished wagon materials in the fifth class, *it is held* that **hub blocks** which are prepared as such to be sold to the manufacturers of hubs and of wheeled vehicles, but upon which only so much labor has been expended as is useful to put them in condition for seasoning are to be regarded as the **raw material** upon which the process of manufacture of hubs is not yet begun, just as boards are the raw material from which wagon boxes are made. The blocks **belong**, therefore, **when not otherwise specified in the classification sheet, with lumber instead of with unfinished wagon materials.**

(Heard July 17, Decided July 20, 1888.)

COMPLAINT alleging excessive rates for, and improper classification of, rough hub blocks.

See abstract of complaint, *ante*, 15; abstract of answer, *ante*, 31.

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

The complaint in this case presents a question of construction, arising under what is known as official classification No. 2, adopted by the joint committee of the Trunk Line Association, to take effect July 15, 1887.

The complainant is a manufacturer of hub blocks at Ashtabula, Ohio, on the line of the defendant's road. Previous to 1887 he was in the same business at another place and on the line of another road, and in view of a remov-

al to Ashtabula, if satisfied it would be to his advantage, he opened correspondence with the general freight office of the defendant to ascertain what the freight charges would be on his product. In the correspondence the terms "hub blocks" and "hub blocks in the rough" were made use of. In response to his inquiries the regular rates on articles in the sixth class were quoted to him. After receiving the response he located at Ashtabula, relying, as he claims, upon having sixth class rates regularly given him.

The blocks which complainant prepares for market and in which he deals are variant in size, but appear from the evidence to average about twelve inches in length, and to be in diameter from about four inches up to about twelve. They are sawed from trunks of trees or logs, which, as a maximum, must not much exceed a diameter of twelve inches, and they are then passed through the turning machine and sufficient taken off to remove all the bark, leaving a cylindrical block of uniform thickness. A hole an inch or so in diameter is then bored longitudinally through the heart of this block, and the ends are dipped in a preparation of rosin and oil to prevent checking. In that condition the blocks will average in value about four cents; and it is in that state that complainant disposes of his blocks to the manufacturers of hubs and wheeled vehicles. Complainant has made several shipments over defendant's road, but in each case the consignment has been billed as fifth class merchandise. The freight department of defendant, insisting that the billing is such as the classification requires, this proceeding is instituted to correct the supposed error.

A preliminary objection is raised on the part of the defense that necessary parties are wanting.

The consignments made by complainant over defendant's road were destined respectively to Wallingford, Connecticut; Lambertville, New Jersey; New Haven, Connecticut, and Shortsville, New York. In each case the consignment was billed for delivery by defendant to another carrier, the defendant's road not reaching any of the points named. None of the other carriers is made a party to this proceeding. Counsel for defendant insist that this is essential, and that, consequently, this proceeding should be dismissed. We do not think so.

In *Allen v. Louisville, New Albany & Chicago R. Co.* 1 Inters. Com. Com. Rep. 199, 1 Inters. Com. Rep. 621, it was decided that when the object of a complaint was to compel a reduction of rates from a western point to the seaboard, all the carriers forming the line over which the property is transported must be parties, and that it is not sufficient to proceed against the initial carrier alone. The reason is obvious; all the carriers are interested alike and directly, and any order made against the initial carrier alone would be altogether futile, since the direction to that carrier to change the rate for the whole distance would be one it would have no power to comply with, because it could not, even under the order of the Commission, make rates for other carriers. But an order to this defendant that it receive merchandise and bill it in a particular class for transportation would be one that there would be no

difficulty in its complying with without awaiting the consent of others.

It is true that the other carriers which have received complainant's property from the defendant are interested in the question the case presents; but so are all the parties which united in making official classification No. 2, and which are governing their rates by it. If in this case it should be held that the classification actually made by the defendant was erroneous, all the carriers making rates under official classification No. 2 will be expected to conform to the ruling. The interest is so apparent that if any of such carriers had appeared and asked to be heard when this case was presented the request would have been granted without hesitation. Nevertheless, the interest of such other carriers is indirect, and is in the question involved, rather than in the particular controversy; it is such an interest as in judicial proceedings would not make any one of them a necessary party to a suit. And to require all the parties governed by the official classification to be joined in this case would, from the very number, be to make the remedy of little or no value. But the law, clearly, as we think, does not require it.

If the Commission were to undertake to make an order retroactive in terms, and to require the refunding of freight moneys paid, which have been received by several parties, the necessity for such parties being first brought in might be imperative; but in this case, if we find the classification erroneous, we shall restrict to its correction any order that may be made. The defendant is not, therefore, entitled to have the case dismissed.

It will be convenient, before taking up the official classification for examination, to consider the complainant's claim that he was induced to locate at Ashtabula by the assurances of defendant's agents that his goods would be taken as sixth class. Some importance is attached to these assurances as establishing equities in his favor. On the other hand it is contended by the defense that complainant was understood in the correspondence to be asking for rates upon blocks as they are when first cut from the log and with the bark on, and that it was with reference to such blocks that rates were given him. We do not, however, consider this very material. The official classification must have the same construction in favor of all other persons as is given it in favor of complainant; no assurances to him, however honestly made or honestly relied upon, can entitle him to special rates. He could not have special rates under an express promise, and quite as plainly he cannot have them because of any conduct of defendant's agents such as was shown in proof. The law requires uniformity and impartiality in the dealings of a carrier with all its customers.

We are brought, then, to an examination of official classification No. 2. This classification has since been superseded, but the clauses in it which would bear upon this controversy are retained in that which takes its place.

Among the articles specified is lumber, which, in car load lots, is placed in the sixth class. Under the general head of wood articles is specified "wooden billets, sawed in rough," also placed in the sixth class. Under

the general head "Parts of vehicles and vehicle stock or stuff in car loads" are mentioned hubs, placed in the fifth class, and wagon material, unfinished, also placed in the fifth class. The hub blocks dealt in by complainant must find a place with some of the articles thus mentioned.

On the hearing it was thought by counsel that a settlement of the proper term to be applied to these blocks might go far to determine their place in classification, and the defense sought to show that the proper designation was hub blocks, as distinguished from hub blocks in the rough, which, it was contended, were the blocks before the bark was removed. A member of the committee of railroad officers who had prepared official classification No. 2 was called and asked to give his opinion and the understanding of the committee, but the evidence was ruled out as altogether inadmissible. A classification sheet is put before the public for its information. It is supposed to be expressed in plain terms, so that the ordinary business man can understand it, and, in connection with the rate sheets, can determine for himself what he can be lawfully charged for transportation. The committee who prepared the classification have no more authority in construction than anybody else, and they must leave the document, after they have given it to the public, to speak for itself.

Terms of art, however, or terms peculiar to a particular occupation or business, may sometimes require the evidence of experts for their full understanding, and the defense offered testimony of persons connected with transportation as to the understanding of the terms "hub blocks" and "hub blocks in the rough" in transportation circles; but this evidence was also rejected for the plain reason that it was not the meaning as understood in transportation circles that was in question, but the meaning accepted and acted upon in the business in which the blocks are dealt in and made use of. The classification is supposed to inform the persons engaged in that business in what classes the articles they handle are placed for transportation purposes, and it would fail to do this if instead of employing terms of designation in the sense familiar to themselves it made use of them in a sense fixed upon by persons engaged in an occupation altogether different, and which might to an expert in their own business be strange and misleading.

But we do not regard the term applied to the particular article in question as very important when neither of the terms suggested is found to be given in the classification sheet. We have the article before us in the proof, and the question is where it should be placed under a classification which does not name it specifically. The defense claim that it belongs with "wagon material unfinished," it being indisputably designed for wagons and a process of manufacture having actually been commenced upon it. This fact—that the manufacture has been commenced—is supposed by the defense to be what should determine the question in controversy.

It is conceded, however, that there is a stage in which wood is not to be classed as "wagon material, unfinished," though destined for the making of wagons, and though something has

already been done upon it in the way of preparation. Thus wood for wagon boxes is in a process of manufacture when it is being cut into boards; but it is not then called "wagon material, unfinished." Indeed, if the boards were to be cut at just the required length and sold for the particular use, they would still be "lumber," and would be accepted and transported as such in the sixth class. This was conceded by counsel on the hearing. The process of manufacture, then, is a process subsequent to that which converts the trees into lumber; and it may be added that it is commonly a process which begins some considerable time later, and after the lumber has become seasoned.

Now, the evidence in the present case is that the manufacturers of hub blocks procure the raw material in the log, cut it into pieces of the proper length, turn off the outside sufficiently to remove all bark, which in part is done to guard against injury by worms, and take out the heart. All this is for the purposes of a proper and safe seasoning. If the seasoning were to take place with the bark on and the center not taken out the cracking from unequal contraction would render the blocks unsuitable for use. The dipping of the ends in the mixture of rosin and oil is to prevent checking at the ends. When thus prepared the blocks should be and usually are kept for one or two years for seasoning or should be steamed before they can be made into hubs; but all that is done up to this point is not the beginning of a manufacture of hubs, but it is a preparation of timber from which in due time hubs may be manufactured. The marketable value of hub blocks only begins when the blocks are in the condition described; until that stage is reached the raw material would under the classification in question be classed as "logs." The process of preparing the blocks corresponds very closely to the process of converting trees into boards for such uses as boards are applied to; the manufacture of the particular article begins after the seasoning of the raw material is completed.

There are reasons of strong equity why the railroad managers, in making classification sheets, should thus distinguish between the material which is thus being prepared for manufacture and the article while the manufacture is in progress. It was shown in this case that the value of a car load of these blocks weighing 28,000 pounds would be but about \$290, while the value of a like load of the hubs in the rough—that is to say, of the blocks turned down to the size and shape of the a hub, but not mortised or otherwise perfected—would be about \$5,000. The reasons, therefore, would be very strong for not classing the blocks and the hubs in the rough together, and it is not likely that any classification committee would intentionally do so. But, however that may be, we do not think it has been done in this case. The blocks in question are not to be regarded as "wagon material unfinished," because the process of making the marketable article into parts of wagons is not yet begun upon the marketable article. They are the unseasoned raw material on its way to the hands of the manufacturer. They must, therefore, be considered as properly classed

with lumber, and not as they were classed by the defendant's agents in the case of the consignments in question.

This construction of the classification is strongly supported by the lumber tariff issued by defendant and in force upon its lines. In the official classification the word "lumber" is not defined, nor is any attempt made to indicate what articles are intended to be embraced in that general designation. The lumber tariff, however, enumerates a line of articles which are accepted for transportation under that general head. They include, among others, barrel shooks, box stuff, cooperage stock, heading bolts, hoops, hop poles, lath, wooden paving blocks, pickets, picture backing, shingles, stave bolts, staves, and heading, telegraph cross-arms, and telegraph poles. Applying to hub blocks the rule of the classification, that "articles not enumerated will be classed with analogous articles," they quite easily arrange themselves with the articles above named, some of which, indeed, have reached the final stage of manufacture. On the other hand the articles manufactured from wood which are placed by the official classification in the fifth class were enumerated in the case of *Reynolds v. Western New York & Pennsylvania R. Co.* 1 Inters. Com. Com. Rep. 397, 1 Inters. Com. Rep. 685; and scarcely any of them can be said to be analogous to the hub blocks in question.

Order will be entered that the complaint is sustained, and that in any consignments to be hereafter made over its road the defendant must conform to the construction of the classification sheet above laid down.

Frank L. HURLBURT

v.

PENNSYLVANIA R. CO.

(No. 133.)

(Heard July 17, Decided July 20, 1888.)

Cooley, Chairman:

This case was submitted upon the testimony taken in the case of *Hurlburt v. Lake Shore & Michigan Southern Railway Company*. It presents the same question and no others, and requires the same decision. *Order will be entered accordingly.*

NEW JERSEY FRUIT EXCHANGE

v.

CENTRAL R. CO. OF NEW JERSEY and
Lehigh Valley R. Co.

(No. 138.)

1. Rates for the transportation of fruit.

The traffic originates in the State of New Jersey, and is destined to the City of New York; but the delivery by the defendants to the consignees is made at Jersey City in New Jersey, and the rates of defendants are made not to New York but to Jersey City. Under these facts the **traffic**, so far as defendants' conduct of it is concerned is **not interstate**, and the Commission has no jurisdiction over their rates.

2. As to certain traffic originating in New Jersey and destined to Pennsylvania, it is held that the **showing is too indefinite** for any conclusion.

(Heard July 10, 11, Decided July 23, 1888.)

COMPLAINT alleging unjust rates for the transportation of peaches. *Dismissed.*

See complaint, *ante*, 18.

Mr. J. A. Bullock, for complainant.

Mr. Robert W. deForest, for defendant the Central Railroad Company of New Jersey.

Messrs. F. H. Janvier and F. I. Gowan, for defendant the Lehigh Valley Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

The complainant in this case is duly incorporated under the laws of New Jersey, under the name and style of the New Jersey Fruit Exchange, and the complaint sets forth that the defendants, the Central Railroad Company of New Jersey and the Lehigh Valley Railroad Company, charge eleven cents per basket of sixteen quarts for the transportation of peaches from Flemington and neighboring stations to New York, eight cents from Bloomsbury to Easton, and similar rates from and to other places; that the average weight of a basket of peaches is thirty pounds, and the distance from Flemington to New York is fifty-two miles, making the freight charge fourteen cents per ton per mile between those places; that the distance from Bloomsbury to Easton is eight miles and the rate is forty-four cents per ton per mile; that the peaches from that section are generally transported in full car loads, several being filled at each station every day during the season of gathering the fruit. The complainant charges that the rates are excessive, unreasonable, and unjust, and in violation of the first section of the Act to Regulate Commerce, and the petition asks that the Commission shall order such reduction of rates by the companies complained of as shall make them reasonable and just and in accordance with the provisions of the Interstate Commerce Act. Schedules of rates are annexed to the complaint and are made part of it.

The answers admit that the charges for transportation of peaches during the peach season of 1887 were as stated in the schedules annexed to the complaint, but deny that any rate is made from points in New Jersey to the City of New York. The weight of a basket of peaches and the distance from Flemington to New York, and from Bloomsbury to Easton, are also admitted.

It is further admitted that peaches from many, although not from all the stations in the section referred to, are generally transported in full car loads, and the answers deny that the rates for the transportation of peaches are excessive, unreasonable, or unjust, and justify the rates by setting forth that the transportation of peaches requires special preparation and special arrangements, which greatly increase the cost of transportation. The answers specify the number of cars set apart for this special

service, and the manner in which they are fitted up for that purpose, and also allege that after the season opens special trains are run for the transportation of peaches, one and frequently two daily, making almost the time of passenger trains, and that a large force of men is employed at the peach-shipping stations and at Jersey City in this service, at considerable expense; that the peach trains deliver their freight at a special yard in Jersey City, and not in New York City, said delivery at Jersey City being more expeditious and more convenient for shippers; that the peach cars can carry no return freight by reason of the manner in which they are fitted up, and are returned empty, except that the baskets are returned by them, and on these no charge is made. It is further alleged that the rates heretofore charged have only been remunerative in years when a full crop of peaches was raised and transported; that when crops have been small said rates have barely covered respondent's expenses. The answers set forth that so far as the transportation is concerned the commerce is entirely within the limits of one State, to wit, the State of New Jersey.

The essential facts as to the distance hauled, the rates charged, the weight of a basket of peaches, that they are usually transported in car load lots, that the service is special, and cars fitted up expressly for the business, and that the time made is nearly equal to that of passenger transportation, are all undisputed, and are set forth in the pleadings.

Considerable testimony was given on the hearing showing the origin and growth of the peach traffic, the quantities transported for several successive years, and the prices received for the peaches in the market. Evidence was also given showing in detail the manner in which the cars are fitted up for this service and the expense of fitting them up, and the additional expense incurred by the defendants for the train service in the transportation of the peaches. It was satisfactorily shown that the transportation of the peaches in question by defendants, so far as that transportation is east bound, is to Jersey City, and not to New York, and that the delivery of the peaches to the consignees in New York—or when they are carried by other lines beyond New York—is at Jersey City. The tariffs published by the defendants for this transportation are to Jersey City, and not to the City of New York, and other tariffs were put in evidence showing that the transportation to the City of New York by the defendants is three cents per hundred higher than to Jersey City. It appears in evidence that the present rates of transportation for peaches are the same as they have been from the beginning of the special service for this traffic, and that, although the volume of business has largely increased, the rates have not been reduced. It also appears in evidence that the shippers of peaches are at liberty to have them transported in ordinary freight trains to New York, at a rate of transportation which on those trains is lower than on the special trains, but that it is highly important that the peaches should have a speedy delivery in the market, and for that reason the shippers prefer the special trains. It also appears that the delivery in Jersey City has been the custom for many

years, and is not a device of the carriers to evade the law, but is made there by the consent and for the accomodation of the consignees in New York. During the last season, and since the organization of the Fruit Exchange, the sales of peaches by the growers have, to a considerable extent, been made in New Jersey at or near the points of production, instead of being transported, as formerly, to New York to be sold by commission agents; and the growers have realized better prices since their sales have been made in New Jersey. Very little testimony was given in relation to the west bound shipments into Pennsylvania and other western points, and no data have been furnished to the Commission upon which any satisfactory conclusions can be based as to the rates upon shipments in that direction. The bulk of the shipments, as shown by the testimony, go to the City of New York.

Upon the facts of the case, as they appear without contradiction, the Commission has no authority or jurisdiction to make an order concerning the rates. If the shipments were interstate in their character they would be within the jurisdiction of the Commission, but as the transportation by the carriers is wholly within the State of New Jersey, the Commission has no jurisdiction. The proviso in the first section of the Act to Regulate Commerce is as follows:

"Provided, however, That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

This provision applies to all the peaches that are delivered at Jersey City and destined either for New York City or any points beyond that city.

The argument of the complainant's counsel that a contract for delivery in New York is to be inferred from the fact that a tag is attached to one or two of the baskets in each shipment, addressed to the commission merchant to whom the shipment is consigned, showing the street and number of his place of business in New York City, is not supported by the proofs. The undisputed facts are that the delivery is actually made in Jersey City; that the returns of the commission merchant invariably show the deduction of a given sum for freight and four cents for cartage and that the consignees desire to receive and, in fact, actually do receive the peaches at Jersey City. Whatever *prima facie* contract may in some cases be inferred from the receipt of an addressed parcel, it is clear that in the present case no duty is undertaken by the carriers, and none devolves upon them, beyond the delivery of the peaches at Jersey City.

These facts being clear, it is superfluous and profitless to dwell with any detail upon the character of the business, or to discuss the subject of the rates. It may be appropriate to observe, however, that, in view of the increasing volume of business in the peach traffic, and the increased competition in the New York market, a reasonable reduction in the rates, corresponding with the growing volume of business and the competition in the market,

might be just. It would seem quite probable that rates which might have been deemed reasonable and necessary in the infancy of this traffic, now that the traffic has become large and important, might justly be reduced to some extent and still leave to the carriers full compensation for the service and a reasonable margin of profits. These are considerations that address themselves to the sense of justice of the carriers, and rest on the principle of fair dealing that is due between the carriers and their customers.

For the reasons that there are not sufficient facts presented in the case upon which to base an order respecting the west bound shipments, and that the transportation to Jersey City is wholly within the State of New Jersey, and, therefore, not under the jurisdiction of this Commission, *the complaint is dismissed.*

CHICAGO BOARD OF TRADE

v.

CHICAGO & NORTHWESTERN R. CO.
and Pennsylvania Co.

(No. 144.)

COMPLAINT filed July 23, 1888, alleging unjust discrimination against Chicago, in the transportation of grain.

To the Honorable the Interstate Commerce Commission:

The Board of Trade of the City of Chicago would respectfully show unto your honorable Commission as follows:

1. That your petitioner is a corporation duly incorporated and established by an Act of the General Assembly of the State of Illinois, approved February 18, 1859, to which Act of incorporation your petitioner begs leave to refer and make a part of this petition, and from which it appears that your petitioner is an association of merchants and dealers both on commission and as principals in grain, produce and provisions, with power to establish rules, regulations and by-laws for managements of the business of its members and their government, and generally to secure to such members the benefits of co-operation in the furtherance of their legitimate pursuits, among which is the receiving, shipping and procuring just and reasonable transportation for the commodities in which they deal. That your petitioner is and always has been, since its incorporation, located in the City of Chicago, in the State of Illinois, and as all persons of good character and credit and of lawful age are qualified for admission, its membership for a long time since has been, and now is large, embracing a very large proportion of such merchants and commission dealers in Chicago and the northwest, and whose aggregate business of buying and selling, receiving and shipping grain, produce and provisions transacted at Chicago through this association is very large.

2. That the facilities possessed by this association for dealing in and handling the grain and other agricultural products of the West, Southwest and Northwest, for the best interests of producers and shippers, are very large.

That the aggregate capacity of regular elevators or grain warehouses at Chicago, conveniently located for both railroad and water transportation, is large and amply sufficient for the storage of grain consigned to this place, and to members of this association, from localities westward, southwestward and north-westward therefrom, and not immediately sold and forwarded to the Atlantic seaboard and other eastern points without being placed in store to await favorable markets; so that these warehouses are seldom, if ever, taxed to their full capacity, and from January 1, to May 1, 1888, were not taxed on an average to exceed one half their capacity. That of the grain shipped from these western, southwestern and northwestern points and places, and consigned to Chicago and to members of this association during this period of time, over 21,000,000 bushels were sold and shipped by rail east to the seaboard and other eastern points; and of this amount a large proportion was sold at Chicago by its consignees, either before or upon arrival, and was rebilled and immediately forwarded over eastern trunk lines of railroad without being placed in store in the grain warehouses at Chicago. That by the course of business long since established and now existing at Chicago, grain is shipped from these western, southwestern and northwestern points and places, consigned to commission merchants at Chicago, members of this association, and either sold by them before arrival or to be by them sold on arrival, for immediate eastern shipment or placed in store here for future sale and shipment, depending upon the state of the markets; and thus the producers and owners of these commodities have the advantage of the markets at all eastern places and sea ports from Savannah, Georgia, to Portland, Maine, and in Canada—and indeed the markets of the world, for their sale to the best advantage, as buyers for all these markets are represented at all times at Chicago by members of this association, and as there are ample facilities for both rail and water transportation from this place to all these markets.

3. Your petitioner further shows that the Chicago & Northwestern Railway Company having its eastern terminus at Chicago, and the Pennsylvania Company (which controls and operates a line of railroad east from Chicago to the seaboard and which controls and operates the Pittsburgh, Fort Wayne & Chicago Railway which is a part of said line having its western terminus at Chicago), are each common carriers engaged in interstate transportation and commerce, and are each subject to the Act of Congress to Regulate Commerce, approved February 4, 1887.

And your petitioner charges and alleges that each and both of said common carriers have violated the first, second, and third sections of said Act by unreasonable charges for service, and by unjust discriminations against the said City of Chicago as a locality, and against persons, members of this association there transacting business, and their principals; and subjecting this locality, and these persons to undue and unreasonable prejudice and disadvantage. That the facts to establish such unreasonable charges and unjust discriminations are as hereinafter stated.

INTER S.

4. Your petitioner further shows that since the first of January, 1888, and especially in the month of February, 1888, these two common carriers transacted business of interstate transportation of grain under tariffs established by each of them respectively, and under joint tariffs established by both from numerous stations on the line and beyond the line of the Chicago & Northwestern Railway in the State of Nebraska, to Chicago, and thence eastward to the City of New York upon the Atlantic seaboard, over the lines of these carriers respectively.

That the following list or tabulated statement shows the stations in Nebraska on the Northwestern Road and beyond same and the rates from each respectively to Chicago, and the rate east from Chicago to New York; and the joint or through rates from these Nebraska stations via Chicago to New York under these separate and joint tariffs, and the difference between the sum of the rates from these Nebraska stations and the rate thence east to New York and the joint through rates from each of these stations to the latter city; and which shows an average difference or discrepancy of over eleven cents per 100 pounds.

NEBRASKA.

Rates on Corn and Oats, February 17 to February 29, 1888.

| Stations in Nebraska. | Rate to Chicago | Rate to New York. | Two Locals to N. Y. | Through Rate. | Two Locals Exceed Through Rate |
|-----------------------|-----------------|-------------------|---------------------|---------------|--------------------------------|
| Blair, Neb. | 20c. | 27½c. | 47½c. | 36½c. | 11c. |
| Omaha Heights | 20 | " | " | " | " |
| De Bolt Place | 20 | " | " | " | " |
| Irrington | 20 | " | " | " | " |
| Bennington | 20 | " | " | " | " |
| Washington | 21 | 27½ | 48½ | 36½ | 12 |
| Kennard | 20 | 27½ | 47½ | 36½ | 11 |
| Arlington | 21 | 27½ | 48½ | 36½ | 12 |
| Fremont | 22 | 27½ | 49½ | 36½ | 13 |
| Cedar Bluffs | 22 | " | " | " | " |
| Colon | 22 | " | " | " | " |
| Wahoo | 22 | " | " | " | " |
| Swedesburg | 22 | " | " | " | " |
| Ceresco | 22 | " | " | " | " |
| Davey | 22 | " | " | " | " |
| Little Salt | 22 | " | " | " | " |
| Lincoln | 22 | " | " | " | " |
| Morse | 22 | " | " | " | " |
| Linwood | 22 | " | " | " | " |
| Abie | 22 | " | " | " | " |
| Skull Creek | 22 | " | " | " | " |
| Brainard | 23 | 27½ | 50½ | 37½ | 13 |
| Dwight | 23 | " | " | " | " |
| Bee | 23 | " | " | " | " |
| Seward | 23 | " | " | " | " |
| Gunter | 23 | " | " | " | " |
| Beaver Crossing | 24 | 27½ | 51½ | 38½ | 13 |
| Hunkins | 25 | 27½ | 52½ | 39½ | 13 |
| Exeter | 25 | " | " | " | " |
| Buxton | 25 | " | " | " | " |
| Genova | 25 | " | " | " | " |
| Octavia | 25 | 27½ | 49½ | 36½ | 13 |
| David City | 23 | 27½ | 50½ | 37½ | 13 |
| Millerton | 23 | " | " | " | " |
| Surprise | 23 | " | " | " | " |
| Gresham | 23 | " | " | " | " |
| Thayer | 24 | 27½ | 51½ | 38½ | 13 |
| Houston | 25 | 27½ | 52½ | 39½ | 13 |
| York | 25 | " | " | " | " |
| Charleston | 25 | " | " | " | " |
| Henderson | 25 | " | " | " | " |
| Stockham | 25 | " | " | " | " |
| Eldon | 25 | " | " | " | " |

Stations in Nebraska.

| | Rate to Chicago. | Rate to New York. | Two Locals to N. Y. | Through Rate. | Two Locals Exceed Through Rate. |
|----------------|------------------|-------------------|---------------------|---------------|---------------------------------|
| Harvard | 25c. | 27½c. | 52½c. | 39½c. | 13c. |
| Inland | 25 | " | " | " | " |
| Hastings | 25 | " | " | " | " |
| Nockerson | 27½ | 49½ | 36½ | 13 | " |
| Hooper | 27½ | " | " | " | " |
| Scribner | 27½ | " | " | 37 | 12½ |
| Snyder | 27½ | 49½ | 38 | 11½ | " |
| Dodge | 27½ | " | 38½ | 11 | " |
| Howells | 27½ | " | " | " | " |
| Clarkson | 27½ | 50½ | 38½ | 12 | " |
| Leigh | 24 | 27½ | 51½ | 38½ | 13 |
| Creston | 24 | " | " | " | " |
| Brookfield | 24 | " | " | " | " |
| Cornlea | 24 | " | " | " | " |
| Lindsay | 24 | " | " | " | " |
| Newman's Grove | 24½ | 27½ | 52 | 38½ | 13½ |
| Bradish | 25 | 27½ | 52½ | 39½ | 13 |
| Albion | 25 | " | " | 40½ | 12 |
| Loran | 25 | " | " | " | " |
| Petersburg | 25 | " | " | 41½ | 11 |
| Elgin | 25 | " | " | " | " |
| Crowell | 22 | 27½ | 49½ | 37½ | 12 |
| West Point | 22 | " | " | 38½ | 11 |
| Beemer | 23 | 27½ | 50½ | 38½ | 12 |
| Wisner | 23 | " | " | " | " |
| Pilger | 23 | " | " | 39 | 11 |
| Stanton | 23½ | 27½ | 51 | 39½ | 11½ |
| Norfolk | 24 | 27½ | 51½ | 40 | 11½ |
| Hadar | 24 | " | " | 40 | " |
| Pierce | 24 | " | " | " | " |
| Foster | 24 | " | " | 40½ | 11 |
| Plainview | 24½ | 27½ | 52 | 40½ | 10½ |
| Creighton | 25 | 27½ | 52½ | 41½ | 11 |
| Battle Creek | 24 | 27½ | 51½ | 38½ | 13 |
| Meadow Grove | 24 | " | " | 39½ | 12 |
| Burnett | 24½ | 27½ | 52 | 40½ | 11½ |
| Oakdale | 25 | 27½ | 52½ | 41½ | 11 |
| Neligh | 25 | " | " | 42½ | 11 |
| Clear Water | 26 | 27½ | 53½ | 43½ | 10 |
| Ewing | 27 | 27½ | 54½ | 44½ | 9 |
| Inman | 27 | " | " | 45½ | 9 |
| O'Neil | 28 | 27½ | 55½ | 46½ | 9 |
| Emmett | 28 | " | " | 46½ | 9 |
| Atkinson | 29 | 27½ | 56½ | 47½ | 9 |
| Stuart | 29 | " | " | 47½ | 9 |
| Newport | 30 | 27½ | 57½ | 48½ | 9 |
| Basset | 30 | " | " | 48½ | 9 |
| Long Pine | 31 | 27½ | 58½ | 49½ | 9 |
| Ainsworth | 32 | 27½ | 59½ | 50½ | 9 |

On March 5, 1888, rate Chicago to New York was reduced to twenty-five cents per 100 pounds.

5. Your petitioner further shows that by the course of business at Chicago for many years, and still in vogue, grain shipped from any of these Nebraska stations via Chicago consigned to New York or other eastern points on through bills of lading, is transferred from the car in which it arrives at Chicago to another car on the Pittsburgh, Fort Wayne & Chicago Road (or such eastern trunk line over which it may be billed) after being switched over to the track of such eastern road under a switching charge of \$2, defrayed by the carrier; and when consigned to Chicago and by the consignee or purchaser rebilled and forwarded eastward, it is likewise, and in the same manner, transferred to another car, and in such case the switching charge is defrayed by the shipper; but the transaction is generally attended by a delay of not exceeding one day to the car arriving in excess of the delay attending a through shipment upon a through bill of lading, and which may involve a demurrage charge upon this car of \$3, which is the uni-

form charge. So that the service of the carriers is precisely the same in each instance with but \$1 per car additional expense over a through shipment being the difference between the demurrage charge of \$3 per car and the switching charge of \$2, and which upon the average weight of grain transported in freight cars would amount to not exceeding one third of a cent per 100 pounds. And if grain consigned to Chicago be here stored in elevators for future sale and shipment, it is transferred to and from these elevators with great dispatch, without charge to the carrier, and without delay or expense to the carrier over a through shipment.

6. As an illustration of the practical application and operation of these tariffs your petitioner further shows that F. J. Schuyler, Esq., of the firm of W. F. Johnson & Co., a commission merchant and grain dealer, doing business at Chicago, and a member of this association, shipped on account of said firm over the Chicago & Northwestern Railway from Hooper, Nebraska, on the 28th day of February, 1888, two car loads of corn (which he had there purchased) in car No. 42,010, which was billed and consigned to Chicago, and upon its arrival here, March 9 last, was immediately on the same day rebilled to New York over the Pittsburgh, Fort Wayne & Chicago Railway, and was transferred into car No. 49,040 of that road; and in car No. 18,650, which was billed and consigned to New York via the Pittsburgh, Fort Wayne & Chicago Railway, and upon its arrival at Chicago the corn was transferred to car No. 12,498 of the Pittsburgh Road. Both car loads arrived in New York at about the same time, where the freight was paid on each. At the date of shipment from Hooper the Northwestern tariff rate to Chicago was twenty-two cents per 100 pounds, and the tariff rate from Chicago to New York was 27½ cents per 100 pounds, but while car No. 42,010 was in transit to Chicago this tariff was reduced to twenty-five cents per 100 pounds, so that the freight on this car load aggregated forty-seven cents per 100 pounds, or 10½ cents in excess of the through rate of 36½ cents upon car No. 18,650.

7. Your petitioner submits that this large discrepancy between the through rates from the Nebraska stations to New York, and the rates from these stations to Chicago and from Chicago eastward to New York is an unjust discrimination against producers, owners and shippers of grain who may wish to consign the same to Chicago to be handled and disposed of in this market, and against their consignees, commission merchants at Chicago, and members of this association, and against Chicago itself as a locality, and should be so declared by this Commission; and that the latter rates are unreasonably high compared with the through rates. Your petitioner further shows that an examination of the tariffs from Chicago to other eastern points, and the through tariffs from these Nebraska stations to the same eastern points, will show a similar if not greater discrepancy, and that these tariffs are therefore in violation of said Interstate Commerce Law, and should be so declared by this Commission.

And your petitioner further submits that the fact that this particular through tariff rate was only continued in force for ten days* or a little over, affords no reason why this Commission should not so rule upon this question, as it was only made thus temporary in pursuance of a practice by these carriers during this period from January 1 to May 1, 1888, of temporary discriminating rates established and revoked or changed in numerous instances and at short intervals of time, which practice, as your petitioner is informed and therefore charges, these carriers are intending to renew as soon as the present season of lake navigation ends. And if this practice of temporary through rates and tariffs with this unjust discrimination is to be tolerated, it affords opportunities, which are eagerly embraced, for those who are seasonably advised to obtain unjust advantage over others engaged in the same trade, to the detriment of Chicago as a locality, and of those desiring to consign their grain to this place, and their consignees, commission merchants and members of this association. Your petitioner further submits that said carriers should be directed to refund to said W. F. Johnson & Co. the excess of freight charges on said car load consigned to Chicago and thence rebilled and forwarded to New York over their then through rate from Hooper to New York, or such portion thereof as, under the circumstances, shall be deemed reasonable and just, and as the transportation service is the same in each instance, the difference in charges, if any, should not exceed one-third of one per cent per 100 pounds, as above shown.

8. Your petitioner shows that the said Chicago & Northwestern Railway Company, among other schemes of unjust discrimination against Chicago and persons interested in the grain business at that place, adopted and published a tariff on the 5th of March, 1888, fixing rates on corn and oats from about eighty-seven stations in Nebraska to a place called Turner or Turner Junction, about thirty miles west of Chicago, which is not a terminal point on its road, and where no grain business is transacted; and, by this tariff, fixing different rates from the same Nebraska station to Turner, depending on the destination of the grain east from this point; as, for instance, from Blair, one of these Nebraska stations, if destined to New York, 14½ cents; if to Boston, 13½ cents; if to Baltimore, 15½ cents, and if to Philadelphia, 15½ cents per 100 pounds; and at the same time arranged with eastern lines, including the Pennsylvania Company, a prorating from Turner to eastern points upon such terms as to secure to the said Northwestern Road its then established rates from these Nebraska stations to Chicago, and at the same time making the combined rates from such stations through to New York and other eastern points much lower than the regular rates to Chicago and thence eastward to the same eastern points; thus unjustly discriminating against Chicago and against those desiring to transact business at that place.

[L. s.] The Board of Trade of the City of Chicago,

Attest: By C. L. Hutchinson, *President*.
Geo. F. Hone, *Sidney Smith, Attorney*
Secy. and of Counsel for Petitioner.

[Verified.]

INTER S. VOL. II.

SEPARATE ANSWER OF THE PENNSYLVANIA COMPANY.

(Filed Aug. 9, 1888.)

(*Mr. J. T. Brooks, General Counsel.*)

1. Inasmuch as it appears from the complaint filed herein that the alleged unreasonable charges, and unjust discriminations referred to in said complaint, are not now being practiced by defendants; and as it is only conjectured in said complaint that defendants may at some time in the future begin to commit the alleged unlawful acts referred to, it is respectfully submitted that the complaint presents no case of which the Honorable Interstate Commerce Commission can take cognizance, or in which it can lawfully render a decree.

2. The Pennsylvania Company denies that it has violated the first, second, or third sections of the Interstate Commerce Law, either by making unreasonable charges for services, or by practicing unjust discriminations, as charged in said complaint. Or that it has subjected the City of Chicago or the persons named in said complaint to undue or unreasonable prejudice and disadvantage.

It denies that the rates which it has charged, in connection with the Chicago & North Western Railway Company, on traffic originating west of Chicago, or that the rates which it has fixed in connection with eastern connecting carriers in respect to traffic originating at Chicago, have been unjust or unreasonable.

On the contrary it avers that the same have been fixed and maintained with a view of placing as nearly as possible, all shipping points on a plane of equality; and having in view the fact that the rate per ton per mile should grow less in proportion to the greater distance, while the aggregate rate should increase in proportion to such greater distance.

Wherefore, it says that the rates so fixed by it, in respect to the traffic referred to in the complaint of petitioners, are not obnoxious to the Interstate Commerce Law, and prays that said complaint may be dismissed.

CHICAGO BOARD OF TRADE

v.

CHICAGO, ROCK ISLAND & PACIFIC R. CO. and Baltimore & Ohio R. Co.

(No. 145.)

COMPLAINT filed July—, 1888, alleging unjust discrimination against Chicago, in the transportation of grain.

To the Honorable the Interstate Commerce Commission:

The Board of Trade of the City of Chicago would respectfully show unto your honorable Commission as follows:

[Paragraphs 1 and 2 are the same as in preceding case, of same complainant against C. & N. W. R. Co. and Pa. Co.]

3. Your petitioner further shows that the Chicago, Rock Island & Pacific Railway Company, having its eastern terminus at Chicago, and the Baltimore & Ohio Railroad Company having its western terminus at the same place, are each common carriers engaged in interstate transportation and commerce and are each

subject to the Act of Congress to Regulate Commerce, approved February 4, 1887.

And your petitioner charges and alleges that each and both of said common carriers have violated the first, second and third sections of said Act by unreasonable charges for service, and by unjust discriminations against said City of Chicago as a locality, and against persons, members of this association, there transacting business, and their principals, and subjecting this locality and these persons to undue and unreasonable prejudice and disadvantage. That the facts to establish such unreasonable charges and unjust discriminations are as hereinafter stated.

4. Your petitioner further shows that since the first of January, 1888, and especially in the month of February, 1888, these two common carriers transacted business of interstate transportation of grain under tariffs established by each of them respectively and under joint tariffs established by both, from numerous stations on the line of the said Chicago & Rock Island Railway, in the State of Iowa, to Chicago and thence eastward to Baltimore, in the State of Maryland.

That the following list or tabulated statement shows these stations in Iowa on the Rock Island Road and the rates from each respectively to Chicago and the rates east from Chicago to Baltimore and the joint through rates from these Iowa stations via Chicago to Baltimore, and the difference between the sum of these rates from these Iowa stations and the rate thence east to Baltimore and the joint through rates from each of these stations via Chicago to Baltimore: [See next column.]

On March 5, 1888, rate Chicago to Baltimore, was reduced to twenty-two cents per 100 lbs.

5. Your petitioner further shows that by the course of business at Chicago, for many years and still in vogue, grain shipped from any of these Iowa stations via Chicago consigned to Baltimore or other eastern points on through bills of lading is transferred from the car in which it arrives at Chicago to another car on the Baltimore & Ohio Road (or such eastern trunk line over which it may be billed) after being switched over to the track of such eastern road under a switching charge of \$2, defrayed by the carrier. And when consigned to Chicago, and by the consignee or purchaser rebilled and forwarded eastward, it is likewise and in the same manner transferred to another car, and in such case the switching charge is defrayed by the shipper; but the transaction is generally attended by a delay of not exceeding one day, to the car arriving, in excess of the delay attending a through shipment upon a through bill of lading, and which may involve a demurrage charge upon this car of \$3, which is the uniform charge; so that the service of the carrier is precisely the same in each instance with but \$1 per car additional expense over a through shipment; being the difference between the demurrage charge of \$3, and the switching charge of \$2, and which, upon the average weight of grain transported in freight cars would amount to not exceeding one third of one cent per 100 pounds. And if grain consigned to Chicago be stored in elevators for future sale and shipment, it is transferred to and from these elevators with great

dispatch, without charge to the carrier, and without delay or expense to the carrier over a through shipment.

IOWA.

Rates on Corn and Oats, February 18 to February 29, 1888.

| Stations in Iowa. | Rate to Chicago. | Rate to Baltimore. | Two Locals to Baltimore. | Through Rate. | Two Locals Exceed Through Rate. |
|----------------------|------------------|--------------------|--------------------------|---------------|---------------------------------|
| Davenport, Ia | 10c. | 24½c. | 34½c. | 28½c. | 6c. |
| Walcott | 11 | " | 35½ | " | 7 |
| Fulton | 12 | " | 36½ | " | 8 |
| Durant | 12 | " | " | " | " |
| Wilton | 12 | " | " | " | " |
| Summit | 12 | " | " | " | " |
| Moscow | 12 | " | " | " | " |
| Atalissa | 12 | " | " | " | " |
| West Liberty | 13 | " | 37½ | " | 9 |
| Downey | 13 | " | " | " | " |
| Iowa City | 13 | " | " | " | " |
| Tiffin | 13 | " | " | " | " |
| Oxford | 14 | " | 38½ | " | 10 |
| Homestead | 14 | " | " | " | " |
| South Amana | 14 | " | " | " | " |
| Marengo | 14 | " | " | " | " |
| Ladora | 15 | " | 39½ | " | 11 |
| Victor | 15 | " | " | " | " |
| Brooklyn | 15 | " | " | " | " |
| Malcom | 15 | " | " | " | " |
| Grinnell | 15 | " | " | " | " |
| Kellogg | 16 | " | 40½ | " | 12 |
| Newton | 16 | " | " | " | " |
| Wilson | 16 | " | " | " | " |
| Reasnor | 16 | " | " | " | " |
| Franklin | 16 | " | " | " | " |
| Metz | 16 | " | " | " | " |
| Colfax | 16 | " | " | " | " |
| Mitchellville | 16 | " | " | " | " |
| Altoona | 16 | " | " | " | " |
| Des Moines | 16 | " | " | " | " |
| Avon June | 16 | " | " | " | " |
| Carlisle | 16 | " | " | " | " |
| Somerslet | 16 | " | " | " | " |
| Indianola | 16 | " | " | " | " |
| Spring Hill | 16 | " | " | " | " |
| Lothrop | 16 | " | " | " | " |
| Bevington | 16 | " | " | " | " |
| Patterson | 16 | " | " | " | " |
| Winterset | 17 | " | 41½ | " | 13 |
| Commerce | 16 | " | 40½ | " | 12 |
| Booneville | 16 | " | " | " | " |
| Van Meter | 16 | " | " | " | " |
| De Soto | 17 | " | 41½ | " | 13 |
| Earlham | 17 | " | " | " | " |
| Dexter | 17 | " | " | " | " |
| Stuart | 17 | " | " | " | " |
| Menlo | 17 | " | " | " | " |
| Glendon | 18 | " | 42½ | " | 14 |
| Monteith | 18 | " | " | " | " |
| Guthrie Center | 18 | " | " | " | " |
| Casey | 18½ | " | 43 | " | 14½ |
| Adair | 18½ | " | " | " | " |
| Anita | 18½ | " | " | " | " |
| Wiota | 18½ | " | " | " | " |
| Atlantic | 19 | " | 43½ | " | 15 |
| Loral | 19 | " | " | " | " |
| Brayton | 19 | " | " | " | " |
| Exira | 19 | " | " | " | " |
| Andubon | 19 | " | " | " | " |
| Lewis | 19 | " | " | " | " |
| Griswold | 19 | " | " | " | " |
| Marne | 19 | " | " | " | " |
| Walnut | 19 | " | " | " | " |
| Avoca | 19 | " | " | " | " |
| Corley | 19 | " | " | " | " |
| Harley | 19 | " | " | " | " |
| Hancock | 20 | " | 44½ | " | 16 |
| Oakland | 20 | " | " | " | " |
| Carson | 20 | " | " | " | " |
| Shelby | 19 | " | 43½ | " | 15 |
| Minden | 20 | " | 44½ | " | 16 |
| Neola | 20 | " | " | " | " |
| Underwood | 20 | " | " | " | " |
| Weston | 20 | " | " | " | " |
| Greendale | 20 | " | " | " | " |

6. As an illustration of the practical application and operation of these tariffs, your petitioner further shows that H. F. Dousman, Esq., a commission merchant and grain dealer, doing business at Chicago, and a member of this association, shipped from Atlantic, a station in Iowa, on the Rock Island Road (where he purchased the same), two car loads of corn one on the 27th and the other on the 28th of February, 1888, and in cars No. 1139 and 18772 Car No. 1139, which was shipped on the 27th, was consigned to Baltimore via Chicago over the Rock Island and Baltimore & Ohio Roads with a through bill of lading at 28½ cents per 100 pounds and upon its arrival at Chicago the corn was transferred to car No. 13686 of the Baltimore & Ohio Road, and on its arrival at that city 39½ cents per 100 pounds freight was demanded thereon by these carriers in direct violation of said published through tariff and said Interstate Commission Law, but was paid by said Dousman.

Car No. 18772 was shipped from Atlantic on the 28th day of February, 1888, and was consigned to Chicago at nineteen cents per 100 pounds freight, and on its arrival its load was transferred to Baltimore & Ohio car No. 911, and was rebilled and forwarded over said road to Baltimore by direction of said Dousman (he paying the switching charge), but at the rate of twenty-two cents per 100 pounds freight to which the Baltimore & Ohio tariff from Chicago had in the mean time been reduced, making the freight from Atlantic to Baltimore forty-one cents per 100 pounds, being 2½ cents more than the illegal charge of 39½ cents per 100 pounds demanded and paid on the through shipment, and 12½ cents per 100 pounds more than the published through tariff of 28½ cents per 100 pounds.

7. Your petitioner submits that this large discrepancy between the through rates from these Iowa stations to Baltimore, and the rates from these stations to Chicago, and from Chicago eastward to Baltimore is an unjust discrimination against producers, owners and shippers of grain, who may wish to consign it to Chicago to be handled and disposed of on this market and against their consignee and against Chicago itself as a locality, and that the latter rates are unreasonably high compared with the through rates, and should be so declared by this commission.

Your petitioner further shows that an examination of the tariffs from Chicago to other eastern points and the through tariffs from these Iowa stations to the same eastern points, will show a similar if not greater discrepancy, and that these tariffs are therefore in violation of said Interstate Commerce Law and should be so declared by this Commission.

And your petitioner further submits that the fact that this particular through tariff rate was only continued in force for ten days or a little over, affords no reason why this Commission should not rule upon this question, as it was only made thus temporary in pursuance of a practice by these carriers during this period from January 1, to May 1, 1888, of temporary discriminating rates established and revoked or changed in numerous instances and at short intervals of time, which practice, as your petitioner is informed and therefore charges, they

are intending to renew as soon as the present season of lake or water navigation and transportation ends; and if this practice of through unjust and discriminating rates or tariffs is to be tolerated, it will afford opportunities, which will be eagerly embraced, for those who are seasonably advised to obtain unjust advantages over others engaged in the same trade, to the detriment of Chicago as a locality, and of those desiring to consign their grain to this place and their consignees, commission merchants and members of this association.

And your petitioner further submits that said carriers should be directed to refund to said Dousman the excess of freight charges on the said car load consigned to Chicago and thence rebilled and forwarded to Baltimore, over this through rate from Atlantic to Baltimore, or such portion of such excess as under the circumstances shall appear to be just. And as the transportation service is the same in each instance, the difference in charges, if any, should not exceed one third of one cent per 100 pounds as above shown; and that they should also be directed to refund to said Dousman the illegal overcharge of eleven cents per 100 pounds upon the car load shipped directly through to Baltimore, and which amounts to \$39.60.

8. Your petitioner further shows that the said Chicago, Rock Island & Pacific Railway Company and the said Baltimore & Ohio Railroad Company and other western and eastern railway companies having their eastern and western terminus, respectively, at Chicago, have entered into agreements or formed combinations for prorating (with Chicago and Chicago rates as the basis) in certain districts of irregular boundaries in the State of Illinois, southwestward and westward from Chicago, and have issued a map showing these districts, and showing the pro rata in each district or group, as they are termed. For example, the 110 group consists of an irregular shaped district carved out of a northeastern portion of said State, with its extreme western points extending about two thirds of the width of the State westward and southwestward from Chicago, as by reference to this map showing this district, also the other groups or districts, and to which your petitioner asks leave to refer, will more fully appear. And your petitioner alleges that this arbitrary and irregular system of prorating leads to all sorts of irregularities and manipulations of rates and unjust discriminations in favor of particular shippers and against Chicago as a locality and the commercial interests naturally centering at this place, as hereinbefore stated. And your petitioner charges the fact to be that the said Chicago, Rock Island & Pacific Railway Company has manipulated rates, in numerous instances, by billing grain as originating at points in this group or district 110, which was in fact shipped from points and places far westward from and outside of said district, and thus obtaining the advantage of this prorating in the interest of said road and in the interest of certain favored shippers; and thus enabling the latter to obtain special and lower rates than could be had generally by those interested in traffic to Chicago from the westward and thence eastward to the seaboard and other eastern places. And your petitioner submits that rates established by eastern and

western lines on the basis of Chicago and Chicago rates should be upon a line drawn substantially southward on the meridian of Chicago, thus establishing a reasonable system of rates which would be stable and operate justly and fairly to all alike, and to the general interests of transportation and commerce of the country.

[L. S.] The Board of Trade of the City of Chicago.

Attest Geo. F. Hone, *Secy.*

By C. L. Hutchinson, *President.*

Sidney Smith, *Attorney and of*

[Verified.] *Counsel for Petitioner.*

IMPERIAL COAL COMPANY, and Andrews, Hitchcock & Co.

v.

PITTSBURGH & LAKE ERIE R. CO., and New York, Lake Erie & Western R. Co., Lessee of New York, Pennsylvania & Ohio Railroad.

(No. 139.)

ANSWERS to complaint alleging unjust and excessive rates for and discrimination in the transportation of coal, given *ante*, 18.

Separate Answer of the Pittsburgh & Lake Erie R. Co., filed July 16, 1888; **Messrs. Knox & Reed**, Solicitors:

To the Honorable the Interstate Commerce Commission:

The separate answer of the Pittsburgh & Lake Erie Railroad Company, for itself, and as operating the Pittsburgh, McKeesport & Youghiogheny Railroad, to the complaint of the Imperial Coal Company and Andrews, Hitchcock & Company, attested May 14, 1888, and filed with your Honorable Commission, wherein it is alleged that this respondent company, together with the New York, Lake Erie & Western Railroad Company, has violated the provisions of the Act of Congress, entitled "An Act to Regulate Commerce," approved February 4, 1887, respectfully sets forth:

First. That the first paragraph of said complaint is true.

Second. The second paragraph of said complaint is true.

Third. Respondent denies the allegations of the third paragraph of said complaint.

Fourth. So much of the fourth paragraph as is hereinafter not admitted is denied. For further answer to the fourth paragraph of said complaint, this respondent says: It is true, as averred in said complaint, that this respondent leases and operates the Pittsburgh, McKeesport & Youghiogheny Railroad, for the lease of which latter road it pays a fixed rental not based or dependent upon its earnings, nor does the Pittsburgh, McKeesport & Youghiogheny Railroad receive any portion of said earnings. The two roads form one continuous line and any division of the rate is for the purpose of accounts, and does not affect or concern the shippers over the line of railroad or leased line of respondent.

It is also true that respondent makes and charges a uniform through rate of ninety cents per ton on coal destined for Cleveland, and

originating at any point on the Pittsburgh & Lake Erie Railroad, or its leased line, the Pittsburgh, McKeesport & Youghiogheny, and it is true that it divides the said through rate between its main line and leased line upon its own books as set forth in said complaint, and that the division of said through rate received by the New York, Lake Erie & Western Railroad is correctly set forth in said complaint, but it respectfully submits that that the division of said through rate between said connecting railroads does not concern or affect the shipper. It is also true that this respondent and the New York, Lake Erie & Western Railroad Company receive 76 50-100 cents per ton on coal transported between Montour Junction and Cleveland, and divide the same between themselves as set forth in said complaint, but aver that the total of said rate received by said two companies is less than the total rate received by them upon coal shipped from points on the Pittsburgh, McKeesport & Youghiogheny Railroad, as shown by said complaint.

Respondent further shows that the works of the Imperial Coal Company are located upon the Montour Railroad, a road owned by a company in which some or all of the stockholders of the Imperial Coal Company are stockholders, and said railroad is operated in the interest of the Imperial Coal Company, which is the only coal shipper on the line of said railroad. At Montour Junction said railroad connects with the main line of respondent's railroad. Upon all shipments of coal from the works of the Imperial Coal Company, to Cleveland, a through rate of ninety cents per ton is charged by the three railroad companies, to wit: the Montour Railroad Company, the Pittsburgh & Lake Erie Railroad Company, and the New York, Lake Erie & Western Railroad Company. Of this through rate the Montour Railroad Company receives 13 50-100 cents per ton, the Pittsburgh & Lake Erie Railroad Company 36 72-100 cents per ton, and the New York, Lake Erie & Western Railroad Company 39 78-100 cents per ton. The total amount received by the two last named railroad companies is less than the total received by them for shipments from mines on the line of the Pittsburgh, McKeesport & Youghiogheny Railroad Company. Thus they receive a lesser rate for the shorter haul than they do for the longer haul.

For further answer to the said complaint, respondent avers that its rates upon coal shipments are reasonable and just, and that thereby no discrimination exists in favor of or against shippers, but that all the mines and shippers of coal to Cleveland from points connected with its line of railroad, including its leased line and lateral connecting railroads are put upon a just and proper equality.

That all the coal mines in the vicinity of Pittsburgh are in the same district and are in direct competition with each other. That if rates based solely on distance were fixed and charged, some of said mines situated within a short distance of others, would be able by the use of different railroads to gain an advantage over such other mines, although in the same region. More than this the miners of coal who ship to Cleveland for lake shipment are

brought into direct competition with the miners who ship to Lake Erie, at Toledo, from what is known as the Hocking Valley region in the State of Ohio. To enable all shippers from the Pittsburgh region to compete with the Hocking Valley shippers the only practicable method was found to be to fix a uniform rate from the Pittsburgh region so that not only as between themselves, but as competing with the Hocking Valley region, the coal shippers from the Pittsburgh region might have an equal and fair chance to reach the market. By this means the largest number of shippers are benefited and are enabled to compete in the open market with other shippers upon fair and equitable terms. Any attempt to introduce differences in rates between shippers of the same commodity from practically the same locality to the same place of destination and for the same market, would have resulted in injury to the majority, if not all of the shippers of coal upon its lines of railroad.

This respondent therefore, showing that it has not been guilty of any violation of the provisions of the Act of Congress aforesaid, or of any discrimination against the complainants, prays that the complaint aforesaid may be dismissed.

Separate Answer of the New York, Lake Erie & Western R. Co., as lessee, filed July 19, 1888; Messrs. Buchanan & Steele, Solicitors:

The separate answer of the respondent, the New York, Lake Erie & Western Railroad Company, as lessee of the New York, Pennsylvania & Ohio Railroad, to the petition of the above named petitioners, respectfully shows:

First. The said respondent admits the allegations contained in the first paragraph of the said petition, except that it does not know and therefore does not admit that the petitioner, the Imperial Coal Company, is a corporation of the State of Pennsylvania.

Second. The respondent admits the allegations contained in the second paragraph of the said petition, except that, on its information and belief, it denies that the coal therein mentioned is delivered by the said Imperial Coal Company to said Andrews, Hitchcock & Co., at Montour Junction, and the rate given by said Pittsburgh & Lake Erie Railroad Company from that point.

Third. The said respondent denies that the rate charged on coal mined and alleged to be sold by said Imperial Coal Company to said Andrews, Hitchcock & Co. and others is unjust or excessive, or that such coal is shipped from Montour Junction to Cleveland except as part of the through shipment from the mines; and said respondent denies that there is, or that there has been, unjust or any discrimination against the said Imperial Coal Company, or the said Andrews, Hitchcock & Co., or others dealing with said Imperial Coal Company, in favor of miners and shippers of coal whose freights originate east of the City of Pittsburgh and are delivered in the City of Cleveland and other points, or in favor of any persons whatever.

Fourth. The said respondent admits that it

receives as its proportions of the through rates mentioned in the fourth paragraph of the petition, the sums therein stated, but the respondent denies that the said rates or proportions are unjust or excessive, or that they constitute any unjust discrimination against the petitioner.

Fifth. The respondent does not know, and therefore does not admit, that coal on the Pittsburgh, McKeesport & Youghiogheny Railroad is a thicker vein than that mined by the Imperial Coal Company, or more easily and cheaply mined, or that the railroad yards in the City of Pittsburgh are more contracted, or the hauling of freight from there more difficult than in the yards at Montour Junction.

Sixth. The said respondent further answering, avers that around and in the vicinity of the City of Pittsburgh, in the State of Pennsylvania, there are numerous collieries similar to that owned by the Imperial Coal Company, all producing about the same quality of coal, and which is chiefly marketed at points on the lakes reached via Cleveland, Painesville, Ashtabula or Erie, all of which are ports situated on Lake Erie. Transportation from the said collieries, in the vicinity of Pittsburgh, may be had to the lake ports by several different lines of railroad, including the lines of the respondents herein, the distances from different collieries to the different lake ports named varying on the different roads. The coal from this region also comes in competition with the same class of coal from what is known as the Hocking Valley region, in the State of Ohio, from which region shipments are made to the same markets reached by the Pittsburgh coal, through Toledo, Cleveland, Huron and Loraine, all on Lake Erie.

In order to put all the collieries in the vicinity of Pittsburgh on as nearly as possible the same footing with reference to the transportation of their coal to market through the lake ports, it has long been, and is now, the custom to make a uniform rate from that group of collieries in the vicinity of Pittsburgh to any of the lake ports; and this uniform rate is now fixed at ninety cents per ton, which this respondent avers is a just and proper rate for such transportation. This uniformity of rate enables all the collieries, constituting the group around Pittsburgh, to reach market through the lake ports upon the same terms, and they are thus enabled, not only to compete with each other in that market, but also to compete with the Hocking Valley coal, which goes to market through the port above stated. Any arrangement of rates on a mileage basis simply, would create a monopoly of the coal business in the markets reached by the lake ports, in that one colliery which happened to be a little the nearest to the lake ports.

The works of the Imperial Coal Company are situated on the Montour Railroad, a short line which simply connects those works with the Pittsburgh & Lake Erie Road at Montour Junction there being no other colliery situated upon it. This line, as the respondent is informed and verily believes, is owned and controlled by the petitioners herein.

The same rate of ninety cents is made from the Imperial Coal Company's Werks by the

Montour Railroad in conjunction with the respondents herein, as made from all other collieries in the Pittsburgh group; and the respondent denies that any rate is made separately from Montour Junction to Cleveland. Of this ninety cent rate thirteen and one-half cents is allowed the Montour Railroad, and the balance is divided between the respondents herein. Just in the same way other collieries in the Pittsburgh group, which are situated on short branch lines, have the same rate of ninety cents to Cleveland, or other lake ports, and of this rate the short line gets an allowance similar to that made the Montour Railroad. And this respondent avers that the division of the balance of the ninety cent rate between the respondents hereto, in no way concerns or affects the petitioners; but that, as a matter of fact, the aggregate amount received by the respondents, for transportation from points on the Pittsburgh, McKeesport & Youghiogeny Railroad, mentioned in the petition, is greater than the aggregate received by them on the transportation of the petitioners' coal from Montour Junction. Even if, therefore, the proportions of the through rate of ninety cents received by the different companies concerned could be considered, the respondents receive a lesser rate for the shorter haul on the petitioners' coal, than they do for the longer haul on coal from points on the Pittsburgh, McKeesport & Youghiogeny Railroad.

This respondent further avers that as it is advised, the method of making rates above set forth is proper and legal, and constitutes no undue or unjust discrimination against any of the collieries situated in the Pittsburgh group, but that, on the contrary thereof, unless such or some similar method were pursued, the consumers of coal in the market in which the coal produced by these collieries is sold, would be entirely deprived of the benefits of competition between the different collieries concerned, that one colliery which is nearest to such market would have a virtual monopoly of the coal business there, and the other collieries in the same general locality would be entirely deprived of the most advantageous market for their output.

Wherefore this respondent, showing that it has been guilty of no violation of the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce," respectfully prays that the petition herein may be dismissed.

The INTERNATIONAL EXPRESS

v.

The PHILADELPHIA & READING R. CO.

(No. 142.)

ANSWER filed July 5, 1888, to complaint alleging unjust discrimination, an abstract of which is given *ante*, 32.

1. The defendant is not informed, save as averred in the complaint filed, whether or not the International Express introduced, some two years ago, a system of carriage and trans-

portation on freight trains, which offered the public a medium between express and railroad freight transportation, combining the convenience of one as to terminal facilities, with the economy of the other—or whether or not, various railroad companies forwarded such freight to its destination, or whether or not the right of the International Express to offer said freight was raised or questioned. And if the said allegations are deemed to be material, the defendant requires that the complainant make proof thereof.

2. That the Reading Company in order to accommodate the public has established a freight service between Philadelphia and New York. All packages destined to one consignee weighing 100 pounds or less, are classified and charged at a common rate per package. That the complainant, or parties representing themselves as agents thereof, gathered together packages of various weights and values, consigned by the owners thereof to parties in New York and elsewhere, composed of jewelry, watches and various other articles of great value, easily destroyed and stolen, and packing them into chests, presented them to the Reading Company, and demanded that they be shipped as one package, to one consignee, for the rate of transportation above referred to. The Reading Company declined to do so, and insisted, and still insists, that it had and has the right to classify the said freight, and to charge a rate based on the value and weight thereof, and that the complainant has no right to widen the responsibility of the Reading Company, by concealing the character and weight, and refusing to make known the contents of the packages or their ownership. That when the contents of such chests are, as in these cases, extraordinarily valuable, whereby in case of loss by fire, theft, or otherwise, greater liability will be thrown on the carrier, and where when they are owned by many and various persons, the company will be compelled in case of loss, to respond in damages to many unknown owners, not revealed by the consignments, and when, in addition thereto, in all claims for damages the company will be at the mercy of the shippers and unknown owners to whom the same belong, in every case as to the value of such shipments, these considerations and others, entitle the Reading Company in all shipments of this character, to know the shipper, the name of the real consignee, the character, weight and value of the package so shipped to each person, and to charge therefor, upon consignments of like character, weight and value, the rates fixed by the schedules. This is all the Reading Company has done in its dealings with the International Express Company. The said International Express Company has refused to pay the charges demanded according to such classification, and thereupon the said packages referred to were refused. But it is not true that the International Express Company were informed that they must ship their packages by Adams Express. The Reading Roadroad Company believes it to be true that the International Express Company did ship some packages by Adams Express. But whether the chests were appropriated by the Adams Express, and the contents thereof disposed of by

the Adams Express, the Reading Company is not informed.

3. That the business that the International Express were engaged in, as appears by the allegations in the complaint, was practically an express business, and by concealing the character of the business, the kind, weight and value of the packages, and the names of the real consignors and consignees, they were and are endeavoring (by seeking to have the same classified as ordinary freight) to secure an unlawful and unjust discrimination in their favor over all other persons shipping packages over the Reading Company's lines. That the agents of the International Express were informed that the Reading Company would refuse to accept and forward as freight, at freight rates, packages which were express packages subject to express rates of freight, and which were never carried as freight by the transportation companies of the country.

The Reading Company is prepared to receive and forward, as it has in the past, by freight trains, all freight offered at regular tariff rates, according to the official classification, without discrimination or preferment, and in strict compliance with the Interstate Commerce Law, but packages of the International Express, complained of, were refused for the reason hereinabove stated, and because their acceptance on the terms offered would have been a gross discrimination against other shippers of like articles.

The International Express, the complainant, is not shown to be a corporation, partnership or association, nor is the membership thereof in any wise disclosed by the complaint, nor has the Reading Company any information on the subject, and it denies that the said complaint can or ought to be maintained in the name of the International Express, and prays that the said complaint be dismissed.

Supplemental Answer.

(Filed July 18, 1888.)

The defendant, in further answer to the complaint before the Interstate Commerce Commission by the International Express, avers that, by agreement with the Adams Express Company, provision was made for transporting express matter over the lines of the Philadelphia & Reading Railroad Company; the said contract was in force at the time of the matter complained of by the International Express, and is in force now, and obligatory upon the Philadelphia & Reading Railroad Company until the 31st day of January, 1892.

Under the terms of the said agreement, all the usual facilities were and are afforded to the public for conducting express business over the lines of the Philadelphia & Reading Railroad Company. Having, in the manner aforesaid, provided all necessary, proper, and adequate facilities for the transportation of express matter over its lines, the defendant was not and is not required to carry packages and parcels, uniformly carried over lines of transportation as express matter, over its lines as ordinary freight.

LINCOLN BOARD OF TRADE

v.

BURLINGTON & MISSOURI RIVER RAILROAD COMPANY in Nebraska, and the Chicago, Burlington & Quincy Railroad Company.

(No. 94.)

1. One locality is by law entitled to rates which shall not give an undue preference to any other locality; but its **right** in that regard is **not increased**, nor is the **equal right of a competing locality diminished**, by **municipal subscriptions** which were advanced for the building of the road.

2. Where, taking the shortest route from Chicago to Lincoln and from Chicago to Omaha as the basis, the disparity in rates corresponds quite closely with the difference in distance, in attempting to apply the **principle** acknowledged in making **freight rates**, that with the **increase of distance the ratio of the rate shall decrease**, it must be **qualified by the considerations**:

(a) That the Omaha rate is not based alone upon the mileage of the defendant road to that city, but as several lines from Chicago concentrate at Omaha, the mileage of the shortest route is the one which practically governs in the determination of the rate.

(b) The different routes traversed by the various lines competing for traffic from Chicago to Omaha, with their various points of intersection, cannot be overlooked.

(c) It is also to be considered that the rates from Omaha and from Lincoln to interior Nebraska points are so arranged that the rates from Chicago are practically the same whether the freight is handled by jobbers at Omaha or at Lincoln.

(d) Neither can the ratio of rates charged through the sparsely settled regions of the distant west decrease in proportion to distance without depriving the carriers of necessary revenue, and although this condition may not exist about Lincoln, yet, as the road is almost wholly confined to supplying the necessities of a farming population and the distribution of farm products, the possibilities of such tariff reduction as is made upon roads fed by mineral resources cannot be expected.

(e) So, also, the application of the principle that with the increase of distance the ratio of the rate shall decrease, is affected by the fact that the rate for the shorter distance is of itself, alone, often too low to be treated as a fair criterion for points beyond, so that a long line, met at a given point by a short line, and compelled to accept a scarcely remunerative rate, when the point is passed may fairly increase its charges with some consideration of the absolute distance by its own line from the originating point in a ratio more rapid than if it

had been able to grade its own rates continuously throughout its line.

(f) Water competition and other controlling causes produce a like effect, and a situation upon a navigable river is to be considered, although it does not at present afford active competition with the railroad.

3. Under these various considerations, the **complaint** of the Lincoln Board of Trade against existing rates to that city is **not well founded**.

(Tried at Lincoln, Neb., March 23, 1888—Filing of Briefs Completed May 23, 1888—Decided August 11, 1888.)

COMPLAINT that the rates from Chicago, Illinois, to Lincoln, Nebraska, are unjust and unreasonable in themselves, and as compared with the rates from Chicago to Omaha and other competing towns in Nebraska, and as compared with rates prior to the passage of the Act to regulate commerce. *Dismissed.*

See abstract of complaint, 1 Inters. Com. Rep. 647.

Messrs. G. M. Lambertson and O. P. Mason for complainant.

Mr. T. M. Marquette for defendants.

REPORT AND OPINION OF THE COMMISSION.

Walker, Commissioner:

The complaint now to be disposed of forms part of a complaint against the same and other companies on the docket of the Commission as No. 94. The other issues presented therein relate to east-bound transcontinental rates, and are to be separately considered.

The portion of said complaint now to be considered avers that the rates over the defendant lines from Chicago to Lincoln are unjust and unreasonable in themselves; that they are unjust as compared with the rates from Chicago to Omaha and other competing towns in Nebraska, and also as compared with rates prior to the passage of the Act to Regulate Commerce. It is averred that rates from Chicago to Lincoln, based on distance, would not exceed 106 per cent of the rate from Chicago to Omaha, whereas in fact they are from 10 to 40 per cent higher. It is also averred that Lincoln is a large jobbing point, a city of commercial importance, and in active competition with other cities of a similar class for supremacy in trade; that it is the practice of the railroads to make large business centers rate-basing points, and in so doing to consider the equitable demands of trade; that this principle has been ignored by the defendants, so that while other jobbing points have equal access to points in Nebraska and throughout the west, Lincoln, as a result of high in-rates, is confined to a very restricted territory; and that this is not the result of unfortunate location, but of discriminating tariffs. It is further claimed that, in making rates from Chicago to Lincoln, the defendants should consider distance as a factor, and that the ratio of the rate should decrease with the increase of the distance, a principle which it is said the defendants ignore.

The answer claims that the distances and rates are not correctly stated in the complaint;

denies that the charges in question are in contravention of any of the provisions of the Act to Regulate Commerce, and insists that they are just and reasonable.

The facts are to be found as follows:

Lincoln is the capital of the State of Nebraska; a city of about 40,000 inhabitants; the center of a considerable jobbing trade, in which it competes with Omaha for the distribution of all classes of goods throughout central and northern Nebraska; the seat of two packing-houses and several other manufacturing establishments; the crossing or terminal point of several railroads; and it is quite advantageously situated for all commercial purposes.

The defendant companies are separate corporations which are operated in harmony and form what is commonly known as the "Burlington" system. The Chicago, Burlington & Quincy Railroad Company operates the roads of that system east of the Missouri River and the Burlington & Missouri River Railroad Company in Nebraska operates those west thereof. Joint rates are made by said companies between points east of the Missouri River and points west thereof. The main line of said system runs westerly from Chicago through Burlington, on the Mississippi River, across the State of Iowa, crossing the Missouri River at Plattsmouth, and thence on through Lincoln to Denver in Colorado. Plattsmouth, Nebraska, is 21 miles south of Omaha, and 487 miles from Chicago, making the distance from Chicago to Omaha over this route a total of 508 miles. Lincoln is 48 miles west of Plattsmouth, making its distance from Chicago a total of 535 miles, 106 per cent of the distance to Omaha. The Burlington line can use another route to Omaha, crossing the Missouri River at Council Bluffs, the distance by which is also 508 miles. The usual place of crossing, however, is from Pacific Junction to Plattsmouth, over a bridge owned by the "Burlington" system. Passenger trains are run via Plattsmouth and thence north to Omaha; thence southwesterly, striking the main line at Ashland, distant 30 miles from Plattsmouth and 31 miles from Omaha. Freight trains are run directly west from Plattsmouth, through Ashland to Lincoln and points beyond. Freight destined for Omaha is hauled north from Plattsmouth to that city. The shortest rail line from Chicago to Omaha is 490 miles, and from Omaha to Lincoln 54 miles. On that basis the Lincoln distance is something over 110 per cent of the Omaha distance. On the basis of the shortest route to Omaha, 490 miles, and the shortest route to Lincoln, 535 miles, the Lincoln distance is something over 109 per cent of the Omaha distance.

The various roads competing for business from Chicago to Omaha unite upon an agreed tariff to all Missouri River points. One of those roads is the Missouri Pacific, which reaches Omaha from the south, coming from Kansas City on the west side of the Missouri River. The latter company, conforming to the requirements of the fourth section of the Act to Regulate Commerce, makes rates to all points on its line south of Omaha no higher than the agreed Omaha rates, thus compelling the extension of the Missouri River rates on the Bur-

lington system to points in Nebraska where its line crosses the Missouri Pacific. One of these points is Louisville, on the main line above described, distant 23 miles west from Plattsmouth and 30 miles east from Lincoln. Another is Dunbar, 47 miles east of Lincoln on a line running to Nebraska City.

The rates from Chicago at the time the petition was filed were as follows (tariff of August 22, 1887):

| | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E | Timber | Hard coal |
|---------------|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|--------|-----------|
| Omaha | 90 | 75 | 50 | 35 | 30 | 32½ | 29½ | 25 | 20 | 16 | 20 | 16.12 |
| Lincoln | 1.00 | .84 | .57 | .41 | .35 | .40 | .35 | .28 | .25 | .21 | .26 | .18 |

A reduced tariff, dated December 20, 1887, became generally effective March 26, 1888, after a so-called "rate war" among the roads. This tariff was not actually in force at the time of the hearing, but the case was tried and the briefs of counsel were prepared in view of the new rates then about to become operative, and which are now in force, as follows:

| | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E | Timber | Hard coal |
|---------------|-----|-----|-----|-----|-----|-----|-----|-----|------|-----|--------|-----------|
| Omaha | 75 | 60 | 40 | 30 | 25 | 30 | 25 | 20 | 17½ | 16 | 16 | 17¼ |
| Lincoln | .80 | .65 | .44 | .35 | .28 | .33 | .28 | .23 | .20½ | .19 | .19 | .18 |

By comparing the foregoing tables it will be seen that at the time of filing the petition the Lincoln rates ranged from ten cents to four cents higher on the various classes than the rates to Omaha, Louisville, Dunbar, etc. At the present time the tariff ranges from five cents to three cents higher at Lincoln than the existing rates to Omaha and other Missouri River points.

Before the Act to Regulate Commerce took effect, the difference in the printed tariffs from Chicago to Omaha and Lincoln was from fourteen cents to five cents per hundred on the various classes, and the rates to both places were higher than at present. Rebates were freely given, however, and the Lincoln merchants were led to understand that, by that means, they were securing about the same rates charged Omaha merchants. But rebates were allowed to a considerable extent at Omaha also, and the disparity shown by the printed tariffs was in fact that way substantially preserved.

It is not claimed that these rates are in themselves unreasonably high. The complainants still insist, however, that the existing rates unjustly discriminate against Lincoln in favor of Omaha.

Considerable assistance in money and land grants was given to the Burlington & Missouri River Railroad Company in Nebraska, in connection with the original construction of its lines, by the city of Lincoln and by the State of Nebraska; but it is not perceived in what way the facts in respect thereto are here material. Lincoln is by law entitled to rates which shall not give an undue preference to any other locality, and its right in that regard is not increased, nor is the equal right of

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Omaha diminished, by municipal subscriptions which were advanced for the building of the road.

The views of the Commission have heretofore been sufficiently expressed upon the alleged practice by which large business centers are made rate-basing points.

Coming, then, to the single remaining question of the relative rates, it appears that the existing class rates to Lincoln are from 6½ to 19 per cent higher than to Omaha, the average being something more than 9 per cent. The factor of distance, therefore, upon which the complainants rely, does not point to any serious discrimination in the rate. It is true that upon the line of the defendant system the distance from Chicago to Lincoln is but 106 per cent of the distance from Chicago to Omaha; nevertheless the fact cannot be overlooked that this is caused by the fact that Omaha is one side of the main line of defendant's road, while by the more direct line to Omaha the distance to that point is relatively less, as above stated. Taking the shortest route to each point as the basis, the disparity in rates corresponds quite closely with the difference in distance.

Complainants, however, appeal to a principle said to be acknowledged in making freight rates, that with the increase of distance the ratio of the rates shall decrease. This principle is generally acknowledged when the rates are based upon distance and cost alone, and are not affected by other modifying conditions; and its justice arises from the obvious fact that the expense of transportation does not increase in proportion to the distance, many of the elements which unite to make up the cost of handling freight being the same whether the terminal points be more or less widely separated; it is easily perceived, however, that other considerations may often affect the application of the rule. *Business Men's Association of Minnesota v. Chicago, St. Paul, Minneapolis & Omaha R. Co.* 2 Inters. Com. Com. Rep. 52, 2 Inters. Com. Rep. 41. In the present case, for example, the Omaha rate is confessedly not based alone upon the mileage of the defendant road to that city, but, as several lines from Chicago concentrate at Omaha, the mileage of the shortest route is the one which naturally and practically governs in the determination of the rate. Moreover the different routes which are traversed by the various lines competing for traffic from Chicago to Omaha, with their various points of intersection, cannot be overlooked. It appears that the Omaha rate is also the Missouri River rate, precisely the same charged at a large number of points above and below that city, which are reached by one or another of the various roads which compete for Missouri River traffic. It is not claimed that this fact involves any impropriety or any violation of law. On the contrary, its justice appears to be conceded; and the result is to a large extent brought about by obedience to law. Prior to the passage of the Act to Regulate Commerce, points in Nebraska on the line of the Missouri Pacific, like Louisville, Dunbar, Weeping Water, and Falls City, were charged higher rates than were given to Omaha, at a greater distance over the same line. Many points in western Iowa were treated in a similar way.

Now the rate to all such points is made no greater than the rate to Omaha. Lincoln was also formerly favored in the same manner as Omaha. The result of the operation of the law, among other things, has been that points near the Missouri River in Nebraska and points in Iowa along the lines running east from the Missouri River, receive through rates which are much less than any they have formerly known. The Omaha rate in fact comes in use upon the defendants' line at a point 90 miles east of Omaha, and the mileage comparison might as well be made at the eastern end of the group as the western. If so made the Lincoln rate would obviously be greatly below the increase due to the increase of the distance.

Moreover, it is shown that the rates from Omaha and from Lincoln to interior Nebraska points are so arranged that the rates from Chicago are practically the same, whether the freight is handled by jobbers at Omaha or at Lincoln, so that the latter in fact suffer no prejudice in the actual conduct of their business as compared with their Omaha competitors.

As has been previously said by the Commission, the extent of traffic carried and the character of the country traversed are necessarily to be considered in applying the rule appealed to. The ratio of rates charged through the sparsely settled regions of the distant west cannot decrease in proportion to distance without depriving the carriers of necessary revenue. And while such a condition may not exist in the fertile regions about Lincoln, nevertheless the interests of that locality are chiefly agricultural; there are no ores, no lumber, no stone, no coal, to increase the revenues of the carriers; the business of the roads is almost wholly confined to supplying the necessities of a farming population and the distribution of farm products. Although the traffic so afforded is considerable, and when concentrated at eastern terminals is immense, nevertheless the possibilities of tariff reduction afforded by roads which are largely fed by mineral resources, quarries and manufactures, cannot be fairly expected upon the numerous lines which interlace themselves throughout the purely agricultural State of Nebraska.

The application of the principle in question is also frequently affected by the fact that the rate for the shorter distance is of itself a low one; often too low to be treated as a fair criterion for points beyond. It sometimes happens that a road having a long mileage to a given point is there met by a much shorter line which makes a rate just and reasonable on its part, but not fairly remunerative if the distance of the longer line is alone to be considered. In such a case the longer line, conforming to the law, must give a rate no greater than that fixed by its competitor to the given point and also to intermediate points on its line; but when the given point is passed it may fairly increase its charges with some consideration of the absolute distance by its own line from the originating point, and in a ratio more rapid than the proportionate charges would have otherwise shown, had it been able to grade its own rate continuously throughout its line. The same effect is at times produced by water competition and other controlling causes.

Omaha is situated upon a large navigable stream; and although the Missouri River does not at present afford active competition with the carriers by rail, nevertheless its existence and its possibilities are potential in maintaining low rates along its banks.

These various considerations are necessary factors of the situation, and in view of them it is clear that the complaint of the Lincoln Board of Trade against the existing rates to that city is not well founded. In fact it does not seem probable that this complaint would have been presented had the rates when it was filed been the same as they were afterwards made. The disparity between the rates to Omaha and those to Lincoln is now slight. It is no more than the distance appears to fairly call for, especially when considered in connection with the other conditions which surround the case. The hope apparently entertained by the petitioners, that some basis could be found whereby the same rates might be given to Lincoln as to Omaha, has not been supported by the proofs; in fact, as the matter now appears, no such arrangement could be made without affording to the citizens of Omaha a substantial grievance. The Commission has already decided that the existing system of through rates to interior Nebraska points is not an undue prejudice against Omaha under the Act to Regulate Commerce, (*Martin v. Chicago, Burlington & Quincy R. Co.* 2 Inters. Com. Com. Rep. 25, 2 Inters. Com. Rep. 32.) The rights of that city are entitled to full consideration, however, and, having viewed the subject with care from the standpoint of each party, the Commission finds that the rates now established by the carriers apparently work out substantial justice to both.

The petition is therefore dismissed.

LINCOLN BOARD OF TRADE

v.

MISSOURI PACIFIC RAILWAY COMPANY.

(No. 95.)

1. Although the traffic to Omaha from St. Louis, in relation to that to Lincoln, is much the largest, and upon a comparison of volume simply the expense of handling the Lincoln business may be two-and-three-fourths times that of handling the Omaha business, yet it is obvious that in such a matter **many other things besides the mere volume of business must be considered**, including the comparative **length of the two pieces of road, the grades, crossings and bridges, the interest upon the cost**, the facilities with which trains may be handled, and many other matters fairly material to render such a comparison useful.
2. The fact that a difference is made upon St. Louis and Mississippi business only, as the same is directed either to Omaha or to Lincoln, and not upon other business originating at other portions of the defendant's system, is significant that the **real reason for the difference made in**

the **St. Louis traffic is not because Lincoln is situated upon a branch line.**

3. The true reason why the rates from St. Louis to Lincoln are higher than the rates from St. Louis to Omaha is that the rates from **Chicago** are also **higher** by precisely the **same figures**, uniform working rates between the two sections having by agreement been carried out by all the lines.
4. The **differentials** are given to Omaha on St. Louis business because of the short line to that point made by the Wabash, and for the purpose of a rule applicable to all Missouri River points they approximate equity.

5. Rates having been established from St. Louis to Omaha in view of the distance over the Wabash line, the **action of the Missouri Pacific in meeting the Wabash rates**, although too low to be greatly desirable for its longer line, and involving loss of former revenue at intermediate points on the main line south of Omaha, by the application to the situation of the long and short haul clause, **cannot be properly criticised.**

6. The **Missouri Pacific**, having met the Wabash rate at Omaha, is **not necessarily required to give Lincoln the same terms**, although the distance is a trifle less and Lincoln is the center of a thriving trade. The Missouri Pacific gives Lincoln equal rates with Omaha upon all business coming from a direction where there is no competition by a shorter route. The discrimination in the St. Louis rate between the traffic to Omaha and Lincoln has been reduced nearly one half since the filing of the petition.

7. The rate from St. Louis to Lincoln is not of itself unreasonable, and the **general scheme on which rates are made throughout the vast territory covered by the roads that have been united in the existing traffic requires that the existing difference between Omaha and Lincoln** should be preserved upon traffic from St. Louis as well as from Chicago; and the fact that a low rate from St. Louis is forced upon the Missouri Pacific by competition at Omaha is not to be taken advantage of to compel a corresponding reduction upon its Lincoln branch.

8. **No substantial damage is suffered by Lincoln** from the difference in rates between St. Louis and Omaha and St. Louis and Lincoln, inasmuch as the **distributing rates from Lincoln are so arranged**, in comparison with those from Omaha, that the difference in the rates to these points is equalized; and although this is not done by the defendant road, it is sufficient that nearly all points available to Lincoln jobbers are reached by lines over which the adjustment of rates is made. That a **disparity exists as to merchandise which is consumed at Lincoln**, coming from St.

Louis, as against merchandise consumed at Omaha, coming from the same city, must be fairly **attributable to the situation** of Lincoln a substantial distance west of the line of common rates from eastern points.

(Tried at Lincoln, Neb. March 23, 1888—Filing of Briefs Completed May 23, 1888—Decided August 11, 1888.)

COMPLAINT of an undue preference against Lincoln in favor of Omaha in the rates from St. Louis. *Not sustained.*

See abstract of complaint, 1 Inters. Com. Rep. 648.

Messrs. G. M. Lambertson and O. P. Mason, for complainant.

Mr. B. P. Waggener, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Walker, Commissioner:

This complaint alleges violation of the Act to Regulate Commerce in the rates established by the defendant from St. Louis, Missouri, to Lincoln, Nebraska. Said rates are alleged to be from 10 to 50 per cent higher than the rates from St. Louis to Omaha, and to work an undue preference against Lincoln in favor of Omaha. It is averred that, "during the last twelve years Lincoln has enjoyed Omaha rates, and these rates must be guaranteed in future, or the distributing trade, manufacturing business, and local importance of Lincoln will be greatly injured. The city is now a large business center, with 45,000 population. Her enterprises include four large grocery and other jobbing houses, two extensive packing-houses, and other manufacturing industries that were located here on the faith of the lower rates that they have received heretofore and have a right to expect in the future; also the principal State institutions are located here. Lincoln should not be considered as a local station in grading rates, but as a rate-basing point from which rates are graded. This principle has been ignored by the Missouri Pacific Railway Company," etc.

The answer denies that the existing rates were made for the purpose of discriminating against Lincoln, and insists that they are in all respects just and reasonable.

The Missouri Pacific Railway system includes a line of road from St. Louis to Kansas City, and thence on the west side of the Missouri River northerly through Leavenworth and Atchison to Omaha. The distance by this route from St. Louis to Kansas City is 283 miles, and to Omaha 494 miles. At Weeping Water, 39 miles south of Omaha, a branch diverges westerly to Lincoln, 35 miles distant, making the total distance from St. Louis to Lincoln 490 miles.

About seven years ago a more direct line from St. Louis to Omaha was put in operation, known as the Wabash, St. Louis & Pacific Railway. The distance by that route is 413 miles.

Rates over the defendant line from Atchison, Leavenworth, St. Joseph, Kansas City, New Orleans, Galveston, and in fact from all points in Kansas, Arkansas, Texas, and Louisiana, are the same to Lincoln as to Omaha.

From St. Louis it is otherwise. Rates from Chicago and St. Louis to the Missouri River and beyond are agreed upon by the members of an association of roads called the "Western and Northwestern Freight Bureau," comprising all the leading roads which compete for such business. Said roads, among other things, have agreed that the rates from St. Louis to said region shall be ascertained by deducting from the Chicago rates the following differentials, viz.:

| Class | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|-------|----|----|----|---|---|----|----|---|---|---|
| | 20 | 20 | 10 | 5 | 5 | 7½ | 7½ | 5 | 5 | 5 |

They have further agreed that the rates from Chicago to certain Missouri River points shall be the same; these points embrace Omaha, Kansas City, and all intermediate territory. The effect of this is that, after deducting the above named St. Louis differentials from the agreed Chicago rate, the rates from St. Louis to all said Missouri River points remain identical.

Prior to April 5, 1887, the first-class rate from Chicago to Omaha had been 90 cents, to Lincoln 104 cents. The tariff then put in effect was to Omaha 90 cents and to Lincoln \$1. At the same time rates to intermediate points were made no higher than to more distant points, the contrary practice having previously prevailed. Some changes were made in August, 1887, and on December 20 a new tariff was issued, which in fact did not become operative until March 26, 1888, making the first-class rate, Chicago to Omaha, 75 cents and to Lincoln 80 cents.

In April, 1887, this defendant was at first uncertain whether it would unite with the other lines in the rates above stated, in view of the loss of revenue involved in its business at intermediate points; after consideration it determined to do so, and its rates from St. Louis therefore became at first 70 cents to Omaha and 80 cents to Lincoln, and afterwards 55 to Omaha and 60 cents to Lincoln, at which point they now remain. The rates on the other classes were proportionately less, and need not be stated in detail.

The result is that precisely the same differences exist between the rates from St. Louis to Lincoln and to Omaha which have been considered in another case in respect to the rates from Chicago to said cities respectively, ranging at the present time from five to three cents per hundred upon the different classes of merchandise. *Lincoln Board of Trade v. Chicago, Burlington & Quincy R. Co.* 2 Inters. Com. Com. Rep. 147, ante, 95.

The cases differ, however, in this, that while Lincoln is a greater distance from Chicago than Omaha, it is a little nearer to St. Louis than is Omaha. A further anomaly is also here presented in the fact that freight from Kansas City and points south thereof is delivered at Lincoln and Omaha by the defendant upon identical rates, while freight from St. Louis through Kansas City and thence to Lincoln and Omaha, over precisely the same line of road, is subject to the aforesaid difference of charge.

Two justifications for this increased charge

on business from St. Louis to Lincoln are relied upon:

First. The fact that Lincoln is upon a branch road and the transportation to that point is more expensive than to Omaha. The road from Weeping Water to Lincoln is undoubtedly a branch road, but it is a road easy of operation, and over which a considerable amount of traffic is handled. The Lincoln terminals were donated, while the Omaha terminals were costly. The traffic to Omaha is much the largest, and upon a comparison of volume simply an estimate was made and the expense of handling the Lincoln business was two-and-three-quarter times that of handling the Omaha business. The details of the computation were not given, and it is obvious that in such a matter many other things besides the mere volume of business should be taken into account. The comparative length of the two pieces of road, the grades, crossings, and bridges, the interest upon the cost, the facility with which trains may be handled, and many other matters which might be suggested, would be clearly material in order that such a comparison should be usefully made. It is sufficient for present purposes, however, to say that the fact that a difference is made upon St. Louis and Mississippi River business only, and not upon business originating at other portions of the defendant's system, points significantly to the conclusion that the real reason for the difference made in the St. Louis traffic is something else than because Lincoln is situated upon a branch line. So far as the question here involved is concerned, this fact is clearly to be treated rather as a fortunate make-weight than as the operative cause of the difference made.

Second. A more efficient, and no doubt the correct, reason why the rates from St. Louis to Lincoln are higher than the rates from St. Louis to Omaha is presented in the fact that the rates from Chicago are also higher by precisely the same figures, a uniform system of working rates between the two sections having been agreed upon which is carried out by all the lines.

This throws back the question to a consideration of the propriety of the existing rate from St. Louis to Omaha, which is twenty cents less than the rate from Chicago to Omaha, although the distance from St. Louis by the defendant line is a little greater than the distance from Chicago by the more direct route, and although the distance by defendant's line from St. Louis to Kansas City is but little more than half the distance to Omaha, while the rates charged are identical. In justification of its comparatively low rate from St. Louis to Omaha the defendant points to the Wabash system, which has a road from St. Louis to Omaha that is considerably shorter than any line from Chicago to the same place; and this we find to be in fact the controlling feature of the situation. The differential is given to Omaha on St. Louis business because of the short line to that point made by the Wabash; over that route the difference is not greatly disproportionate. The differentials, from 20 to 5 on the various classes, are apparently a little too great at Omaha and too small at Kansas

City, applying their percentage to the shortest route in each case; for the purpose of a rule applicable to all Missouri River points they approximate equity.

Rates having been thus established from St. Louis to Omaha, in view of the distance over the Wabash line, it became necessary for the Missouri Pacific to accept the same rates or to retire from Omaha business. After consideration of the situation it decided not to abandon the traffic, and announced that it would meet the Wabash rates, although considered too low to be greatly desirable for its longer line, and although much loss of former revenue at intermediate points on the main line south of Omaha was involved by the application to the situation of the long and short haul clause of the Act to Regulate Commerce. This course was entirely within defendant's right and cannot be properly criticised.

But the question is not yet answered whether, having met the Wabash rate at Omaha, the defendant should not give Lincoln the same terms. Complainant insists that it should, because the distance is a trifle less, and because Lincoln, as the center of a thriving trade, is entitled to protection against all rivals. Defendant, on the contrary, points to the fact that the rate which it makes to Omaha is not a matter of favor, but of necessity. It insists that it gives Lincoln equal rates with Omaha upon all business coming from a direction where there is no competition by a shorter route. It shows that the discrimination in the St. Louis rate between traffic to Omaha and Lincoln has been reduced nearly one half since the filing of the petition. It avers that the existence of the difference which remains is not due to any wish on its part to unduly prejudice the city of Lincoln. It claims that the rate from St. Louis to Lincoln is not of itself unreasonable. It alleges that the general scheme on which rates are made throughout the vast territory covered by the roads that have united in the existing tariffs requires that the existing difference between Omaha and Lincoln should be preserved upon traffic from St. Louis as well as from Chicago; and it insists that the fact that a low rate from St. Louis is forced upon it by competition at Omaha should not be taken advantage of to compel a corresponding reduction upon its Lincoln branch.

This legal question is therefore presented: Is the preference in question undue and unreasonable?

Under all the circumstances we are inclined to the opinion that it is not. In reaching this conclusion we are influenced to some extent by considering what consequences might result from a contrary decision. It is clear that questions of this kind must be determined upon broader principles than mere comparisons of mileage. If the rule contended for by complainants is enforced, Kansas City, Leavenworth, and Atchison might allege that their distance from St. Louis is very much less than that of Lincoln, nevertheless they are charged the same rates, to their prejudice in competing for the trade of Northern Kansas and Southern Nebraska. It would be difficult for Lincoln to resist such a claim, except by taking the position that the general good of the territory west of the Missouri is best subserved

INTER S.

by the maintenance of rates upon the present plan,—that is, by giving identical rates from Chicago to all Missouri River points, and to such points west of the river as the exigencies of the fourth section of the Act to Regulate Commerce require, and increasing gradually from that line to the west. Lincoln is situated some thirty or forty miles west of the line so drawn. This line was not the creation of the defendant, nor was it established for any willful purpose to wrong complainants' thriving city. It exists by reason of the application of the provisions of a new law to previously established facts. A disregard of its presence and importance might produce many complications, some of which, as above suggested, would be greatly injurious to Lincoln. The withdrawal of defendant from its present competition with the shorter line at Omaha would at once permit an increase of the rates at a large number of points in Eastern Nebraska and Kansas, causing much disaster and hardship. To order a reduction in the St. Louis rate at Lincoln would naturally involve the rates at many points south and west of Lincoln, not only upon the defendant line, but upon other roads as well.

Moreover it is difficult to see from the proofs that any substantial damage is effected by the difference in rates complained of. It is in evidence that the distributing rates from Lincoln are so arranged in comparison with those from Omaha that the difference in the rates to these points is equalized. To this complainants reply that this is not done by the defendant road, but by another. That is also true; but nearly all points available to Lincoln jobbers are reached by lines over which the adjustment is made. The fact therefore exists, and is an answer to the claim that the Lincoln merchants are damaged, in comparison with Omaha merchants, by the disparity in rates complained of. The same disparity exists as to merchandise which is consumed at Lincoln; but, for this, the situation of that city a substantial distance west of the line of common rates from eastern points must be held responsible.

So long as the present system of making rates to Nebraska is maintained, the geographical position of Lincoln appears to warrant the difference made between the rates from Chicago and St. Louis to Lincoln and to Omaha. While it is not impossible that some better system may hereafter be devised, none has as yet been suggested.

In view of these considerations *the complaint is held to be not sustained.*

LINCOLN BOARD OF TRADE

v.
UNION PACIFIC R. CO. and SOUTHERN
PACIFIC CO.

(No. 117.)

The **grounds of complaint** stated in the petition having been **obviated** by changes in the rate sheets, the Commission abstains from any expression of opinion upon them.

(August —, 1888.)

COMPLAINT charging unjust discrimination against Lincoln, Nebraska. See ab-

stract of complaint, 1 Inters. Com. Rep. 702.

The case above entitled was heard at Lincoln, Nebraska, March 21, 22, 1888, where voluminous testimony was taken. The following cases were heard with it:

Friend & Son v. The Southern Pacific Company, The Denver & Rio Grande Railway Company, and The Burlington & Missouri River Railroad Company. (No. 43. See abstract of pleadings, 1 Inters. Com. Rep. 582.)

Raymond Brothers & Company v. The Chicago, Burlington & Quincy Railroad Company, The Denver & Rio Grande Railway Company, The Denver & Rio Grande Western Railway Company, and The Southern Pacific Company. (No. 80. See complaint, 1 Inters. Com. Rep. 592.)

Plummer, Perry & Co. v. The Union Pacific Railway Company and the Southern Pacific Railway Company. Two cases. (Nos. 82 and 96. See complaints, 1 Inters. Com. Rep. 596, 648.)

The Lincoln Board of Trade v. The Burlington & Missouri River Railroad Company in Nebraska, The Chicago, Burlington & Quincy Railroad Company, The Denver & Rio Grande Railway Company, The Denver & Rio Grande Western Railway Company, and The Southern Pacific Railway Company. (No. 94. See abstract of complaint, 1 Inters. Com. Rep. 647.)

Counsel appeared in the cases as follows:

Messrs. G. M. Lambertson and O. P. Mason, for complainants.

Messrs. Charles H. Tweed and W. H. L. Barnes, for the Southern Pacific Company.

Messrs. Edw. O. Wolcott and J. F. Vail, for the Denver & Rio Grande Railway Company and the Denver & Rio Grande Western Railway Company.

Messrs. C. J. Green, T. M. Marquette, and Wirt Dexter, for the Chicago, Burlington & Quincy, and Burlington & Missouri River Railroad Company in Nebraska.

Messrs. J. M. Thurston, Shellabarger & Wilson, and A. J. Poppleton, for the Union Pacific Railway Company.

MEMORANDUM BY THE COMMISSION.

In all the cases complaint was made of the rates charged by defendants for the transportation of freights from Pacific coast points to Lincoln. These rates were higher than were charged for the transportation of like freights from the same points to Omaha, and the defendant roads were charged with unjust discrimination as against the people and traders of Lincoln in making them so.

In some of the cases a violation of the "long and short haul clause" of the fourth section of the Act to Regulate Commerce was charged; one of the lines on which Pacific coast shipments were made to Omaha being through Lincoln, and Omaha being nevertheless given the lower rate.

In the cases to which the Union Pacific Company is a party a further question was raised, whether the people of Lincoln, on the ground of representations which were made to them when the road from Valley to their city was constructed,—that they should have

the same rates from the Pacific coast which should be given the Missouri River points,—might not now require the company to make good their promise, or as it is called in the record, their guaranty.

The questions were fully argued by counsel and submitted for decision, but before decision had been filed the defendant carriers had made such changes in their transcontinental rate sheets as would put Lincoln on an equal footing with Omaha and other Missouri River points, and give it the same rates for the transportation to it of merchandise from points on the Pacific coast. The principal grounds of complaint set out in the several petitions were thus removed.

Under these circumstances no opinion is filed, and the complainants have leave to withdraw their petitions.

KENTUCKY & INDIANA BRIDGE CO.

v.

LOUISVILLE & NASHVILLE R. CO.

(No. 118.)

1. The Kentucky & Indiana **Bridge Company** has the chartered **powers of a common carrier** and is such *de facto*. It is therefore, under the Act to Regulate Commerce, **entitled to demand** of railroad companies whose lines are intersected by its tracks the same reasonable, proper, and **equal facilities for the interchange of traffic** and for the receiving, forwarding, and delivering of property that may lawfully be demanded by other carriers under that Act.
2. The Louisville & Nashville Railroad Company united with other companies having lines terminating on the Ohio River at or opposite Louisville in a contract whereby it was agreed that all their business across the river at that point should be taken over the Louisville bridge. The Louisville Bridge Company was a party to the contract, and the tolls were dependent on the amount of business done, and were diminished as the debt of the bridge company was paid off from funds derived from tolls. A new bridge being constructed over the river at this point, one of the railroad companies which had contracted to take all its business over the old bridge transferred the business to the new bridge. The Louisville & Nashville **Railroad Company** thereupon **refused to receive for transportation over its line any freights which had been brought over the new bridge in violation of the contract** made with it. *Held*, that this refusal was **unlawful**.
3. A **common carrier by rail**, to which property is offered for transportation, cannot in this indirect manner and by refusal to perform obligations imposed by law upon it, **enforce its contracts**, but must for that purpose resort to the customary remedies.
4. Nor can a common carrier, as a reason for refusal to afford to another common

carrier the customary reasonable and equal facilities for the interchange of traffic, assign the fact that such other common carrier supplies no public necessity, the public having been fully accommodated without it. All railroads created by competent public authority must be conclusively presumed to be conveniences, and other common carriers cannot refuse to exchange traffic with them on any suggestion or showing to the contrary.

5. The fact that **statutory regulations of internal commerce** are such as to preclude the literal enforcement of pre-existing contracts does not affect their validity, or make them, in a constitutional sense, laws impairing the **obligation of contracts**. Such a consequence is often a necessary result of any considerable change in the general laws, and must be submitted to as such.
6. When a **question of rates** as between two carriers is involved, the Commission will express **no opinion** upon it in a case in which **one of the carriers is not a party**.

(Complaint Filed February 10, 1888—Tried March 7, 8, 9, 1888—Filing of Briefs completed March 29, 1888—Decided August 2, 1888.)

COMPLAINT charging refusal to interchange traffic, etc. See pleadings, 1 Inters. Com. Rep. 703, 715

Messrs. **E. T. Trabue, Ramsey & Maxwell**, and **Bullitt & Shield**, for complainant.

Messrs. **Edward Baxter and Lyttleton Cooke**, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

The petition in this case avers that petitioner is a corporation created by the consolidation of an Indiana corporation and a Kentucky corporation of the same name, and exists under and by virtue of the laws of the States of Indiana and Kentucky; that the Louisville & Nashville Railroad Company, defendant herein, is a corporation created and existing under the laws of Kentucky and Tennessee.

That petitioner owns and operates a bridge for steam railway and other purposes across the Ohio River between the city of New Albany, Indiana, and the city of Louisville, Kentucky, and a railway extending from New Albany across the bridge into Louisville; that defendant owns and operates a railroad extending from the city of Louisville southwardly through the State of Kentucky to the city of Nashville, in Tennessee, with various branches and connecting roads.

Petitioner avers that in the city of New Albany petitioner's railway connects with the railway of the Ohio & Mississippi Railway Company, which operates roads extending thence into the States of Indiana, Illinois, and Ohio, thereby reaching the cities of Cincinnati and St. Louis. Petitioner's railroad at New Albany, aforesaid, also connects with the railroad of the Louisville, New Albany, & Chicago Railroad Company, which extends from New Albany to Chicago, and over and by means of

the railways mentioned petitioner reaches all the principal points of commerce in the United States north of the Ohio River.

It avers that its railway also extends from the southern end of its bridge in Louisville to the railway of the defendant, connecting therewith at the intersection of Seventh Street and Magnolia Avenue, in said city of Louisville, and in defendant's freight yard; that the connection is complete, and affords an easy and convenient means of interchanging cars, freight, and all business between the petitioner and defendant and any railway company using or which may use the railway of petitioner, and such interchange of cars, freight, and other business can be made without any use of the terminal facilities of defendant.

That by section 18 of the charter of defendant, enacted by the Legislature of Kentucky, it is provided that any railroad or railway thereafter constructed under the authority of the Legislature of Kentucky may connect and join with the railroad of defendant; and the railway of petitioner has been constructed in said city pursuant to the authority of the Legislature of Kentucky since the date of defendant's charter.

Petitioner avers that it is a common carrier, and engaged in the transportation of freight and passengers, wholly by railroad, between the cities of New Albany and Louisville aforesaid, subject to the provisions of the Act to Regulate Commerce; that defendant is a common carrier of freight and passengers over its railway and engaged in interstate commerce; and that petitioner and defendant, respectively, habitually hold themselves out to the public as common carriers of freight and passengers over their lines of railroad, respectively, subject to the provisions of said Act to Regulate Commerce; that by its charter petitioner is required to receive from and for the Ohio & Mississippi Railway Company, the Louisville, New Albany, & Chicago Railway Company, and all other companies, persons, or shippers demanding it, carloads of freight destined to any point on or beyond and by way of its lines in either direction, and that it is now receiving large amounts of freight from the two companies last mentioned, and from other companies and individuals, at New Albany aforesaid, for transportation over its bridge and railway to points upon and beyond and by way of the railroads of the defendant, and which petitioner has tendered to defendant at said connection with its railroad at Seventh Street and Magnolia Avenue, for transportation by defendant from that point over its road and connecting railroads.

But petitioner avers that in violation of law the defendant, in combination and conspiracy with the Louisville Bridge Company, a corporation owning the only other bridge across the Ohio River between Louisville & New Albany, and with other railroad companies interested in said last-named bridge, for the purpose of preventing the transfer of freight over petitioner's bridge and compelling the railway transportation of freight across the Ohio River at Louisville to be made over the bridge of the Louisville Bridge Company, has refused and now refuses to interchange traffic between the railways of petitioner and defendant, or to receive from petitioner, or railway companies

using its track, at said point of connection, cars of freight tendered to defendant for transportation over its railroad to points thereon and beyond and by way of said railroad, or to deliver to petitioner, or any railroad company using its track, freight arriving by defendant's railroad at Louisville for or consigned to points on petitioner's railway or any railroad connecting therewith at New Albany, although defendant affords such facilities for interchange of traffic to said Louisville Bridge Company.

Wherefore petitioner prays that the defendant be required by the order of the Commission to interchange traffic with petitioner, and with the railway companies using its railroad, at said point of connection at Seventh Street and Magnolia Avenue, and to receive from petitioner and said railway companies using its railroad all freight tendered by it or them to said defendant for transportation to points on or beyond and by way of its railroad or railroads, and to deliver to petitioner, and to the railroad companies using petitioner's railroad, at said point of connection, all freight arriving at Louisville over defendant's railroad and consigned to petitioner, or to railroad companies using petitioner's railroad, or to points on the line of petitioner's railroad or the railroads of companies using its track.

The answer of the defendant is very long, and it is not material for the purposes of this case that it be recited at length. The existence of the petitioner is conceded, and its ownership of the bridge across the Ohio River; but it is not conceded that it is a common carrier. Defendant says it is advised by counsel that under its charter other companies thereafter incorporated under the laws of Kentucky have the right to connect with defendant's road, but that defendant is not compelled to make any such contracts with petitioner as are necessary to be made in all cases where an interchange of traffic between two companies is to be conducted.

Defendant describes its freight yards in the city of Louisville, of which it has four; it says that the physical connection made by petitioner's railway with defendant's railway is between the third and fourth of these yards, and it denies that such connection affords an easy and convenient means of interchanging traffic between defendant and petitioner, or between defendant and the railways using the railway of petitioner; and it also denies that such interchange can be made without the use of defendant's tracks and terminal facilities by petitioner; and defendant specifies many reasons why the place of such connection is not a convenient place for the interchange of business.

Defendant admits that it has refused and now refuses to interchange traffic between the railways of defendant and petitioner at the point of connection at Seventh Street and Magnolia Avenue, or to receive from petitioner or from railways using its track at that point cars of freight tendered to it for transportation, or to deliver to petitioner at that point freight arriving by defendant's railroad at Louisville consigned to points on petitioner's railway or any railroad connecting therewith at New Albany. It admits that it affords facilities for the interchange of traffic passing over the bridge of the Louisville Bridge Company, but this is done at

one of respondent's regular yards, where it has all the force and facilities necessary for the business.

Defendant denies that either in the interchange of traffic which crosses the bridge of the Louisville Bridge Company, or in refusing to interchange the traffic which crosses the petitioner's bridge, defendant is acting in violation of law or in conspiracy with the Louisville Bridge Company, or with any railroads interested therein. It is true there are two bridges across the Ohio River at Louisville. Defendant on June 5, 1872, entered into a written contract with said Louisville Bridge Company and with the Jeffersonville, Madison, & Indianapolis Railroad Company and the Ohio & Mississippi Railroad Company to the effect that freights coming from points north of the Ohio River, destined to defendant's railroad or to railroads connected therewith, should be transported over the bridge of said Louisville Bridge Company. Defendant has felt and still feels that it is legally and morally bound to comply with said contract, in letter and in spirit, and one of the reasons why defendant has refused to interchange traffic with petitioner at the point of connection of their tracks is because in defendant's opinion it would be a violation of said contract, and of other contracts existing between defendant and other parties, entered into in good faith and to subserve the interest and convenience of its patrons.

Defendant then proceeds to state the following facts: Prior to the construction of the Louisville Bridge Company's bridge all freights, mails, and express goods to and from points north of the Ohio River, destined to defendant's road and its connections, had to be ferried across the river on boats and hauled through the streets of Jeffersonville and Louisville. The difficulties and expense of this traffic are stated, and because of these defendant says it was concluded to bridge the river, and defendant subscribed \$300,000 of the stock of the Louisville Bridge Company. The bridge was built at a cost of \$2,300,000, represented by \$1,500,000 of stock and \$800,000 of bonds.

About the time the bridge was completed, to wit, June 5, 1872, a written contract was entered into between the Louisville Bridge Company and the Jeffersonville, Madison, & Indianapolis Railway Company, the Ohio & Mississippi Railway Company, and the defendant, whereby in substance it was agreed that the tolls and charges for the use of said bridge by said railroad companies should be fixed at rates that should not be in excess of a sum sufficient to produce in the aggregate an amount equal to the cost and expense of keeping the approaches and its bridge in repair, paying a semi-annual dividend of 6 per cent upon the capital stock, the interest upon the bonds, and a sinking fund sufficient to pay off the bonds at maturity, and an amount sufficient to keep up the corporate organization of the bridge company, including taxes; and in the event the bridge should be destroyed by casualty, additional 7 per cent bonds were to be issued by the bridge company, and sufficient charges were to be made against said railroad companies to meet the interest and sinking fund upon such additional bonds.

It was provided that said charges and tolls should be from year to year reduced in proportion to the reduction of interest on said bonds by the operation of said sinking fund, and that they should always be the same to each of said railway companies. Said contract contemplated that other railroad companies should thereafter be allowed to use said bridge; that all tolls and charges paid by such other companies should be applied to and form part of the fund provided by the contract for the payment of expenses, sinking fund, etc.

It will be seen by this statement that as the sinking fund increases and the amount of outstanding bonds is diminished, defendant's charges and tolls for the use of the bridge are proportionately diminished. Said bonds are now nearly all paid off; when fully paid the tolls and charges will be reduced to a sum sufficient to keep the bridge in repair, maintain its corporate organization, pay taxes, and the dividend on its stock. It will further be seen that when other railroad companies are induced to use said bridge the payments made by them will also tend to reduce the tolls and charges which defendant must pay.

It is therefore greatly to the interest of defendant to continue its contract arrangement with the Louisville Bridge Company, and it is proper that it should endeavor by all fair and legal means to induce other railroad companies to use that bridge. It is also manifest that if petitioner can succeed in getting the Ohio & Mississippi Railway Company, or other companies, to withdraw their traffic from the Louisville Bridge Company, or in compelling defendant to divert any portion of its traffic to petitioner's bridge, it will proportionately increase the tolls and charges which defendant will have to pay to said Louisville Bridge Company in discharge of its obligations under the contract of June 5, 1872.

Defendant then refers to other contracts supposed to have some bearing upon the controversy; avers that it was authorized to enter into them by its charter; says that the bridge of the Louisville Bridge Company is the natural connection and traffic ally of defendant, while the parties concerned in petitioner's company are the avowed enemies of defendant, and are doing all that is in their power to injure it. The answer closes with an averment that defendant has no traffic arrangement with petitioner; that it does not interchange traffic with other companies except in pursuance of agreed arrangements, and that petitioner has no license or permission from defendant to make use of any part of its roads, or to transport persons or property thereon.

Upon the issues thus presented the case was heard on testimony taken orally, and the parties presented their views in oral arguments and afterwards in elaborate briefs. We find the facts established by the evidence, so far as we deem them important to the decision of the legal questions raised, to be as follows:

The Louisville Bridge Company was incorporated by the Commonwealth of Kentucky March 10, 1856, and the charter was amended February 19, 1862. The amended charter contains provisions giving the company authority to contract with railroad companies "to warrant the annual profits of the bridge to be

built by said company shall be equal to the keeping the bridge in repair and of its operation, and that the net earnings shall be equal to 6 per cent on a cost of \$1,000,000." Also to contract with any railroad company "for the annual use of said bridge by the cars or for the purposes of said railroad company." Also that "any railroad company incorporated by the Commonwealth of Kentucky may lawfully subscribe to the stock, or make the guaranties and agreements authorized by the preceding sections of this Act, when authorized by the stockholders at some general meeting."

By Act of Congress approved February 17, 1865, a previous Act of July 14, 1862, was so amended as to authorize the Louisville & Nashville Railroad Company and the Jefferson Railroad Company (stockholders in the Louisville Bridge Company) to construct a railroad bridge over the Ohio River at the head of the Falls of the Ohio, and the bridge when constructed was declared to be a lawful structure.

Under the legislation above mentioned the capital stock of the Louisville Bridge Company was subscribed for by the Jeffersonville, Madison, & Indianapolis Railroad Company, the Louisville & Nashville Railroad Company, and certain other corporations and individuals, the Louisville & Nashville Railroad Company subscribing for \$300,000 thereof.

On June 5, 1872, a contract was entered into between the Louisville Bridge Company, party of the first part, the Jeffersonville, Madison, & Indianapolis Railroad Company, party of the second part, the Ohio & Mississippi Railway Company, party of the third part, and the Louisville & Nashville Railroad Company, party of the fourth part, in which it was recited that the capital stock of said Bridge Company was \$1,500,000, and its mortgage debt \$800,000, evidenced by bonds to mature December 1, 1888, bearing interest at 7 per centum, payable semi-annually.

The contract contained stipulations as follows:

First. That the second, third, and fourth parties agree respectively to use said bridge as is hereinafter covenanted.

Second. That the first party agrees that the tolls and charges over and for the use of said bridge and its tracks owned by the first party, in the transportation of freight, passengers, mails, and other goods received from or delivered to the roads of said second, third, and fourth parties, per ton and per passenger, or per car, engine, or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge owned by the first party, paying a dividend semi-annually of 6 per cent on said capital stock of \$1,500,000, the interest upon said bonds as the same mature and become payable, a sinking fund sufficient to pay off said bonds of \$800,000 at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against said Bridge Company on said bridge or other property pertaining thereto or otherwise.

Third. It is understood and mutually agreed that said charges and tolls shall from year to year be reduced in proportion to the reduction of interest on said bonds by the operation of said sinking fund.

Fourth. That the tolls and charges shall always be the same to each of the second, third, and fourth parties.

Fifth. That the tolls and charges to other railroads, or railroad companies, for like use of said bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties hereto.

Sixth. That all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties.

Seventh. In the event said bridge or its appurtenances shall be injured by floods, ice, or other casualty, or by crystallization of the iron, or other inherent decay, so as to render the same useless or dangerous, and it shall become necessary to rebuild the whole or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of guaranteed rates and charges, then an additional number of bonds were to be issued to yield a fund sufficient to renew and repair the bridge; and in that event the tolls and charges were to be increased, so as to provide for the payment of the interest on such additional bonds and to provide a sinking fund to retire them at maturity.

Eighth. The second and third parties each severally agrees that it will pass over the said bridge all the freight, passengers, mails, express matter, and other goods carried on and over their roads, to and from Louisville and to and from points which require their passage over the Ohio River at or near Louisville, during the existence of this agreement, and will pay punctually to the party of the first part the tolls and charges hereinbefore provided for the use by them, respectively, of said bridge and the tracks and approaches thereto owned by the first party.

Ninth. The party of the fourth part covenants with each of the parties of the first, second, and third parts, their respective successors and assigns, that it will deliver to the said party of the first part, to be passed over the said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may for the time being be transferring freight, passengers, mails, express matter, and other goods over the said bridge, all the freight, passengers, mails, express matter, and other goods carried on and over its road, or in any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points which require their passage over the Ohio River at or near Louisville, during the existence of this agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of toll and charges hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party.

Tenth. The approach to said bridge at the

north end thereof was owned by the second party, and the third party agreed with the second party to use said approach to said bridge in going into and over said bridge, and it was agreed between said second and third parties that all the trains, cars, and engines passing over said approach, and over said bridge, shall be under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars, and engines of the second party, in the premises, shall be equally applicable to the trains, cars, and engines of the third party, each being dealt with alike. . . . And the second party hereby covenants to furnish all needful and sufficient engines for the service hereinbefore mentioned, and at all times to transfer with the same promptness and care over the said bridge the trains, cars, engines, and traffic of the parties of the third and fourth parts, that it does the trains, cars, engines, and traffic received from or to be delivered to its own road, the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.

Eleventh. For the service aforesaid of said engines of the second party, and the conducting and management of the same, and of cars, trains, and bridge over the said approach and bridge, the second party shall be allowed a reasonable compensation, to be fixed on signing this agreement, to be apportioned between the parties hereto in proportion to the service to each, per ton and per passenger, or per car, engine, or other means of transportation as the parties may hereafter agree.

There was then a provision for the arbitration of differences arising between the parties under the contract, and a final clause as follows:

"This contract shall continue in force and operation until it shall be determined by some one of the parties thereto giving notice in writing to the other parties of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of which two years the same shall terminate as to all the parties thereto included in such notice."

Since the contract was entered into the Louisville, New Albany, & Chicago Railroad Company and the Louisville, Evansville, & St. Louis Railroad Company have been allowed to use said bridges and its approaches in substantial accordance with its provisions. The tolls and charges for the use of the bridge have been continually growing less as the traffic over it has increased. Several years ago an arrangement was made whereby the dividends agreed to be paid upon the capital stock of the bridge company were reduced from 6 to 4 per cent semi-annually. The sinking fund provided for by the contract is now sufficient to pay off the bonds, and it is expected that they will be paid off when they mature in December next.

The complainant, the Kentucky & Indiana Bridge Company, was incorporated by the Commonwealth of Kentucky by special charter April 6, 1880. It was empowered "to locate, build, construct, and maintain, under the laws of the United States, a bridge for railway, wagon, street-railway, and all other purposes, between the cities of Louisville,

Kentucky, and New Albany, in the State of Indiana, from any convenient and accessible point within the limits of the city of Louisville, or within one mile thereof, to any point in the city of New Albany, Indiana, or within one mile thereof," and to acquire by purchase or condemnation the necessary real estate for that purpose. It was further given power "to lay down on said bridge a single or double track for railroad cars or street cars, or for wagons or other vehicles, and all animals, and to erect footways for passengers, and to charge for the use thereof reasonable tolls; . . . and may also run any line of railway through the city of Louisville upon such terms as may be prescribed by ordinance of said city of Louisville, or along any street or alley, to connect with any railway bridge, transfer company, or depot, and shall have the right to operate or lease said connecting line or lines, and may charge a reasonable compensation for the use of the same."

On March 7, 1881, a corporation by the same name and for the same purpose was incorporated by the entering into and filing of articles of association under a general statute of the State of Indiana. The statutes of Indiana empowered a company duly incorporated to construct a railway with one or more tracks over its bridge and the embankments pertaining thereto, and to connect the same with other railway tracks, and "to fix and alter at pleasure the rates of toll for all persons and property passing over said bridge and railway tracks connected therewith, whether on foot or horseback, or in vehicles of any kind, or in cars propelled by steam or any other power." It was also provided that the company "shall have full power and authority to connect line of railway over said bridge by continuous line of railway, in such manner and upon such route and terms as may be deemed most expedient, with any other line of railway whatever, and to maintain, use, operate, and control the said connection when completed, and charge and receive tolls for the use thereof."

The two corporations thus formed under the same name were subsequently consolidated under legislative authority which we do not understand to be questioned. On March 13, 1884, the Kentucky charter was amended, and the amendatory Act provides, among other things, that the corporation "is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in said State of Indiana, which may be necessary for completing its terminal facilities." Another amendatory statute, of date May 3, 1884, contained provisions that the company "is authorized to contract with or to construct any railway or terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities, and may bond the same or may indorse the bonds of any corporation or company building such line or lines, or it may extend such branch lines through the city of New Albany, State of Indiana; and it may construct such line or lines in the county of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots."

INTER S.

Consent of the city of Louisville to the construction of railway tracks by the said Kentucky & Indiana Bridge Company within its limits was given by several ordinances, one of which, bearing date November 4, 1886, provides that "the right herein granted is subject to the proviso that the Kentucky & Indiana Bridge Company shall permit the use of the said tracks by any railroad company now or hereafter, desiring to use the same, under reasonable conditions not inconsistent with the use thereof by the said bridge company: provided, however, that before such company shall be entitled to such use it shall tender to said Bridge Company reasonable compensation for same for one year, and shall agree to pay in each year thereafter reasonable compensation for such use. And provided, further, that such railway company shall agree to and allow said Kentucky & Indiana Bridge Company to use the tracks of such railway company within the city of Louisville upon like reasonable terms."

Consent of the city of New Albany was also given to the Kentucky & Indiana Bridge Company "to build, construct, and maintain approaches, roadways, and embankments and trestles on, over, along, and across" certain specified streets, but without particularly designating the intended use of such approaches, roadways, etc.

On September 29, 1886, the Kentucky & Indiana Bridge Company entered into a written contract with the Ohio & Mississippi Railway Company, which contemplated the abandonment by the last-named company of the pre-existing contract with the Louisville Bridge Company hereinbefore described, and the transfer of its business across the Ohio River at this point to the bridge of the Kentucky & Indiana Bridge Company. The important provisions of this last contract are the following:

"The bridge company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky & Indiana bridge and approaches, from a convenient point of connection at Vincennes Street, New Albany, to the ground of the railway company at Fourteenth Street, in Louisville, or, should the railway company elect so to do, to a connection with the track of the Short Route Railway Transfer Company near Thirteenth Street, in Louisville; the railway company's locomotives, cars, and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the bridge company.

The bridge company is to keep its bridges, approaches, and lines of railway in repair at its own expense; it agrees "to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now seeking New Albany, within a reasonable time, either directly or through the use of the other railway lines and to switch the cars of the railway company over such connecting tracks at a switching charge of \$1 per car; also to transfer cars from the railway company's transfer yard south of Bank Street, in Louisville, to the L. & N. R. R. or the C. , O. & S. W. R. R. at the same rate per car."

It is agreed that "the tolls shall be fixed at the same rate, from time to time, as the rate of the Louisville Bridge Company, and these tolls shall be paid monthly by the railway company to the bridge company, it being provided, however, that whenever the sum so collected shall exceed the sum of \$17,500 per quarter, any excess over such amount shall be paid back to the railway company, but the railway company agrees to pay to the bridge company \$17,500 per quarter, whether or not the amount of tolls so collected equals that sum; the intention being to give a fixed annual rental to the bridge company of \$70,000 per annum." But the railway company is to "endeavor with reasonable despatch to clear itself of future liability for tolls, rentals, charges, or otherwise under its present contract for the use of the Louisville bridge, and until such liability shall be removed the railway company shall not be compelled to pay any tolls hereunder to the bridge company. And the Kentucky & Indiana Bridge Company may at its own cost, and in the name of said Ohio & Mississippi Railway Company, defend against any claim of liability on the part of said O. & M. R. Co. under said contract."

"The railway company agrees . . . to carry and transport over said bridge, approaches, and railway tracks all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own line . . . destined or consigned to or from Louisville, or to or from points which require their passage over the Ohio River at or near Louisville; provided, however, that said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge, but the rental to be paid hereunder shall not be decreased by reason thereof. The interchange of freight at Louisville and New Albany between said railway company and connecting road shall be done over the tracks of the bridge company between the south approach to its bridge and the tracks of such connecting road, so far as the O. & M. R. Co. can lawfully control the same, and the charge for the use of such tracks shall not exceed that on any other line."

"The railway company agrees, so far as it lawfully may, not to carry or transport over the said bridge and the approaches and tracks thereto any locomotives, cars, freight, passengers, mail and express matter between Louisville and New Albany that originates in or comes from any railroad or water line entering the one place and destined for the other, it being mutually understood and agreed between the parties hereto that the bridge company shall have the sole exclusive right to control, carry, and transport over the bridge and the approaches and tracks thereto all traffic not received from or destined to points reached over the railroad of the railway company north and east of New Albany."

"The railway company agrees to furnish at its own cost all motive power necessary for the transfer of its locomotives, cars, freight, passengers, mail and express matter transported by it over the said bridge and the approaches and tracks thereto."

"It is mutually agreed by the parties that each shall be alone responsible for all loss, damage, or injury to its own locomotives, cars,

machinery, and other property, as well as for all injury to its own servants, freights, and passengers, which may occur while its trains are being run and managed by its own engineer, conductor, and other trainmen on the said bridge and tracks, which may be caused by the negligence of its own servants; and in all cases wherein either persons or the property of persons not parties to this agreement shall be run against or over, or thereby shall be otherwise injured by the engines or cars of either party, then in all such cases the party whose trainmen are at the time in charge of and operating such engines or cars shall alone be responsible. . . . In case of collision between the trains of the parties hereto, the party whose men or trains are at fault shall be responsible to the other party for all loss, damage, or injury sustained by it on account thereof."

The defendant company was incorporated March 5, 1850, "to construct a railroad from Louisville to the Tennessee line in the direction of Nashville," and with the usual powers of railroad companies. One provision in the charter was that "it shall not be lawful for any other company or any other person or persons to travel upon or use any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof;" but the power was reserved to the State of Kentucky to incorporate thereafter other railroad companies, and it was provided "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated." An amendment to the charter in 1860 authorized the company to "make arrangements with other companies for through freights and passage from distant points on such terms as they may agree from time to time."

The complainant, after the construction of its bridge and approaches and certain railway or terminal lines in New Albany and Louisville, claimed the right, under the provision of the charter of the defendant above referred to, to connect the railway track of said bridge company with the track of said railroad company; and a physical connection of said tracks was made at the intersection of Seventh Street and Magnolia Avenue in the city of Louisville. When this had been done complainant claimed a right to an interchange of traffic between itself, as a common carrier, and any railroad company that might make use of its tracks, with the defendant as a common carrier at that point.

The defendant has in or near the city of Louisville, elsewhere than at the point of connection with the tracks of complainant, four freight yards, which it claims are fully adequate for the transaction of all the business of the company, whether passenger or freight. It is not satisfactorily shown that this claim is not well founded, and for the purposes of a disposition of this case we assume that it is. At these yards an adequate force of clerks, inspectors, porters, etc., is kept by defendant for the transaction of its business and the making of exchanges.

Previous to the filing of the complaint in this case freight was tendered in loaded cars

by complainant to defendant at the point of connection of their tracks at Seventh Street and Magnolia Avenue, to be transported over the defendant's lines to destinations specified, and defendant refused to receive the same. The grounds of refusal briefly stated were the following: That complainant is not a common carrier, and therefore not entitled to demand an exchange of traffic; that the freight tendered had been taken over the bridge of complainant by a party to the contract with the Louisville Bridge Company, and in violation of the provisions of that contract; that defendant had ample facilities at its four freight yards for the exchange of traffic with connecting carriers, and was not, therefore, bound to afford further facilities at Seventh Street and Magnolia Avenue, and that in any event the party which should make demand for an exchange was not complainant, but the railway company making use of its bridge and taking freight over it. At the time of making such tender of freight, complainant was actually engaged as a common carrier in interstate traffic as hereinafter stated.

Upon these facts our conclusions will be briefly indicated.

First. We think the charter of complainant, as given by the Commonwealth of Kentucky, conferred the powers of a common carrier, and that such was the legislative intention. Whether the statute under which the Indiana corporation was organized had an intent equally broad may perhaps be open to question, but for the purposes of this case it is not very material. It is unquestionable that under the consolidation the complainant is proprietor of a bridge and of tracks which it lawfully operates, and which serve the purpose of a belt line in giving connection of the railroads on one side of the river with those on the other.

The power granted by the Commonwealth of Kentucky to construct and also to "operate" a line or lines of railway over the bridge and the approaches thereto, and to connect it with the lines of other parties has thus been acted on, and complainant by means thereof is engaged in interstate traffic; its passenger traffic being very considerable. It owns passenger cars and several locomotives, but no freight cars. This last fact is of no legal importance. The long lines of the country to a considerable extent lease or otherwise procure cars not owned by themselves; and if they thus procured all they used, they would none the less be common carriers and entitled to all the rights and privileges the Act is intended to secure.

The chartered authority of complainant also contemplated that its bridge, approaches, and tracks would be used by other common carriers who would pay tolls or other compensation therefor. Such use by other carriers would not be inconsistent with the use by complainant as a common carrier also, but the effect would be to prolong the line of the carrier making use of the same to that extent, and thus enable it to deliver its traffic, without other agency of the complainant, to such lines as could thereby be reached. By such prolongation of their lines the railroad companies reaching New Albany from the north and west may be enabled to tender traffic brought

over complainant's bridge to the defendant in Louisville, and so long as by contract or otherwise any such company has the right to make use of complainant's railway and to run its locomotives and cars over the same, no connecting company to whom its traffic is offered can be heard to question the right to make use of complainant's line for the purpose. To bring the bridge and the traffic over it under the Act to Regulate Commerce, it is only necessary that the bridge be "used or operated in connection with any railroad," as it clearly would be in case the facts were as supposed.

Second. We hold that the point of connection at Seventh Street and Magnolia Avenue in Louisville is a convenient and suitable point for making exchange of traffic between complainant and any carrier that may make use of its tracks, and the defendant.

On the oral argument counsel for the defendant made a statement on this subject which is repeated in a printed brief, and as there given is as follows: "I stated, in oral argument, that a mechanical connection had been made at that point, between the terminal railway of the Kentucky & Indiana Bridge Company and the track of the Louisville & Nashville Railroad Company, and that cars, coming from the terminal railway of the Kentucky & Indiana Bridge Company, could be taken by the switch engines of the Louisville & Nashville Railroad Company and carried to the transfer station, at Ninth and Broadway, with but little, if any, more trouble or expense than cars were taken from the private sidings, which are connected with the tracks of the Louisville & Nashville railroad in Louisville; and I stated that I would not, therefore, consume the time of the Commission in contending that it was physically impracticable to make an interchange of traffic between the two companies at Seventh and Magnolia; nor would I attempt to make any calculation to show how much more expensive or troublesome it would be to make the transfer at Seventh and Magnolia than it would be to make it at Ninth and Broadway. For all the purposes of my argument I am perfectly willing to concede that Seventh and Magnolia may be regarded as a 'proper point for interchange of traffic between the Kentucky & Indiana Bridge Company and the Louisville & Nashville Railroad Company', so far as the mere trouble and expense of the interchange is concerned. I then regarded, as I now regard, that the real question at issue between the parties is, not so much as to *where* the interchange of traffic is to be made, as it is *as to the right of the Kentucky & Indiana Bridge Company to demand an interchange of traffic at all.*"

This is a fair concession, and it states the fact as we should find it independently if no such concession were made. The defendant insists that complainant, in receiving traffic from it or in delivering traffic to it, is to be treated as an individual manufacturer or trader in Louisville would be,—as a mere shipper, with whose charges as a bridge owner or an owner of railway tracks the defendant has nothing to do; that complainant must therefore pay Louisville rates on freight sent or received by it; and that, so far from its having

any rights as a common carrier by reason of the freight it tenders having been brought over its bridge, the defendant, on the other hand, may refuse to receive it for that reason; at least if it comes from any company which is a party with defendant to the contract with the Louisville Bridge Company. When we decide, as we do, that complainant is a common carrier, some part of this contention falls to the ground. Defendant, we think, is bound to receive traffic from it under the Act to Regulate Commerce. The necessity to receive it at a point otherwise than at one of defendant's four yards is to some extent a hardship, but it is one that is very often found to exist and to be inevitable in the case of the construction of a new road. The whole expense, however, does not fall upon the old carrier. The new carrier must do its full share towards making provision for traffic exchange.

Third. The principal question in the case is the one stated by counsel qualifying the concession above made regarding the place for the exchange of traffic. And this question is not fully determined when it is held that complainant is a common carrier, and entitled as such to traffic exchange. Conceding it to be a common carrier, it would still be contended on the part of the defense that the right to an exchange cannot extend to traffic offered to defendant by complainant, but which has been placed in its charge for the purpose by one of the parties to the contract with the Louisville Bridge Company and in disregard of the provisions of that contract. This is upon the ground that defendant has a right to hold the other parties to their contract obligations, especially when it appears that a violation of those obligations would be greatly to defendant's detriment.

To determine this question we should first see what are the provisions of the Act to Regulate Commerce which may have a bearing upon it.

The first section of the Act makes the term "railroad" as used therein include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease. There can be no question, therefore, that the traffic carried on by common carriers over the bridge and tracks of complainant is under the regulation of the Act, whether complainant is the carrier or some railroad company making use of its property for the purpose.

The third section of the Act provides that "every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith; and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The interchange of traffic here mentioned

obviously does not mean mere local traffic. The Act does not mean that the carriers regulated by it shall receive from each other, as shippers merely, the freight that may be offered, but it has in view traffic that has been taken up by one carrier and which at some point on its line is to be delivered to another. Such traffic is through traffic in the sense that it is to pass on or over more than one line. It is not mere local traffic that is taken up at one station of a carrier to be delivered at another of its stations. It is in respect to such through traffic that the Act undertakes to compel the affording of "all reasonable, proper, and equal facilities." A carrier very obviously does not do this when it refuses to receive traffic from a connecting carrier otherwise than as from a shipper.

The question of the right of an interstate carrier to stand independently; to unite in no through rates, and to do no through billing, cannot be raised by this defendant in this case, for the very plain reason that it does not claim such a right and in its dealings with other carriers act upon it. It makes through rates with the roads north of the Ohio River upon traffic to pass over its lines, and it gives through bills therefor. What it insists upon in this case is that it has a right to do this with some carriers and to refuse to do it with others. The claim of the defense is plainly stated in the brief of counsel as follows:

"The L. & N. R. R. Co. is, and has been at all times, perfectly willing to deliver and receive to and from all railroad companies engaged in the transportation of freights to and from points north of New Albany, Jeffersonville, and Louisville, and upon the usual through rates, provided such freights are transported by said railroad companies across the Ohio River at Louisville upon the Louisville bridge. The L. & N. R. R. Co. will give no preference or advantage whatever to either one of those railroad companies over the other, provided they will all bring their freight across the river upon the Louisville bridge. But if, instead of using that bridge, they or any of them see proper to abandon it, and carry the freight across the river upon the K. & I. bridge, or any other bridge that may be built at or near Louisville, then the L. & N. R. R. Co. will decline to make through rates or through routes with such companies, and will insist upon treating them as Louisville customers, and charge them Louisville rates. It is for those railroad companies to say for themselves whether they will have the same through routes and through rates as the J., M. & I. R. Co. or not. If they will use the same bridge they shall enjoy the same through routes and the same through rates. But if they prefer to use the K. & I. bridge, or any other bridge at Louisville, thinking that it will be to their advantage to do so, they must take the consequences. But the preference or advantage which may arise in that event will not be one which is made or given by the L. & N. R. R. Co., but it will be one which the railroad companies themselves may see proper to make. They have a free choice of route, and must abide the result of their choice."

This is the position of defendant, very plainly stated. For taking it at all, the defendant assigns its equities under the contract with the

Louisville Bridge Company, and these are apparently very strong. It is also claimed that there are no reasons of a public nature for compelling it to receive traffic brought over complainant's bridge. The traffic of the Ohio & Mississippi Railway Company, it says, is fully as well, and even more cheaply, accommodated by the old bridge than by the new, and a number of English cases are cited to the point that in considering questions of undue preference courts require it to "be clearly shown that the cause complained of occasioned inconvenience to the public, and regard must be had to the general convenience of the public rather than to the wishes or interests of individual job masters." *Ilfracombe Co. v. L. & S. W. R. Co.* 1 Nev. & Mac. 61; *Beadell v. Eastern Counties R. Co.* Id. 56; *Ransom v. Eastern Counties R. Co.* Id. 112; *Caterham R. Co. v. Brighton, etc. R. Co.* Id. 37; *Barrett v. G. N. etc. R. Co.* Id. 43, 44; *Painter v. L. B. & S. C. R. Co.* Id. 53.

To enable us to determine whether these English cases are fairly applicable to cases arising under the Act to Regulate Commerce, it might be necessary to examine the reasoning made use of in them in the light of the statute. But we do not think this important now, because if the principle here stated were admitted to be applicable in the United States, it would not in this case aid the defendant.

The point is not raised here by any "job master," but it is raised by a common carrier; by one of the class to which the Act to Regulate Commerce requires the defendant to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their respective lines and those connecting therewith." Defendant refuses to afford complainant any such facilities whatever, and replies to its demand for them that traffic is sufficiently accommodated without, and the public has therefore no interest in the demand being acceded to. This seems to be equivalent to saying that on public grounds there is no reason for the existence of complainant's bridge and tracks, and other carriers may ignore their existence altogether. The same principle, if accepted as sound, would justify the refusal to exchange traffic with any railroad company whose lines, long or short, could not be shown to have been built in response to some public demand. The New York, Lake Erie, & Western Railroad Company, for example, might refuse to exchange freight with the New York, Chicago, & St. Louis, and justify its refusal on proof that the road of the last mentioned company was wholly unnecessary, the traffic which it now carries having been sufficiently accommodated by other lines before it was constructed.

Such contention cannot be supported. All railroads in existence which are created under legislative authority must be conclusively presumed, for all the purposes of the Act to Regulate Commerce, to be of public convenience. The fact that they are so is settled by the construction itself, and the legislative or other proper public authority that was given therefor. Defendant cannot therefore refuse to exchange traffic with complainant, or with others

making use of its tracks, on any such ground as is here suggested.

Some reliance is also placed by the defense upon the case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 677 (28 L. ed. 295), in which it was decided that a provision in the Constitution of Colorado that "all individuals, associations or corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State," did not compel a railroad company which had given through routes and through rates to one railroad company to give them to its rival also. But the provision in the Constitution of Colorado is very much less broad than that in the Act to Regulate Commerce: the requirement to afford "equal" facilities is not the same as the prohibition of "undue or unreasonable discrimination" in facilities; and when all the terms above quoted from the third section of the Act are considered together, it is plain, we think, that a carrier does not comply with the requirement to afford facilities without some active co-operation on its part in the receiving, forwarding, and delivering; and that a co-operation cannot be "equal" if it is restricted to one carrier or to less than all.

In its reliance upon its contract with the Louisville Bridge Company the defendant suggests the question of the constitutional power of Congress to pass any Act which would invalidate the contract; and though counsel do not argue the question they insist that, as a matter of construction, the Act to Regulate Commerce should be given effect in such a way as to leave that contract in full force. To this point the language of *Chief Justice Cockburn* in *South Eastern R. Co. v. Railway Comrs.* L. R. 5 Q. B. Div. 231, is quoted. In that case the chief justice said:

"It seems to me next to impossible to suppose that Parliament,—ever disposed to deal tenderly with vested rights,—having conceded these powers and rights as the basis of these great undertakings, could intend by a single blow to place these companies in a worse position than that of private ones. Having once made its bargain with a public company in a matter of commercial enterprise in the Act by which the company is constituted and its powers conferred, the Legislature could not, unless such power has been expressly reserved to it, with any consistency or justice, afterwards impose fresh obligations upon the company, or deprive it of any of the powers and vested rights the grant of which had been the inducement to undertake the enterprise."

Again, the same learned judge says in the same case:

"I cannot but think beyond question that interference with the self government and financial management of railway companies once constituted and established would be an interference with vested rights. It seems to me to follow that, while there can be no doubt that Parliament in the plenitude of its legislative power can deal with such rights, yet that, looking to the tenderness with which vested rights are ever infringed on, any legislative en-

actment in any way interfering with such rights must receive the strictest construction and be carried no further than the language of the enactment necessarily requires."

In support of the same doctrine *Nicholson v. Great Western R. Co.* 1 Nev. & Mac. 150, is also cited by the defense.

The doctrine thus stated is not likely to encounter much dissent in the United States. In so far as it expresses a rule of right and justice it corresponds to the construction which the Federal supreme court in *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 519 (4 L. ed. 630), gave to the provision in the Federal Constitution inhibiting the States from passing laws impairing the obligation of contracts. Whether the power of Congress is limited in this regard, as the legislative power of the States is, is a question that is sometimes mooted, but the discussion of which we will not enter upon. If it were conceded that Congress cannot by its legislation impair the obligation of contracts, the concession would in no respect affect the pending controversy.

The slightest examination of the Act to Regulate Commerce will make it evident that Congress has not undertaken thereby to meddle with contracts or to affect them in any way, except as they may incidentally be affected by the rules it lays down and the regulations it prescribes. Those rules and regulations are in the nature of police laws. They are prescribed that facilities created for the public benefit may not be abused; that right may be done, and public conveniences of a certain class made as useful as possible. It is not one of the purposes of Congress that contracts shall be abrogated; much less that the obligation of this particular contract now brought to our attention, and which the Act in no way refers to, shall in any particular be impaired or interfered with.

But the Act to Regulate Commerce is a general law, and contracts are always liable to be more or less affected by general laws, even when in no way referred to. This is the case with State laws as well as with Federal. There probably was never an Act passed in restraint of the sale of intoxicating drinks that did not affect some contracts, and render their literal enforcement impossible. The same may be said of the Federal revenue laws. Nothing is more likely than that a considerable change in customs regulations or customs duties, or in the provisions made for enforcement of excise laws, will deprive some party of a right he supposed he had secured by contract. But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is a necessary effect of any considerable change in the public laws. If the Legislature had no power to alter its police laws when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible, much less sound and tenable.

But it does not follow that when we hold that defendant is bound to receive traffic offered to it by complainant, notwithstanding it may have come to it from the Ohio & Mississippi Railway Company, that thereby the

contract between that company and the defendant is abrogated or its obligation impaired. On the contrary, if that contract was legal in its inception, and may be lawfully performed by the Ohio & Mississippi Railway Company, notwithstanding any provision contained in the Act to Regulate Commerce, then requiring defendant to receive such traffic from complainant or even from the Ohio & Mississippi Railway Company at the point of connection of the lines of complainant and defendant when tendered by the one or the other will not take from defendant the customary remedy for any breach of the contract. What we decide in this case is that, when the traffic is offered to defendant at the point of connection aforesaid, it is not a liberty, in view of the strong and positive requirements of the Act to Regulate Commerce, to take redress into its own hands, and if it finds that the traffic is affected by a previous breach of contract, then, instead of affording "equal" facilities for it, as required by the Act, to refuse to afford any facilities. This is not the proper mode for obtaining redress in case of even unquestionable legal contracts; the law prescribes judicial remedies for a breach which are supposed to be adequate, and to those remedies the party should resort. No order in this case will preclude it.

Fourth. Defendant further insists that for the purposes of through business there must be through rates, and that no carrier is under obligation to make through rates except on a consideration of its own interest; joint rates being purely a matter of agreement. On the other hand complainant contends that the same rates the defendant makes with one carrier it must make with others. This contention was advanced, as we understood it, with special reference to the business of the Ohio & Mississippi Railway Company.

In the case before us there is nothing to justify any discussion of rates. No company is before us asking rates of defendant. The Ohio & Mississippi Railway Company is not here as a party, and we cannot know what it desires. We cannot even know that it considers the rates now made by the defendant with other carriers reasonable, or that it would be satisfied to accept them for itself. When that company comes here with a complaint we shall deal with it on the circumstances and equities of the case as they are then made to appear. The only complainant now here is the Kentucky & Indiana Bridge Company. On its complaint that defendant refuses to receive traffic from it as a common carrier, we hold that in our opinion defendant is obliged to receive it, and to afford such equal facilities for the traffic as it affords to other carriers. We also hold, as necessarily or at least properly within the issue, that defendant cannot lawfully base a refusal as to any part of the traffic on the ground that it is brought to it in violation of contract. The decision in favor of complainant, on the ground of its being a common carrier, necessarily announces a general principle of which other carriers making use of its bridge and tracks may of right avail themselves.

It is undoubtedly true, as defendant contends, that through business requires through

billing, and is more conveniently done under joint rates. And joint rates are made by consent. On this subject we say, in this case only, that in view of the provision in the third section of the Act that common carriers shall not discriminate in their rates and charges between connecting lines, it is not so clear to us as it seems to be to defendant's counsel, that a carrier may make joint rates with one railroad company engaged in a certain traffic and refuse to make such as, under the circumstances, would be equally reasonable with that company's rival. When a question of that sort comes before us, we shall endeavor to decide it as the law and the circumstances of the particular case may be found to require. But we shall assume, with the general right decided as above, that the parties will dispose of other questions without further invoking our aid.

The question of the validity of the contract between complainant and the Ohio & Mississippi Railway Company, or of any of its provisions, is not involved in this case, and no opinion is expressed upon it. The case is disposed of as it would be if no such contract were in existence.

Order will be entered sustaining the complaint and directing the defendant to cease and desist from refusing to receive the traffic offered to it by complainant at the point of connection of the roads of the parties respectively, at Seventh Street and Magnolia Avenue in the city of Louisville, and instead thereof to afford all reasonable, proper, and equal facilities for the interchange of traffic between the respective lines of the parties, and for the receiving, forwarding, and delivering of property to and from the respective lines and those connected therewith.

DISSENTING REPORT AND OPINION.

Schoonmaker, Commissioner:

The petitioner, after setting forth its incorporation, the construction of its bridge across the Ohio River between Louisville, Ky., and New Albany, Ind., its track connections with railroad lines on both sides of the river, the business in which it is engaged, and other incidental matters, alleges as the ground of complaint that, in violation of law and of the Act to Regulate Commerce, the defendant, in combination and conspiracy with the Louisville Bridge Company, a corporation owning the only other bridge across said Ohio River between Louisville and New Albany, and with other railroad companies interested in said last named bridge, and for the purpose of preventing the transfer of freight over petitioner's bridge, and compelling railway transportation of freight across the Ohio River at Louisville to be made over the bridge of the Louisville Bridge Company, has refused and now refuses to further interchange traffic between the railways of said petitioner and said defendant, or to receive from petitioner, or the railway companies using petitioner's tracks at said point of connection, cars or freight tendered to defendant for transportation over its railway to points thereon and beyond and via said railroad, or to deliver to the petitioner, or any railroad company using its said tracks, freight arriving by defendant's said railway at Louisville, for or

consigned to points on petitioner's railway or any railroad connecting therewith at New Albany, although the defendant affords such facilities for interchange of traffic to said Louisville Bridge Company; and the petitioner prays that the Louisville & Nashville Railroad Company be required, by order of the Commission, to interchange traffic with petitioner, and with the railway companies using petitioner's railroad at the point of connection made by the petitioner with the defendant, at Seventh Street and Magnolia Avenue, in Louisville, and to receive from petitioner, and the railway companies using its railroad, all freight tendered by it or them to the defendant for transportation to points on or beyond and via its railroad or railroads, and to deliver to petitioner, and to the railway companies using petitioner's railroad, at said point of connection, all freight arriving at Louisville over defendant's railroad, and consigned to petitioner or to said railway companies using petitioner's railroad or to points on the line of petitioner's railroad or the railroads of the railway companies using its tracks.

The answer of the defendant denies that it is within either the corporate or physical power of the petitioner or the defendant to exchange cars or freight or other traffic between said railways at the point of connection at Seventh Street and Magnolia Avenue, for the reason that there are no depots, platforms, buildings or other suitable facilities at that point, and because there are no clerks, agents, car inspectors, repairers or other employees at that point to attend to the business of such interchanges; and denies that it would be reasonable or proper to require the defendant to interchange at that point, because the defendant has ample facilities, at its four other yards established in the city of Louisville, to handle all of the freight traffic at that point; and it would be improper and unreasonable to require the defendant to go to further expense in the way of employees or terminal facilities to handle the business which the petitioner desires the defendant to handle at that particular point; and defendant therefore claims that it is justified in refusing to interchange traffic with the petitioner, or the carriers that use the bridge of the petitioner, at the point of connection at Seventh Street and Magnolia Avenue, and denies that either in the interchange of traffic which crosses the bridge of the Louisville Bridge Company, or in refusing to interchange the traffic which crosses the petitioner's bridge, the defendant has been acting or is acting in violation of law or in combination and conspiracy with the Louisville Bridge Company or with other railroad companies interested in that bridge.

Facts Found.

The petitioner, the Kentucky & Indiana Bridge Company, was incorporated by an Act of the Legislature of the State of Kentucky, approved April 1, 1880. By this Act the company was empowered to locate, build, construct, and maintain, under the laws of the United States, a bridge for railway, wagon, street railway, and all other purposes, between the cities of Louisville, Ky., and New Albany,

in the State of Indiana, from any convenient and accessible point in Louisville, or within one mile thereof, to any point in New Albany, or within one mile thereof; and the company was clothed with all the powers, privileges, rights, and franchises necessary for carrying out the purposes named in the Act, together with the power to purchase, lease, or condemn all the real estate that might be necessary for the purposes of the corporation, whether for piers, approaches, tracks, toll-houses, or approaches leading to the same. The corporation is also given power to lay upon the said bridge a single or double track for railroad cars, or street cars or for wagons or other vehicles, and all animals, and to erect footways for passengers, and charge for the use thereof reasonable tolls, and for the said purpose to erect, on either or both sides of said bridge, tollgates, and to do all other acts or things necessary for collecting the charges for the use of the bridge; and also to run any line of railways through the city of Louisville, on such terms as might be prescribed by ordinance of the city of Louisville, or along any street or alley, to connect with any railway bridge, transfer company, or depot, and was given the right to operate or lease said connecting line or lines and to charge a reasonable compensation for the use of the same. It is also empowered to "contract with any railroad company for the use of said bridge by its cars and engines or for other purposes." Any railroad company, street railway, or person or municipal corporation, in or out of the city of Louisville, is authorized to subscribe for its capital stock upon any terms or conditions agreed upon; and it is empowered to "make such contracts or agreements as may be deemed expedient for the use, management or control of such bridge." A like company was organized under the general laws of the State of Indiana, and, pursuant to statutory provisions, the two companies were duly consolidated at a subsequent period.

By an Act of the Kentucky Legislature, approved March 13, 1884, the bridge company was authorized to contract with, or to construct, any railway or terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities, and to extend such branch lines through the city of New Albany, in Indiana, and, by a later Act, it was also authorized to construct such line or lines in the county of Jefferson, State of Kentucky, as might be necessary to complete the connection with other railways or depots. By another Act, approved May 3, 1884, the bridge company was further authorized to connect its line with the line of the Short Route Transfer Company, and for that purpose to cross other railway or bridge lines, passing either under or over the same, and to cross the land of other railway or bridge companies, in case it might be necessary in running its connecting lines.

Under these powers the company constructed its bridge, and the construction was completed in 1886. The bridge forms a connection for railway transportation and for the passage of carriages between the cities of Louisville, Ky., and New Albany, Ind. The company, under its powers, has constructed about 10 miles of railroad tracks in the city of

Louisville, and it has two modes of connection in Louisville with the defendant; one at the Louisville depot, over what is known as the Short Route railway, and another by a line running around the town, about 6 miles, to connect the Southwestern road and the Louisville & Nashville Railroad. The only track connection of the petitioner with the defendant's road is at Seventh Street and Magnolia Avenue, and that is in part over the private switching tracks of a Louisville shipper which the petitioner has acquired the right to use.

By the statutes of Indiana the bridge company was authorized to construct a railway, with one or more tracks, from said bridge and the embankments appertaining thereto, and to connect the same with other railway tracks, and to fix the rates of toll for all persons and property passing over said bridge and railway tracks connected therewith, whether on foot or horseback or in vehicles of any kind or in cars propelled by steam or any other power: also to connect the line of railway over said bridge by continuous line of railway, in such manner and upon such route and terms as may be deemed most expedient, with any other line of railway whatever, and to maintain, use, operate, and control the said connection, when completed, and charge and receive tolls for the use thereof.

On the 29th day of September, 1886, an agreement under seal was entered into between the petitioner, the Kentucky & Indiana Bridge Company, and the Ohio & Mississippi Railway Company, a corporation organized under the laws of Ohio, Indiana, and Illinois, by which, among other things, it was agreed as follows:

1. The Bridge Company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky & Indiana bridge and approaches from a convenient point of connection at Vincennes Street, New Albany, to the ground of the railway company at Fourteenth Street, in Louisville, or, should the railway company elect so to do, to a connection with the track of the Short Route Railway Transfer Company, near Thirteenth Street, in Louisville, the railway company's locomotives, cars, and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the Bridge Company.

3. The Bridge Company agrees to allow the railway company, without charge, to lay, maintain, and use such transfer tracks as it may require on the ground of the bridge company between Bank and Main streets on the connecting line of the Bridge Company, the amount of ground so occupied not to exceed 7 acres and to be of suitable and convenient shape.

4. The Bridge Company agrees to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now entering New Albany, within a reasonable time, either directly or through the use of other railway lines, and to switch the cars of the railway company over such connecting tracks at a switching charge of \$1 per car; and also to transfer cars from the railway company's transfer yard south of Bank Street,

in Louisville, to the Louisville & Nashville Railroad, or the Chesapeake, Ohio, & Southwestern railroad at the same rate per car.

6. The tolls shall be fixed at the same rate from time to time as the rate of the Louisville Bridge Company, and these tolls shall be paid monthly by the railway company to the Bridge Company, it being provided, however, that whenever the sum so collected shall exceed the sum of \$17,500 per quarter any excess over such amount shall be paid back to the railway company, but the railway company agrees to pay to the Bridge Company \$17,500 per quarter whether or not the amount of tolls so collected equals that sum; the intention being to give a fixed annual rental to the Bridge Company of \$70,000 per annum.

7. The railway company shall endeavor with reasonable despatch to clear itself of future liability for tolls, rentals, charges, or otherwise, under its present contract for the use of the Louisville bridge: and until such liability shall be removed the railway company shall not be compelled to pay any tolls hereunder to the Bridge Company. And said Kentucky & Indiana Bridge Company may, at its own cost and in the name of said Ohio & Mississippi Railway Company, defend against any claim of liability on the part of said Ohio & Mississippi Railway Company under said contract.

8. The railway company agrees, during the existence of this agreement, to carry and transport, over the said bridge, approaches, and railway tracks, all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own line of railroad aforesaid which it may carry or transport destined or consigned to or from Louisville and to or from points which require their passage over the Ohio River at or near Louisville: Provided, however, that said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge; but the rental to be paid hereunder shall not be decreased by reason thereof. The interchange of freight business at Louisville and New Albany between said railway company and any connecting road shall be done over the tracks of the Bridge Company between the south approach to its bridge and the tracks of such connecting road, so far as the Ohio & Mississippi Railway Company can lawfully control the same; and the charge for the use of such tracks shall not exceed that on any other line.

9. The railway company agrees, so far as it lawfully may, not to carry or transport over the said bridge and the approaches and tracks thereto any locomotives, cars, freight, passengers, mail and express matter, between Louisville and New Albany, that originates in or comes from any railroad or water line entering the one place and destined for the other, it being mutually understood and agreed between the parties hereto that the Bridge Company shall have the sole and exclusive right to control, carry, and transport over the bridge and the approaches and tracks thereto all traffic not received from or destined to points reached over the railroad company north and east of New Albany.

10. The railway company agrees to furnish at its own cost all motive power necessary for

the transfer of its locomotives, cars, freight, passengers, mail and express matter transported by it over the said bridge and the approaches and tracks thereto.

There are four railroads which enter Louisville from the north side of the Ohio River,—the Jeffersonville, Madison, & Indianapolis railroad; the Ohio & Mississippi railroad; the Louisville, Evansville, & St. Louis railroad, and the Chesapeake, Ohio, & Southwestern railroad. Until a recent date all these railroads used the Louisville bridge to reach the city of Louisville with their cars. Recently the Ohio & Mississippi Railway has used the bridge of the petitioner under the contract before mentioned. The only independent connection over the tracks of the bridge company with the road of the defendant is by a somewhat circuitous route of about 6 miles to the junction of tracks formed at Seventh Street and Magnolia Avenue. It was claimed by the petitioner, and testimony was given to show, that it was not practicable for it to make a connection with the defendant at any other point.

Interchanges of business between the defendant and the petitioner, or the Ohio & Mississippi Railroad using the bridge and tracks of the petitioner, to some extent and for a limited time, have taken place at Seventh Street and Magnolia Avenue, but no agreement for interchange of business at that point has ever been made.

Some discussion upon the subject ensued between the petitioner and the defendant, the result of which was that the defendant refused further interchanges at that point, and insisted on its right to refuse until the time of the hearing. On the hearing it announced itself willing to interchange at Louisville rates, and to that extent waived its objections.

The Louisville & Nashville Railroad Company was incorporated by the Legislature of Kentucky in 1850, and was given power to construct a railroad from Louisville to the Tennessee line in the direction of Nashville. Its line has since been extended, by consolidations, leases, purchases, and traffic arrangements, to several points in the south, including Nashville, Mobile, and New Orleans. The charter provides that it shall not be lawful for any other company or any other person or persons to travel upon or use any of the roads of said company, or to transfer persons or property thereon, without the license and permission of the president and directors thereof; but the power was reserved to the State of Kentucky to incorporate thereafter other railroad companies, and it was provided that any and all of such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated. By an amendment to the charter, made in 1860, the company was authorized to make arrangements with other companies for through freights and passage from distant points, on such terms as they may agree from time to time.

The Louisville & Nashville Railroad Company has four freight yards in and near Louisville. The first, known as the First and Water Street yard, begins at First and Water streets in said city, and extends, with various sidings, as far east as Preston Street, in said city, a distance of about 2,000 feet. The second yard,

known as the East Louisville yard, begins at what would be Main Street, extended in Louisville, and runs southwardly and westwardly to a point near Baxter Avenue, a distance of from 2,000 to 3,000 feet. This yard is between one and a half miles distant from the first yard. These two yards are used principally for handling freights coming from or going to points on the Cincinnati division of the defendant's road, and points beyond that division. The third yard, known as the South Louisville yard, is at the junction of the Louisville Railway Transfer Company tracks with the main line of the defendant, and is 2,000 or 3,000 feet long; this yard is distant from the second yard about 4 or 5 miles. At this point all cars intended for the Cincinnati and Lexington division are taken out of defendant's trains, and those for Louisville proper and to go north of the Ohio River are taken to the fourth yard. The fourth yard, known as the Ninth and Broadway yard, extends from Broadway south to Oldham Street, and from Ninth to Tenth streets. It is about three miles distant from the South Louisville yard. The main or principal yard is located at Ninth Street and Broadway, where the traffic crossing the Ohio River at Louisville is interchanged with the various railroads leading north from Louisville, and where local freight received from the south destined to Louisville, or received at Louisville destined to points south, is handled. At the first, second, and fourth yards above mentioned, the defendant has depot buildings, platforms and other adequate facilities, and clerks, inspectors, repairers, etc., for receiving, delivering, transferring, and handling cars and freights. At the third, or South Louisville, yard, it has a passenger platform, but no facilities for handling freights except to switch them in carload lots. The defendant has switch engines, which, under certain regulations, run between the third and fourth yards above mentioned, passing by the point of connection with the petitioner's railway at Seventh Street and Magnolia Avenue. The connection between the petitioner's railway and the defendant's railway at Seventh Street and Magnolia Avenue has been constructed so that cars can be switched from one railway to the other, and the connection affords a practicable means of interchanging freight cars and freight business between the petitioner and the defendant, or between the defendant and the railway companies using the bridge and railway of the petitioner. But interchanges of freight at that junction can only be conveniently made in carloads. Freight in broken lots or less than carloads requires to be hauled about a mile to the Tenth Street depot to be inspected for interchange.

Neither the petitioner nor the defendant has any buildings, platforms or other structures for the interchange of traffic at the point where the petitioner's connection with the defendant has been made.

The petitioner does some business as a carrier between Louisville and New Albany, and it bills through freight from sidings on its line to go to any point on any other connecting line. There are five sidings of the petitioner in Louisville. The cars supplied by the petitioners to shippers are obtained by ordering

them from other companies, for whose lines the freight is destined. That is the only way cars are furnished for freight destined beyond Louisville or New Albany. The petitioner has five engines and ten passenger cars, but no freight cars. The petitioner pays the freight charges to the lines from which cars are ordered. Its own charges are for the bridge tolls and its terminal service. The bridge toll varies, according to the classification of the freight, from one and one-quarter to six cents per hundred. The switching charge in Louisville for moving freight from the Ohio & Mississippi road, on the tracks of the petitioner, to the defendant's road, varies from \$1 to \$3 per car. The petitioner makes no charge on freight that crosses its bridge, except the bridge toll and the switching charge.

The Louisville Bridge Company was incorporated by the State of Kentucky March 10, 1856. By an amendment to the charter, made in 1862, the Bridge Company was authorized to contract with any railroad company incorporated under the laws of the State of Kentucky or any other State of the United States, to warrant the annual profits of the bridge to be built by said company to be equal to the keeping the bridge in repair, and of its operation, and that the net earnings should be equal to 6 per cent on a cost of \$1,000,000. It was further authorized to contract, at any agreed sum or rate, with any railroad company chartered by the State of Kentucky or any other State of the United States, for the annual use of said bridge by the cars, or for the purpose, of said railroad company; and any railroad company incorporated by the State of Kentucky was authorized to subscribe to the stock or make the guarantees and agreements authorized by the preceding sections of the Act; when authorized by the stockholders at some general meeting.

The bridge was declared to be a lawful structure by an Act of Congress, approved July 14, 1862. By an Act of Congress approved February 17, 1865, the Act of July 14, 1862, was so amended as to authorize the Louisville & Nashville Railroad Company, and the Jeffersonville Railroad Company (stockholders in the Louisville Bridge Company), to construct a railroad bridge over the Ohio River at the head of the falls of the Ohio, subject to all the provisions of said Act, and the bridge so to be constructed was declared to be a lawful structure.

Under these Acts of legislation the capital stock of the Louisville Bridge Company was subscribed for by the Jeffersonville, Madison, & Indianapolis Railroad Company, the Louisville & Nashville Railroad Company, and certain other corporations and individuals; the subscription of the Louisville & Nashville Railroad Company being \$300,000.

On June 5, 1872, a written contract was entered into between the Louisville Bridge Company, of the first part, the Jeffersonville, Madison, & Indianapolis Railroad Company, of the second part, the Ohio & Mississippi Railway Company, of the third part, and the Louisville & Nashville Railroad Company, of the fourth part, in which it was recited that the capital stock of the bridge company was \$1,500,000, that its mortgage debt was \$800,000, evidenced by bonds to mature December 1, 1888, bearing

interest at 7 per cent, payable semi-annually. The contract so entered into provided, among other things, that the second, third, and fourth parties agree to use the bridge as covenanted in the contract. It was covenanted that the tolls and charges over and for the use of said bridge and its tracks, owned by the first party, in the transportation of freight, passengers, mails, and other goods received from or delivered to the roads of said second, third or fourth parties, per ton and per passenger, or per car, engine, or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce, in the aggregate, a sum equal to the cost and expense of keeping in repair and taking care of said bridge, paying a dividend semi-annually of 6 per cent on the capital stock of \$1,500,000, the interest upon the bonds as the same shall become payable, a sinking fund sufficient to pay off the bonds of \$800,000 at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against the Bridge Company on said bridge or other property appertaining thereto or otherwise. And it was further provided that the charges and tolls shall, from year to year, be reduced in proportion to the reduction of interest on the bonds by the operation of said sinking fund, and the tolls and charges should always be the same to each of the second, third, and fourth parties; that the tolls and charges to other railroads or railroad companies, for like use of the bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties to the contract; that all such tolls and charges paid by other railroads or railroad companies shall be applied to and form a part of the fund provided for the payment of expenses, sinking fund, interest, dividends, and taxes, the same as if paid by the second, third, and fourth parties to the contract.

Each of the railroad companies parties to the contract agreed that it will pass over the said bridge all the freight, passengers, mails, express matter and other goods carried on or over their roads to and from Louisville, and to and from points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement.

The fourth party, the Louisville & Nashville Railroad Company, covenanted with each of the other parties to deliver to the party of the first part, the Louisville Bridge Company, to be passed over the said bridge, or the parties of the second or third parts, or to such other railroad company or companies as may, for the time being, be transporting freight, passengers, mails, express matter, and other goods over the bridge, all the freight, passengers, mails, express matter, and other goods carried on or over its roads, or any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of tolls and charges provided for the use of said

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bridge and approaches, and punctually pay the said tolls and charges to the first party.

The approach to said bridge at the north end thereof was owned by the second party, the Jeffersonville, Madison, & Indianapolis Railroad Company, and the third party; the Ohio & Mississippi Railroad Company, agreed with the second party to use said approach to said bridge in going into and over said bridge; and it was agreed between said second and third parties that all the trains, cars, and engines passing over said approach, and over said bridge, shall be under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars, and engines of the second party, in the premises, shall be equally applicable to the trains, cars, and engines of the third party, each being dealt with alike. And the second party covenanted to furnish all needful and sufficient engines for the service so provided for, and at all times to transfer with the same promptness and care, over said bridge, the trains, cars, engines, and traffic of the parties of the third and fourth parts that it does the trains, cars, engines, and traffic received from or to be delivered to its own road, the intention being that each of the parties shall enjoy equal facilities over said approach and bridge.

A reasonable compensation is provided for, to be paid to the said party of the second part for the service so to be rendered, and to be apportioned between the parties to the contract in proportion to the service to each, per ton and per passenger, or per car, engine, or other means of transportation.

It is further provided that the contract shall continue in force and operation until it shall be terminated by some one of the parties thereto giving notice in writing, to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of which two years the same shall terminate as to all the parties thereto included in such notice.

It was shown by the testimony that the rates of tolls and charges upon said bridge have decreased per ton and per passenger, as the volume of traffic over the bridge has increased. Since the contract was entered into the Louisville, New Albany, & Chicago Railroad Company and the Louisville, Evansville, & St. Louis Railroad Company have been allowed to use said bridge and its approaches in substantial accordance with the provision of the contract. It was also shown by the testimony that some years ago an arrangement was made whereby the dividends agreed to be paid upon the capital stock of the bridge company were reduced from 6 to 4 per cent semi-annually, and that the sinking fund provided for by the contract is now sufficient to pay off the bonds, and that they will be paid when they mature, in December, 1888.

The indebtedness of the Kentucky & Indiana Bridge Company, the petitioner, is \$1,000,000, represented by 5 per cent bonds, on the bridge, and \$400,000 upon the belt road, represented by 5 per cent bonds. The capital stock of the petitioner is \$1,700,000. The petitioner bought the required embankment and right of way leading from New Albany in the

direction of Water Street, and gave it to the Ohio & Mississippi Railroad Company as an inducement for that company to build to the bridge of the petitioner. On the 4th of February, 1888, the superintendent of the Ohio & Mississippi Railroad Company gave notice to the Louisville Bridge Company that at 12 o'clock noon of that day that railroad company would cease to use the bridge of the Louisville Bridge Company, and that the engines of the bridge company must not go into the yard of the Ohio & Mississippi Railroad Company.

In November, 1887, the charge for switching by the Louisville Bridge Company was discontinued, and a circular was issued that until further notice no charge will be made for switching, to or from its bridge, loaded cars passing over said bridge and paying established tolls, but that the usual charge will be made for switching loaded cars that do not pass over the bridge.

Neither the Louisville Bridge Company nor the Kentucky & Indiana Bridge Company is a member of any of the associations that fix rates from points north of the Ohio River and Louisville to points south of Louisville. The Louisville Railroad Company does not own or operate any line of railroad north of the Ohio River. Through rates from points north of the Ohio River to points south of the Ohio River are made by agreement of the roads north of the river and those south of the river upon terms and conditions assented to by the companies making such rates, and through bills of lading are issued pursuant to such agreements. There are many points north of the Ohio River, and there are many points south of the Ohio River, to which through bills of lading are not issued, and through rates not made.

The defendant company has arrangements with the four roads entering Louisville from the north side of the Ohio River by the Louisville bridge, for interchanging freight traffic, upon terms and conditions agreed upon between them; and the defendant refuses to receive freights from those roads excepting upon the terms and conditions agreed upon. If those roads bring freight to Louisville in violation of the agreements, the defendant company refuses to receive and transport such freight, except as a local Louisville shipper, and the freight so received is treated the same as freight tendered for shipment by Louisville shippers.

The defendant company has no arrangements for interchange of traffic with the Kentucky & Indiana Bridge Company, and therefore refused, at the time this proceeding was commenced, to receive freight from that company, unless delivered to the defendant at its various freight stations, where it offered to receive the freight, issue the bills of lading, and contract for its transportation upon the same terms and conditions it received like kinds of freight from the Louisville shippers; and its agents were instructed to only receive freight and deliver property to the Kentucky & Indiana Bridge Company at its regular freight stations in Louisville on the same terms and conditions that the Louisville shippers receive and deliver freight. This position was withdrawn on the hearing and the defendant admitted that, so far as any additional expense

and trouble were concerned, the junction at Seventh Street and Magnolia Avenue junction might be regarded a suitable place for receiving and delivering freight cars.

Opinion and Conclusions.

The petitioner in this proceeding raises several important and far-reaching questions. It claims to be a common carrier within the meaning of the Act to Regulate Commerce, engaged in the transportation of passengers and property from one State to another by means of a line of railroad. It also claims, as such common carrier, to be entitled to the same facilities for the interchange of traffic with the defendant, at a point selected by itself, that the defendant affords to other lines at its regular yards and depots, and further demands like interchanges of traffic with the defendant for other lines of railroad that make use of the petitioner's bridge. The results aimed at are, therefore, that through routes and through rates shall be established by the defendant over the bridge of the petitioner, and that any contract obligations the defendant may have previously entered into, or other considerations, public or private, must yield to the mandate of the statute, as interpreted by the petitioner.

The claim is, in effect, that carriers in serving the public shall be compelled to use the petitioner's bridge as part of their transportation lines, and that the statute affords sufficient warrant for this demand.

If the claim of the petitioner can be sustained, any other bridge used for the passage of railroad trains may insist on similar rights, and any fraction of a road may ally itself of right to the railroad system of the country on equal terms. Upon this hypothesis the unification of the railways of the country has become an accomplished fact, and through routes and through joint rates must follow wherever they may be demanded. This sweeping interpretation does not seem to be the fair and legitimate construction of the Act to Regulate Commerce.

The power to regulate commerce was conferred upon the general government for public purposes, and its exercise must be assumed to be in consonance with those purposes. The most important of these purposes are that commerce among the States shall be free, and not hindered or obstructed in its movements, nor burdened by exactions imposed by any other authority than Congress. But Congress does not create the carriers of commerce, nor sustain any relations to them except as they engage in that business. Individuals and corporations may engage in interstate commerce, and their business thus become subject to such regulation as Congress may prescribe. These regulations very properly include reasonable charges, and the prohibition of all unjust discriminations and undue preferences, to the end that equality may be maintained among the citizens of the country in the conduct of their business. But the law does not require anyone to engage in commerce, nor make it obligatory to foster any particular instrumentality of commercial intercourse, whether a bridge or a railroad. The freedom of citizens and corporate organ-

izations of citizens to select such instrumentalities as they may prefer for transportation uses is unimpaired. And apart from the enactments to secure justice and equality in transportation, the numerous matters that precede and attend the business of engaging in commerce among the States, including the creation of the carriers, their corporate powers, the character of their cars, the precautions for safety, their depots for receiving and discharging traffic, and their business arrangements for continuous shipments of traffic, are left to the jurisdictions under which they have their origin.

The cautious legislation of Congress applies to the movements of commerce by the agencies described in the law, when the movement is not wholly within a State. The public concern is in the freedom and expedition of the movement and the reasonableness and equality of cost, and not in any particular agency over which the movement takes place. The Act takes cognizance of carriers in their relations to the interstate business they engage in, and its great purpose is that the business shall be conducted justly and impartially, and that reasonable accommodations may at all times be afforded to the public. As was said, in substance, by the supreme court in the *Express Cases*: The public interest is in the transportation, and not in the agencies by which it is secured, provided they are such as to insure reasonable promptitude and safety. 117 U. S. 24 (29 L. ed. 801); 2 Morawetz, Priv. Corp. § 1118.

The duties of interstate carriers toward each other relate to the important public purposes the law has in view. The questions presented are properly considered, therefore, on the theory that the public interests are of primary concern, and that the private interests of carriers or auxiliary agencies are only important in the sense that the public may be reasonably and adequately served. The petitioner should show that the complaint involves more than a mere contention about a mode of establishing a through route or rate, and that the public interests are in some manner affected by, or concerned in, the controversy.

Railroad carriers are, with few exceptions, creatures of State laws defining their powers and duties, and, in the absence of other authority, their sphere is within the State by which they are created. By congressional legislation many years ago State roads were authorized to connect with the roads of other States, and form continuous lines of transportation at through rates. The creation of such lines, and the basis on which they might be formed in respect to rates and interchanges of traffic, were left to the discretion of connecting roads. They might enter into arrangements with other lines or roads, and with such roads as they might deem expedient, or they were at liberty to decline. The continuous shipment and through rate were voluntary and not compulsory. A State road, however, when it engages in commerce among the States, enters the field over which the general government has jurisdiction, and must conform to the lawfully prescribed regulations of conducting that business. The Act to Regulate Commerce applies to common carriers engaged in the transportation of pas-

sengers or property by railroad, or by railroad and water, when under a common control, management, or arrangement, for a continuous carriage or shipment from one State or Territory to another; and such carriers are required, according to their respective powers, to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines to those connecting therewith, and are forbidden to discriminate in their rates and charges between such connecting lines.

The statute assumes the existence of connecting lines and of arrangements for continuous carriage or shipment, and directs its enactments to business of that character.

By Act of Congress of June 15, 1866, incorporated in § 5258 of the United States Revised Statutes, it is enacted that "every railroad company in the United States whose road is operated by steam, its successors and assigns, is hereby authorized to carry, upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any State to another State, and to receive compensation therefor, and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination." It was further enacted that this section shall not "be construed to authorize any railroad company to build any new road, or any connection with another road, without authority from the State in which such railroad or connection shall be proposed." The effect of this statute is to enable business connections between railroads of different States, for interstate transportation, to be lawfully made, subject to the condition, however, that such connections should be formed by authority from the State in which they might be proposed to be made.

The statute referred to authorizes railroads of one State "to connect with roads of other States so as to form continuous lines for transportation" purposes. The Act to Regulate Commerce, as its title indicates, applies to the business of such lines when formed. It prescribes, what was not contained in the former Act, the rules and principles by which the business is to be governed and the public served. So much of these as apply to this case have been cited.

By these provisions a suitable junction of lines for "the interchange of traffic between their respective lines," for which interchange all reasonable, proper, and equal facilities must be afforded, is implied, for it is enacted that "this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." And the facilities required to be afforded must be reasonable and proper, not unreasonable or improper. The Act, therefore, specifies certain limitations within which interchanges between different lines may of right be demanded.

The theory of the petitioner seems to be that the right to interchange traffic, and thus establish a continuous line, is unconditional, and that one carrier may approach with its tracks the

road of another carrier, and, if the facilities for interchanging, in the form of depots, yards, sidings, and employees, do not exist at the point of contact, they must be provided.

The defendant understands its obligations under the statute to be more limited, and these differences present the points of contention between the parties.

The first question that arises upon the merits of the case is whether the petitioner, the Kentucky & Indiana Bridge Company, is a common carrier, to which the provisions of the Act are made applicable. A bridge company is not *per se* a common carrier. It no more suggests the duties or functions of a common carrier than a turnpike company. The usual powers of a carrier may undoubtedly be granted to a bridge company, or, in the absence of constitutional restrictions, to a banking association; but they have not yet been conferred upon the petitioner in this case.

It has been decided that the owner of a toll-bridge is not a common carrier. (*Grigsby v. Chappell*, 5 Rich. L. 443.) Mere forwarders of goods, though combining the character of warehousemen, are not common carriers. Persons so employed, if they have no concern in the vehicle by which the goods are sent, and have no interest in the freight, are not liable as common carriers, but only for ordinary diligence. Ang. Car. 5th ed. 68.

Courts have held that a railroad which occasionally carries goods or freight in passenger trains is not a common carrier of goods in such trains (*Elkins v. Boston & M. R. Co.* 23 N. H. 275); and the same rule has been applied to a railroad which occasionally carries passengers in freight trains (*Murch v. Concord R. Co.* 29 N. H. 9).

An individual may become a common carrier by simply engaging in the business, and the rights, duties, and liabilities of a common carrier will apply to him by reason of his occupation. But a corporation having an artificial existence created by law has only such rights and powers as are conferred by law or necessarily incidental to its granted powers. It cannot lawfully engage in any other business than that authorized by law; and if it does so, its acts are *ultra vires*. "The public are interested in restraining corporations to the enjoyment of the precise franchise granted and the exercise of the powers expressly conferred and the incidental powers essential to the express power. Shareholders are also interested in keeping their trustees, the governing boards, within the limits of the delegated power with which they are clothed." *Lyons Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 294.

The powers of the petitioner conferred by its charter are cited in the statement of facts so far as they relate to the uses and purposes of its bridge and tracks. These powers are appropriate and ample for the legitimate functions of a bridge company, with the necessary approaches and track accommodations for railway connections,—an improvement obviously of great importance and utility,—but there are no provisions in the charter that indicate an intention to create a common carrier or to regulate its duties as a carrier. Its powers may be fully exercised within the sphere of a bridge company proper, and require apparently un-

warranted implications to embrace those of a common carrier. In the articles of association of the bridge company the object and purpose of the company are stated to be to construct, own, and operate a bridge from a point in the city of New Albany, across the Ohio River, to a point in the city of Louisville, for both railway and common roadway purposes, together with a causeway, as an extension of, and connection with, said bridge. It is reasonably clear, from the provisions of its charter and its articles of association, that the petitioner was not chartered as a common carrier or railroad company, but to construct and maintain a bridge as a means of transit over the Ohio River, with the approaches thereto, and track connections with the railroads entering Louisville and New Albany on either side of the river. The charter contains none of the provisions usually incorporated in railroad charters or expressed in general laws defining the duties and powers of a company as a carrier of passengers and property, and regulating its management or business. Consistently with the object of its incorporation as a bridge company, with incidental facilities of connections with railways, it has no transportation equipment except five engines used for switching purposes, and ten passenger coaches for local transit over the river, and has leased the use of the bridge to the Ohio & Mississippi Railroad Company, with the right to haul all cars for through shipments over the bridge, and giving that company a preference for its engines, cars, and trains in the use of the bridge.

It publishes no tariffs except the tolls for crossing the bridge, which specify the class rates per 100 pounds under the official classification, and a few special carload rates upon six heavy commodities.

It would seem that the authorities of Kentucky did not regard the petitioner as in any sense a railroad company or common carrier, as no mention is made of it in the report of the railroad commissioners of that State for the year 1887, and no report from the company appears in that document.

In a limited and local sense the petitioner exercises the functions of a common carrier. It transfers local passengers over the bridge between Louisville and New Albany, and gathers freight at New Albany and in Louisville, and bills it to the railroads entering those cities; but the cars used for such freight are ordered from the companies by which they are transported. The freight is paid for by the ton to the road furnishing the cars, and no transportation charge is made by the petitioner for freight other than the bridge toll and switching charges. All through traffic is hauled over the bridge by the Ohio & Mississippi Railroad Company, the lessee of the bridge, with its own engines and trainmen.

This limited and terminal service does not make it a common carrier operating a line of railroad for interstate transportation in the sense of the Act to Regulate Commerce. It furnishes an important and very useful facility for such lines in moving traffic, and, under the Act, the bridge is to be deemed a part of the line of any railroad company that operates it in connection with its road. Independently, therefore, as a bridge company, it is not

such a common carrier as, under the Act, to require an interchange of traffic of a through character with other carriers engaged in such business. The two bridges at Louisville sustain practically the same relation to the carriers that use them for interstate transportation. If, therefore, the petitioner can compel interchanges of traffic with the defendant on the Kentucky side of the river, the Louisville Bridge Company, for the same reasons, can compel interchanges of traffic with the Ohio & Mississippi Railroad Company on the Indiana side, and any other bridge company similarly situated would have the same right, and carriers would be obliged to form through routes and make through rates not only with lines using such bridges, but with every bridge that might establish track connections for that purpose. This is certainly not required by the present statute.

For the reasons that the petitioner, by its charter, is only a bridge and transfer company, with powers limited to that business; that it has no equipment except five engines and ten passenger coaches; that it has in fact no line except its bridge and the approaches thereto connecting it with lines of road; that it does not haul or handle through traffic over the bridge; that it does not issue, file, and publish any tariffs, except for the bridge tolls, and pays like other shippers for freight collected and shipped by it in the cars of other roads ordered and furnished for the purpose; that it has no concern in the vehicles by which the goods are transported, and no interest in the freight charges,—it is a common carrier within the purview of the Act to Regulate Commerce, but at most only a *quasi* carrier, and therefore cannot maintain this proceeding on that ground.

But although not in the proper sense a common carrier, the petitioner engages in certain traffic operations which require the co-operation of other roads to render them useful to the public and valuable to the petitioner. Its relation to traffic consists in the collection of freight in Louisville and New Albany, all bearing Louisville rates, and which, when intended for points on defendant's road, is loaded in cars ordered from the defendant. The defendant has at all times been willing to receive and deliver this traffic at its regular yards and depots in Louisville, but until the time of the hearing was unwilling and refused to interchange the traffic at Seventh Street and Magnolia Avenue for the reason that that point was not strictly a freight yard or depot.

On the hearing, however, and subsequently, in a brief filed, the defendant, by its counsel, conceded that Seventh Street and Magnolia Avenue may be regarded as a proper point for the interchange of traffic between the parties, so far as the trouble and expense of the interchange is concerned, and that as to traffic to or from points on the terminal railway of petitioner in Louisville which pays Louisville local rates, and is not destined to cross the river at Louisville, the petitioner is a carrier *de facto* though not *de jure*; and that if the Commission should be of opinion that the statute gives the right of interchange to one who is only a carrier *de facto*, then that the petitioner may be entitled to demand an interchange of that kind of traffic at the point mentioned. It was in-

sisted, however, that the petitioner is not by its charter a common carrier, and that a corporation cannot lawfully demand an interchange of freight unless it can show that it is of right, as well as in fact, a common carrier. That, therefore, the right to demand an interchange of that kind of traffic belongs to the shippers or consignees at Louisville, and not to the petitioner.

This summarizes the position of the defendant. It says substantially: "We will exchange with the petitioner all freight tendered to us or to be received from us at the track connection at Seventh Street and Magnolia Avenue, bearing local Louisville rates, in the same manner and on the same terms as at our regular yards and depots, waiving the objections that the point of exchange is not at a depot and the petitioner not a common carrier; and we do so because the public will be accommodated, and the additional expenses and trouble of the interchange at that point are too unimportant to contend about, and because the question of rates is not involved. But as to through freight crossing the river in either direction, coming from or destined to other lines, that presents a different question; for it involves joint through rates, and our contract obligations with the Louisville bridge, in which we have an interest, and with other lines, parties to that contract, upon which question we have a right to be consulted."

The contention of the defendant seems neither unreasonable nor unlawful. Its waiver of its legal right to receive and deliver freight at its depot and its consent to the interchange of the track connection, notwithstanding the opposite position taken in its answer, are reasonable and proper to be done. The interchange at that point is feasible by reason of side track and switching facilities, and it is in the public interest. This compliance with the petitioner's demand satisfies so much of the complaint as the petitioner can lawfully press, assuming it to be a *de facto* carrier or a forwarder or shipper.

The petitioner also asks that the defendant may be compelled to interchange through traffic passing over its bridge from and to the Ohio & Mississippi railroad. This is, in substance, a demand that the defendant shall make a through route with the Ohio & Mississippi Railroad Company over the petitioner's bridge. This the petitioner has no right to demand. It has a lawful right to secure business for its bridge, to make contracts with railroads and others for its use; but it has no authority to compel a carrier to make its bridge a part of its line of road, and to enter into a business connection with another carrier in order that the traffic may pass over its bridge. The petitioner has no interest as a carrier in the transportation itself. It does not haul this traffic, but it is hauled by the Ohio & Mississippi Company. It is not a party to any through rates. Its interest is in the tolls or compensation for the use of its bridge and the switching charges over its terminal connections with railroad lines. Complaint for refusing to make a through route or through rates with the Ohio & Mississippi railroad should come directly from that company. There is no evidence in this proceeding, other than the allegations of the peti-

tioner, that the Ohio & Mississippi Railroad Company desire such interchanges of traffic and through rates, although it was so argued by counsel. The fact that the defendant's refusal rests solely on the use of the petitioner's bridge does not authorize the petitioner to litigate the question. That controversy, if any, is with the Ohio & Mississippi Railroad Company, and that company is the party to institute a complaint and prosecute it. No order can be made for or against a carrier unless it is a party to the record.

But if the petitioner could legitimately institute a proceeding for the benefit of the Ohio & Mississippi Railroad Company, it could not maintain this proceeding on the facts presented. The question is not whether an interchange of business between the Ohio & Mississippi Railroad Company and the defendant, under arrangements for continuous shipments, whether on joint through rates or otherwise, shall take place at all. The defendant insists it has not refused, but the contention is how this shall be done.

The interchange of traffic at through rates between the Ohio & Mississippi railroad and the defendant has been carried on for many years over the Louisville bridge, under a contract to which both of the companies and others were parties, and which is still in force, and the exchanges of freight and passengers were made at the regular depots and yards of the defendant in the city of Louisville. The question presented is whether the Ohio & Mississippi Railroad Company, through the petitioner, can compel the defendant to make such interchanges over the petitioner's bridge, and at a point where the defendant has no depot or employees stationed, and at some distance from its regular yards and depots. Unless the statute is imperative that one carrier may connect its tracks, and require a business connection with another carrier, at any point it may select, this cannot be done. A railroad company has the right to establish depots for receiving and delivering freight and passengers. It is not bound to receive or deliver them elsewhere unless expressly required to do so by statute. *Atchison, T. & S. R. Co. v. Denver, N. & O. R. Co.* 110 U. S. 681 (28 L. ed. 297). It was ruled in that case that it does not follow, as a necessary consequence from the statutory right of a connection of tracks, or a prohibition against undue or unwarrantable discrimination in facilities, that any railroad company which forces a connection of its road with that of another company has a right to require the company with which it connects to do a through business at joint rates, at the place of junction, if it does a similar business with any other company at another point and under dissimilar circumstances. *Id.* 683.

The Act to Regulate Commerce adds materially to the provision of the Constitution of Colorado under consideration in that case, but many of the general principles so strongly and clearly expressed by the chief justice may still be safely consulted.

The consequences of a principle sought to be applied are sometimes a fair test of its soundness. If it be assumed that one road can make a track connection with another at any point it may choose, and then demand a busi-

ness connection on the same terms as may be afforded to other roads elsewhere, the practical effect is to make an initial carrier dominant over all connecting carriers to any remote point of shipment.

The authority given by law to connect roads so as to form continuous lines of transportation implies that these connections are to be formed by mutual agreement. And the provisions that such lines must afford all reasonable, proper, and equal facilities for moving traffic to other lines also implies inquiry into the reasonableness and propriety of the facilities demanded in any case. Unless a carrier can be protected against an unreasonable demand for an interchange of business at an inconvenient place, or a sacrifice of its interests, it may be subjected to serious injury, and lose proper control of its own business; and the effect may be to retard, instead of to accelerate, transportation.

It would seem to follow that a carrier is not arbitrarily, and under any circumstances, required to erect depots, yards, and sidings, and maintain a force of employees necessary for business interchanges, at any point where another carrier may locate a track connection; and that the necessary facilities are ordinarily supplied when afforded at regular depots sufficient for the purpose. Certain implications may sometimes be allowed to give full effect to general enactments; but when a right or duty is demanded under an implication that is doubtful or plainly inconsistent with other rights, it is safer to await positive legislative action thereon. In exceptional cases, involving a necessity for business connections elsewhere, by reason of the opening of a new line or the volume of business to be accommodated, it may be assumed that carriers will find it to their interest to make suitable provision for them; or the peculiar facts of the case might warrant appropriate action to enforce the interchange.

In this case the defendant, it is understood, makes no objection to receiving and delivering through freight carried over the petitioner's bridge at local Louisville rates the same as for any other Louisville shipper or consignee. It appears in evidence that the defendant company has arrangements with the four roads entering Louisville from the north side of the Ohio River by the Louisville bridge for interchanging freight traffic upon terms and conditions agreed upon between them, and the defendant refuses to receive freight from those roads except upon the terms and conditions agreed upon. If those roads bring freight to Louisville in violation of the agreement, the defendant refuses to receive and transport such freight except as a local Louisville shipper, and the freight so received is treated the same as freight tendered for shipment by Louisville shippers.

The Ohio & Mississippi Railroad is one of the roads with which the agreement referred to in the testimony was made. Under its agreement it has the same rights for interchange of traffic with the defendant over the Louisville bridge as the other roads that enter Louisville by that bridge; and when it violates that agreement by bringing its freight over the petitioner's bridge, its freight is not refused, but is re-

ceived as from Louisville shippers. The same rule is applied to the other roads, and all are upon an equality in that respect. The Ohio & Mississippi road is not denied any privileges or facilities that the other roads enjoy. Its grievance is that its rescission of its contract with the defendant and with the Louisville Bridge Company is not acquiesced in, and that exceptional facilities are not afforded it. It is not shown that any controlling necessity exists for the change. No reason for it, relating to transportation, appears in the evidence. Its action is apparently taken from choice.

Incidental to the question of a through route over the petitioner's bridge and terminal tracks, as matter of right, some other facts appear in the testimony.

By a provision of the charter of the defendant (§ 18), power is reserved to the State of Kentucky to incorporate a company or companies to build a railroad or railroads, and that any and all such railroad or railroads thereafter constructed may connect and join with the railroad of the defendant; and the same section also enacts "that it shall not be lawful for any other company or any other person or persons to travel upon or use any of the roads of said company (the defendant), or to transport persons or property thereon, without the license and permission of the president and directors thereof."

By the charter of the petitioner it is authorized "to run any line of railways through the city of Louisville . . . to connect with any railway bridge, transfer company, or depot," and, by later amendments, "to construct such line of lines in the county of Jefferson, Ky., as may be necessary to complete the connection with other railways or depots."

The original charter contemplated a connection at a depot; and the subsequent amendments, although not very clear, might seem to allow a connection elsewhere; but that is by no means the necessary construction.

An amendment to the defendant's charter, made in 1860, provides "that said company may make arrangements with other companies for through freight and passage from distant points, on such terms as they may agree from time to time." The ordinances of the city of Louisville, granting to the petitioner the right to lay its tracks in that city, provide that the petitioner shall permit other roads desiring to connect through such portions of the city to use the railway tracks laid down pursuant to the ordinances, upon conditions specified, as follows: "That before entering upon the use of said tracks said railway company shall pay to the Kentucky & Indiana Bridge Company its *pro rata* share of the cost of constructing the same, including damages awarded by reason of the construction thereof, and shall bind itself by contracts with the city of Louisville, for the benefit of all parties interested, that it will contribute its *pro rata* share toward the repair and maintenance of said tracks, and toward the construction and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges or trestles, or fills, that may be necessary to the safe and efficient use of said tracks and toward the maintaining of such watchmen as may be necessary to the

proper guarding of the street crossings; and such roads shall be subject, under such use, to all the provisions of this ordinance."

What authority the city of Louisville had to include such conditions in its ordinance does not appear, unless from a clause in the petitioner's charter authorizing it to "run any number of lines through the city of Louisville, upon such terms as may be prescribed by ordinance of said city of Louisville, or along any street or alley, to connect with any railway, bridge, transfer company, or depot." Whether these conditions have any force, and whether they may apply to interchanges of through traffic over the petitioner's bridge and tracks in Louisville, may be controverted questions; but that possible contention may grow out of them is apparent. They may fairly be considered, therefore, upon the question of compelling a through route.

The contract of June 5, 1872, entered into by the Louisville Bridge Company, the Jeffersonville, Madison, & Indianapolis Railroad Company, the Ohio & Mississippi Railway Company, and the Louisville & Nashville Railroad Company,—and which, by its terms, was to continue in force until the expiration of two years after written notice of an intention by any of the parties to recede from it,—is strongly urged by the defendant as a valid objection to a compulsory interchange of through traffic with the Ohio & Mississippi Railway over the petitioner's bridge.

On the 4th of February, 1888, the Ohio & Mississippi Railway Company gave notice of its intention to withdraw from the contract at 12 o'clock noon of that day. The two years stipulated in the contract, during which it should continue in force after notice, will not expire until February 4, 1890.

By the contract the several railroads parties to it agreed, among other things, to pass over the Louisville bridge all the freight, passengers, mails, express matter, and other goods carried on or over this road to and from Louisville, and to and from points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement.

The petitioner claims that this contract was abrogated by the provisions of the Act to Regulate Commerce. The defendant insists that it is unaffected by that Act. Whether congressional legislation can rightfully impair the obligation of a valid contract was not discussed, and is not involved. As the powers of Congress are granted powers, it may be, as some argue, a fair presumption that the framers of the Constitution understood that the instrument contained no actual or implied grant of power to destroy the obligation of a contract, in view of the careful inhibition of the exercise of such power by the States. On the other hand, if, as argued by others, contracts must be deemed entered into in contemplation of possible legislation, under constitutional powers, that may arrest their fulfillment, and, therefore, if embraced within the scope of the power, are subject to legislative authority, nevertheless, in that view the purpose to annul a contract by law should affirmatively and clearly appear, or be the necessary effect of a

strict construction of the statute. The obligation of a contract is its binding force for all the lawful purposes for which it was made.

Parties to contracts may, as is claimed, be indirectly affected by general laws rendering the performance of their agreements oppressive or otherwise, and diminishing or enhancing their value. Revenue laws are instances of this character. But parties are not relieved from the obligation of a contract because its performance may be more burdensome to one or more profitable to another, whether by reason of legislation or other causes. A tax on contracts does not affect their obligation or validity. *Moore v. Moore*, 47 N. Y. 467.

A State, in the exercise of its sovereign power to construct a public work, cannot, by suspending the work, escape the obligation of its contract. *Danolds v. State*, 89 N. Y. 36. The Act to Regulate Commerce does not directly or indirectly affect the contract in question. It adds no burden to it whatever. The contract is as easy of performance and as beneficial in all respects as before the Act. It was entered into under statute authority and was valid when made. It was in aid of commerce and beneficial to the public and to the parties. It is not repugnant to the provisions of the Act. It is not like pooling contracts, or contracts for discriminating rates and rebates, which are invalid, without a statute declaring them void, because immoral and against public policy. It belongs to the class of contracts expressly recognized by the Act. The sixth section provides that "every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers, in relation to any traffic affected by the provisions of this Act, to which it may be a party."

The Act affords no warrant for the argument that it abrogates this contract. Even in England, where the power of Parliament is supreme, the courts have ruled that the legislative intention to annul a contract should appear by express enactment or be necessarily required by the language of the Act strictly construed. *South Eastern R. Co. v. Railway Comrs.* L. R. 5 Q. B. D. 231.

But the Ohio & Mississippi Railway says, through the petitioner: "The Act to Regulate Commerce has created a new right; and by claiming that I can absolve myself from the obligation of my contract, and compel those with whom I contracted to support me in my course and enter into new and different relations with me."

The answer is that the law does not authorize this to be done, and that the new right is not absolute, but in a measure conditional. Laws do not favor violations of contracts, but punish parties that break them. If it be said that the contract remains valid, but the defendant must submit to a breach of it and lose its benefits, and resort to an action of damages for redress, that imputes to the law the paradox that the contract is valid, but binds no one, and a suit may be brought for the breach of an agreement that may be lawfully broken.

If the contract is valid, as it clearly is, the direct and simple mode of dealing with it is to regard it as a satisfactory and valid objection to the demand of the Ohio & Mississippi rail-

way for a new traffic arrangement under different circumstances. It is not reasonable, pending this contract, which confessedly affords reasonable, proper, and equal facilities to all concerned, to sustain a demand for a different mode of interchange,—involving a necessity for other agreements, and to be followed by litigation to settle disputed rights.

It was urged on the argument, and it is manifest, that, though this proceeding is nominally for a through route over the petitioner's bridge, its ultimate object is for through rates by that route. The pleadings do not distinctly make an issue for a rate, and the evidence furnishes no foundation for an order on that subject. But the question has been brought into the discussion, it would seem, with the view of eliciting some ruling or expression with regard to the right to a through rate. And if the right to the route be allowed, it may be difficult to distinguish the right to the rate. The argument that finds support for the one demand in the requirement for equal facilities, as an unconditional right, applies with great force to the other, if a through rate is to be construed as a facility under our statute.

The English statute in terms enumerates through rates as one of the facilities to be afforded. But under the English statute the right to a route or rate, if objected to, must be determined by the Commission in view of its reasonableness.

The Act provides that "if objection be made to the granting of the rate, or to the route, the commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route; and shall allow or refuse the rate accordingly."

"The Commission, in apportioning the through rates, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, and making of the route, or any part of the route, as well as any special charges which any company may have been entitled to make in respect thereof."

Our statute contains no such enactments. But it is plain from the language of the third section, in the clause requiring carriers to "afford all reasonable, proper, and equal facilities," that authority to decide upon the reasonableness of the facility demanded, whether a route with interchanges, or a rate, is lodged somewhere, and is one of the powers conferred upon the Commission. And in determining the reasonableness of the facility demanded, whatever legitimately and lawfully affects the question is to be considered, as well as the corporate and physical power to comply.

In view of the vast network of railways in this country and the great extent of territory traversed by them, the diversities that characterize the roads, their differences in length and in cost of construction and operation, the character of traffic they carry, their financial condition, and many other things, it is obvious that very many considerations enter into the making of continuous routes or joint through rates, and that the corporate and physical power of doing so is only one, and not the most important. As an illustration, if a line

from the seaboard to Chicago, like the Pennsylvania line, should have a connection for through business on joint rates to St. Paul, and the other six lines between Chicago and St. Paul should demand equal facilities, would the physical possibility of affording them alone control, or would the circumstances materially affecting the reasonableness of compliance be lawfully entitled to consideration?

Chief Justice Waite states, as the judgment of the court in 110 U. S. (28 L. ed.): "At common law a carrier is not bound to carry except on his own line, and we think it quite clear that, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position by extending his route with the help of others than he would if the means of transportation were all his own. He certainly may select his own agencies and his own associates for doing his own business."

How much of the rights thus declared remain under the "statutory regulations to the contrary" of the Act to Regulate Commerce is an important question. If through rates are included in the equal facilities to be afforded, the reasonableness of the mode of affording them would seem to remain. And in that respect considerations are involved of a like nature as in the interchange of traffic.

In this case there is no refusal by the defendant of interchanges of traffic with the Ohio & Mississippi road, nor of a through rate upon the traffic interchanged. The contention is concerning the mode of interchange. The defendant insists that, in view of its contract obligations and the other reasons given, it should be done over the Louisville bridge and at its own yards and stations, where the defendant makes exchanges with other companies and "takes on and lets off passengers and property for others," and which, "in the exercise of its legal discretion, it located for its own convenience and that of the public."

The demand in behalf of the Ohio & Mississippi road is for a mode of interchange, including a through rate, that the defendant deems unreasonable and unlawful. It appears that the interchanges have gone on without interruption for sixteen years; that the public has been adequately served, and that the defendant is willing and desirous to continue the same mode of conducting a through business, which is in fact equal to all. The only reason given for changing this mode is that the Ohio & Mississippi road desires to use another bridge. The defendant has an equal right to use the bridge to which its depots and business facilities are adapted. This important fact, together with its large pecuniary interests in that bridge, and its contract relations to it, furnish reasonable and lawful grounds to support its position. Upon the question of interchanges with the Ohio & Mississippi road, the order of the Commission should therefore be that the defendant's position is sustained.

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ORDER OF THE COMMISSION.

This case having been heretofore submitted on the evidence and on written and printed briefs, and having been maturely considered, and the Commission now finding that the complainant is a common carrier and that as such defendant is bound and obliged by law to give to it equal facilities for the interchange of traffic to those it affords to other common carriers; that defendant cannot lawfully refuse to receive traffic which is brought to it over the bridge of complainant on the ground that the railroad company bringing it over had contracted with defendant to bring all its traffic across the Ohio River at this point over the Louisville Bridge; and that the point of connection of complainant's rail line with defendant's road in the City of Louisville is a suitable point at which defendant should receive traffic for and from complainant,—

It is now ordered that the complaint be and the same is hereby sustained, and that defendant cease from refusing to receive from complainant, and the carriers using its track, the traffic brought and offered to it at the point of connection aforesaid, and on the contrary that defendant afford to complainant as common carrier at that point the same equal facilities which it affords to other common carriers at the points of connection with their lines respectively.

George RICE

v.

ILLINOIS CENTRAL R. CO.

THE Illinois Central Railroad Company, one of the companies against which complaints were prosecuted by George Rice, of Marietta, Ohio, based upon allegations of discrimination in favor of the Standard Oil Company in the transportation of oil, has, by its general manager, presented the following statement to the Interstate Commerce Commission, disavowing any intention to evade or transgress any of the provisions of the Act to Regulate Commerce. This statement is made by the company in view of the criticisms upon its conduct expressed in the opinion of the commissioners in the *Rice Cases*, 1 Inters. Com. Rep. 722-754.

ILLINOIS CENTRAL RAILROAD COMPANY.

Office of the General Manager.

Chicago, April 16, 1888.

Hon. T. M. Cooley,

Chairman Interstate Commerce Commission, Washington, D. C.:

Dear Sir.—Allow me to lay before you officially some views in connection with the decision of the honorable Commission in the case of Geo. Rice v. the Illinois Central Railroad Company and other railroad companies.

In the first place, the only formal order with which this company has been served is that made in the case of Rice v. the Newport News & Mississippi Valley Company, and the Illinois Central Company. Search through the printed decision of the Commission fails to show any reference whatever to this case, except where the Commission direct orders to be

entered. A careful examination of the evidence on which the Commission proceeded fails to show any evidence whatever that rates were ever actually made by our company from Louisville, Kentucky, to any point on the Illinois Central Railroad; and, so far as I have been able to ascertain by careful inquiry, not one carload of oil in tanks was received from the Newport News & Mississippi Valley Company, and transported over the Illinois Central Railroad, during the time mentioned in the complaint.

No formal order has been served upon this company in the case against the Illinois Central Company alone, but the Commission, in their decision, have gone into the case against the Illinois Central Railroad Company, and have made some comments upon the action of that company and of its officers, in respect to which I submit the following remarks:

1. This company has not knowingly given to the Standard Oil Company, or any other similar corporation, trust, or monopoly, any advantage over other parties engaged in similar business.

The best evidence of the truthfulness of this assertion is found in the fact that the Standard Oil Company have been small shippers over our lines to southern points. Between April 5 and November 1, 1887, the only shipments were from Cincinnati to New Orleans, and consisted of five tanks of oil.

2. The facts in our possession having shown clearly to us that the Standard Oil Company was doing the great bulk of its business to southern points over the lines of our competitors, and knowing beyond fear of contradiction that our motives and practices were beyond reproach, so far as we could, from our best judgment, determine, I was tempted to leave our case entirely in the hands of the Commission, without argument or evidence, or even an appearance before the Commission; but fearing such a course would be regarded as disrespectful to the honorable board, as a mere matter of form and courtesy, I sent the general freight agent of our southern lines, Mr. Morey, to appear in our behalf at Washington.

3. I respectfully submit that in view of the practices on our competitors' lines in making rates for tank cars regardless of quantity or weight, we had a substantial reason for conforming to that practice, although I have no hesitation in saying that, had the matter been brought directly to my attention or to that of the general freight agent, we would at once have seen the wrongfulness of making rates regardless of weight of contents of car. In respect to this I frankly admit error on our part. Few shipments, however, of tank oil were made on our line during the period covered by the complaint.

4. The relative rates on carloads of oil in barrels and in tanks, between the same points, in the same direction, and over the same railroad, is a matter of judgment and opinion, and I submit a corporate officer may have honestly erred in judgment in establishing such rates,—as to whether the one should be higher or lower than the other, and, if so, which of the two should have the lower rate, and what should

be the difference in the rates, as between oil in tanks and in barrels.

I submit that it is a matter of judgment as to what constitutes a reasonable rate for a given distance, to a given point, for oil either in tanks or in barrels; and, it being purely a matter of judgment, I submit further that, having been actuated by honest motives and right intentions, we should be criticised only for the error of judgment, where such error is found to exist.

5. Reference being had to the quotations, in the printed testimony, from general freight agent's letters, I submit to your honorable board that the correspondence in full, read dispassionately, in the light of the known relations between the complainant and the Illinois Central Railroad Company's officials, in the light of the known practices of that company, and in the light of its relations to the Standard Oil Company and other oil shippers, as shown by the oil traffic upon its road, should not operate to the discredit of the general freight agent, Mr. D. B. Morey. In justice to an honest, conscientious man of integrity and pure character, I submit in full the letter written by Mr. Morey to the complainant, and referred to by the honorable board in its decision.

6. I have read with great care and deep interest the decision of the honorable Commission in the *George N. Rice Cases*, and it gives me pleasure to say that the line of argument is unanswerable, and the general conclusions announced as to the principles which should govern rail carriers are sound beyond question. This decision will go a great way towards correcting wrong practices by rail carriers, as well as towards establishing more firmly the principle that all shippers must stand upon an equal footing, with equal rights under the law and equal protection from the law.

When this case first came up, I was requested by the Louisville & Nashville Railroad Company, and other companies, to make a joint defense, which I absolutely refused to do. I found afterwards, to my regret, that at the hearing at Washington the cases were practically dealt with as one, and I think to the detriment of the Illinois Central Railroad Company.

I trust the Commission will see their way to setting the Illinois Central Railroad Company and its officers right in this matter.

I am, yours very respectfully,
E. T. Jeffery.

The letter written by Mr. Morey, above referred to, is as follows:

ILLINOIS CENTRAL RAILROAD COMPANY.

Office of the General Freight Agent.

New Orleans, Nov. 2, 1887.

George Rice, Esq.,
Marietta, Ohio.:

Dear Sir,—Rate on Oil from Cairo. Upon returning to my office after an absence of several weeks out on the line, I find your favors of September 30 and October 13.

Our local rates changed on the 1st inst. Coal oil or its products, in barrels, is now third class; if released, sixth class. In tank cars, re-

leased, sixth class, actual weight to be charged for in each case, but not less than 24,000 pounds per carload. I trust this heavy reduction in our local rates will enable you to do a large business over our line. As regards our guarantying you as low net rates as other shippers are charged, I have repeatedly assured you that our rates are the same to all shippers, and I do not know that I can do any more than already stated in this matter. I believe the largest tank cars we have hauled over our line contained about 40,000 pounds, and as low as 20,000 pounds.

I trust these new rates will enable you to ship over our line not only to the strictly local stations, but to Jackson, Tennessee, Holly Springs, Grenada, and Jackson, Mississippi, as well, at all of which points there is a good trade.

Yours truly,

D. B. Morey, G. F. A.

P. S. We would also like to handle business for you to Aberdeen, West Point, and Starkville, Mississippi, which points we can reach via Durant and C. A. & N. R. R.

D. B. M.

CHICAGO BOARD OF TRADE

v.

CHICAGO, ROCK ISLAND, & PACIFIC R. CO. and Baltimore, & Ohio R. Co.

(No. 145.)

ANSWERS to complaint alleging unjust discrimination against Chicago in the transportation of grain, of the defendant, given *ante*, 89.

ANSWER OF CHICAGO, ROCK ISLAND, & PACIFIC R. CO.

(Filed August 25, 1888.)

Now comes the defendant, the Chicago, Rock Island, & Pacific Railway Company, one of the defendants to the above entitled petition, and, for answer to the several allegations therein set out, says:

1. It admits the several allegations set out in the first division of said petition.

2. It admits the several allegations set out in the second division of said petition concerning the facilities possessed by the petitioner for dealing in and handling grain and other agricultural products of the west, southwest, and northwest; and avers that it has no knowledge as to what proportion of such products, sold and shipped from the city of Chicago by rail east to the seaboard and other eastern points, has been sold at Chicago by the consignees before or upon arrival, or what proportion thereof was immediately forwarded over eastern trunk lines of railroad without being placed in store in the grain warehouses of the city of Chicago, and it therefore demands strict proof of the said allegations as the same are set out in said petition; it also protests that all the other matters and things in the above division set out are wholly immaterial and irrelevant to the relief prayed in said petition.

3. It admits the several allegations con-

tained in the first paragraph, and denies those set out in the second paragraph of the third division of said petition. Further answering in this regard, this defendant says that the rates on grain from points in the State of Iowa to the city of Chicago, in existence at the date when said petition was filed, show a maximum of 20 cents per 100 lbs., and the rates at the same date from the town of Atlantic to Chicago were then a maximum of 19 cents per 100 lbs.; that previous to 1887 the lowest rate from Iowa points to the said city of Chicago was not below 22 cents per 100 lbs., and that the rate from the same points to said city three years ago was 25 cents per 100 lbs. Defendant says that the rates charged, both from points in the State of Iowa to the city of Chicago and from Chicago to seaboard points, at the date of filing of said petition, were reasonable and just.

4. It admits that the several allegations set out in the fourth division of said petition relating to the rates from points in the State of Iowa to the said city of Chicago are substantially true, and alleges that said rates are reasonable and just.

5. It denies the allegations set out in the fifth division of said petition, to the effect that by the course of business at Chicago for many years, and still in vogue, grain shipped from the several stations in Iowa named in the fourth division of said petition, and conveyed to Baltimore or other eastern points, on through bills of lading, is transferred from the car in which it arrives at Chicago to another car on the Baltimore & Ohio Railroad,—or such eastern trunk line over which it may be billed,—after being switched to the track of such eastern railroad, under a switching charge of \$2, defrayed by the carrier. It also denies the allegation in said petition set out to the effect that, when such traffic is consigned to Chicago and is by the consignee or purchaser rebilled and forwarded to eastern points, the transaction is generally attended by a delay not exceeding one day to the car, in excess of the delay attending the shipment on a through bill of lading; that the service of the carrier is precisely the same in each instance, with but \$1 per car additional expense over the expense of a through shipment; that when grain so consigned to Chicago is stored in elevators for future sale and shipment, it is transferred from such elevators for carriage to eastern points without delay or expense to the carrier over the expense and delay which attends a through shipment. It alleges the truth concerning said matters to be that, when grain is shipped from points in the State of Iowa to Baltimore or other seaboard points, on a through bill of lading, at a rate of say 28½ cents per 100 lbs., it is immediately delivered to the eastern connection at Chicago or other junction points, without any additional cost over the through contract rate and without delay, the cars being delivered on the tracks of the eastern connecting line to which such grain is consigned; that grain shipped on through bills of lading from points in the State of Iowa to seaboard points is transported without transfer at Chicago, or when transferred at that or some other transfer point, the transfer is made to suit the convenience of the

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carriers forming the through line. When such grain is consigned to Chicago, the cars in which it is transported are held at that point from one to three days to enable the consignee to have the grain inspected and to afterwards determine on its disposition, which may be an order to deliver it to elevators, or an order to deliver to the team-tracks, or an order to deliver to a railroad for shipment to such point as the consignee may elect; and a switching charge of \$2 per car is imposed when the car is ordered to another line, out of which the railroad making the transfer is required to pay the trackage charges when the cars are hauled on transfer lines to be delivered to eastern connections. After receiving such grain, the eastern line by which it is received transfers it, and returns the car to the line from which it was received, after a delay of from three to six days. This time, added to the time during which the car waited on arrival for an order for disposition, makes an actual loss of time for the car of about nine days; and in the busy season of the year, when eastern roads are full of business, the time is frequently fifteen days.

It is true that a railway company holding grain in cars after receipt has a right to charge demurrage at destination, after the property has been held on its tracks for twenty-four hours, at the rate of \$2 per day,—not \$3 per day, as stated by petitioner,—but such charge is only made in the course of business, when the consignee absolutely refuses or unnecessarily delays to unload; and no demurrage charge is made for delay occasioned by the failure of a connecting line to promptly unload and return the car. The allegation in said petition as to the delivery of grain from elevators to eastern connecting lines may be more properly answered by the defendant, the Baltimore & Ohio Railroad Company; but this defendant says that the cost of trackage and switching to eastern railroads, in transferring grain from elevators, is considerable, and is borne by the carrier, and not by the shipper.

6. Protesting that the things stated in the sixth division of said petition are not an illustration of the practical application and operation of the rates charged by this defendant, or by it and its codefendant, but are, as is alleged in said division, a "direct violation of said published through tariff," this defendant for further answer says that cars mentioned in said division were routed as follows: Canada Southern Line car 1,139 was billed from Atlantic, in the State of Iowa, February 28, to H. F. Dousman, Baltimore, Maryland, via South Chicago. This is a suburb of the city of Chicago, and a point where the tracks of the codefendants connect. The defendant, the Baltimore & Ohio Railroad Company, not wishing to haul this through-line car, transferred the grain therefrom to car 13,686, and forwarded the grain as consigned, returning promptly car 1,139 to this defendant. Chicago, Rock Island, & Pacific car No. 18,772 was billed from Atlantic, in the State of Iowa, to the city of Chicago, also on the 28th day of February, and it arrived in the city of Chicago on the 2d day of the following March. The grain was held for inspection and disposition on a side track from the 2d of March

until the 6th,—four days. On the last named date an order was received from the said Dousman, dated March 5, requesting this defendant to deliver said car to the Baltimore & Ohio Railroad for shipment to H. F. Dousman, Mansfield, Ohio; which order was complied with, and the empty car was returned to this defendant on March 8, after a delay, from the date of arrival of the car in the city of Chicago until it was returned to this defendant, of six days. This defendant says that it has no knowledge as to how the change of destination was made from Mansfield, Ohio, to Baltimore, Maryland; but it infers, from the fact that no complaint was made therefor, that it was done by the order of the said Dousman. If so done it would necessarily subject the defendant, the Baltimore & Ohio Railroad Company, to additional trouble.

This defendant further says that no claim for any overcharge has ever been made in any form or manner by the said Dousman, or by the complainant to this defendant, on account of the transaction above mentioned; and this defendant is informed and believes, and therefore charges, that such claim was purposely withheld because of a belief on the part of said Dousman and of said petitioner that it would be promptly settled, and such portion thereof as should appear reasonable and just promptly paid. And this defendant confesses its inability to understand why this Commission, charged with the numerous and important duties imposed upon it by the laws of the United States, should be troubled with this trifling claim, which would be adjusted upon application to this defendant.

7. It denies the allegations set out in the first and second paragraphs in the seventh division of the said petition; and, for further answer, this defendant says that early in the month of February, 1888, a disturbance or war of rates occurred in a portion of the territory west of Chicago, which closed on or about the middle of March in said year; that while said disturbance continued rates were named from Nebraska points to Baltimore and other seaboard points on a basis of 31½ cents per 100 lbs. to New York, with the corresponding differential to Baltimore of 3 cents less, or 28½ cents per 100 lbs.; that these rates were first inaugurated by roads which did not use a route through the city of Chicago, but did transport by way of St. Louis, Beardstown, Burlington, Streeter, and other points similarly located with regard to the points of shipment; that this defendant, in connection with the Union Pacific Railway Company, decided to meet these competitive rates, though compelled to transport the traffic received at such rates through the State of Iowa and by way of the city of Chicago; that they did make an arrangement with the codefendant, the Baltimore & Ohio Railroad Company, to receive from them the traffic for Baltimore, and also made like arrangements with other connecting lines for the traffic for New York and other points; that the provisions of the long and short haul clause of the Interstate Commerce Act, as understood by this defendant, required it to make no higher rates from points in the State of Iowa to Baltimore and other seaboard points than the above-men-

tioned rates, which were then charged from points in the State of Nebraska to the like points on the seaboard; that it accordingly made a schedule showing like rates, which schedule was duly filed with your honorable board and was delivered to the members of the complainant corporation in the city of Chicago; that among those who received such schedule was the said H. F. Dousman, who joins in the complaint to which this is an answer; that the reason why such schedule extended only from February 18 to the 29th of the same month, both inclusive, was that the defendant was advised by its competitors that the war rates from Nebraska to the seaboard points would cease on or about February 29. For further different answer to the said division, this defendant denies that it has been its practice to establish and make discriminating rates against the owners or shippers of any grain, who have wished to transport the same to Chicago, or against the city of Chicago or the said complainant, or any other person or place; it also denies that it has any purpose or intention of commencing any such practice when the present season of lake or water transportation shall end, or at any other time. It also, further, denies the jurisdiction of this Commission to anticipate violations of the law which it is shown do not now exist, and provide remedies, upon the ground that possibly they may arise hereafter.

8. And for answer to the eighth division of this petition, defendant says: That it admits that it has an arrangement with the Baltimore & Ohio Railroad Company, and with other eastern lines with which it connects in the State of Illinois, at points south and southwest from Chicago; that these arrangements have been in force for many years, and were found necessary to enable the railroads running from large commercial centres south and southwest from Chicago, such as Peoria, Rock Island, Burlington, Keokuk, Quincy, and Bloomington, to Chicago, or which connected with eastern lines at junctions near Chicago, to engage in traffic between such commercial centres and the seaboard cities; that without such an arrangement all traffic from such commercial centres would move directly by the shorter lines passing south of the city of Chicago to the seaboard; that the basis for making through rates from these commercial centres to the seaboard is the Chicago rate modified by the application of a percentage; as when the rate from Chicago to New York City is 100, the rate from Peoria, Illinois, to New York would be 110, with the customary differentials at other eastern points; that previous to the passage of the Act of Congress regulating commerce the stations between these commercial centres and the said city of Chicago were charged local rates to and from Chicago, but that under § 4 of said Act it was found necessary to group said stations, placing in one group all stations receiving the same rate, the rates being so arranged as to conform to the requirements of said § 4; that a higher charge shall not be made for a shorter transportation than for a longer transportation over the same line. That a map has been issued by several railway companies in the west, including this defendant, showing such groups or districts,

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and a percentage basis of rates applicable to each district, which maps have been made under a general understanding between all the eastern and western railroads; that this understanding between the eastern and western railroads has been modified from time to time since the map was issued; that the latest edition of said map does not show all the changes in the grouping and percentages which have been made since its publication; that in arranging the divisions of through rates from the different groups to seaboard cities the object was to so divide the rate by way of Chicago as to allow the lines east of Chicago approximately the same earnings on the different classes of freight from all of the groups; that all rates from points west of the Mississippi River to the Mississippi River points, the Peoria group points, and to Chicago, are published; that it has been found necessary, in quoting through rates from time to time from such western points to seaboard points, to base the same upon a proportion allowed eastern roads from the group points in the State of Illinois; that this arrangement was mutual between the western and the eastern lines, and is now assented to by all parties thereto; that such quotations of rates are open to all persons who desire to use the same, and are not intended to, and do not, operate to discriminate between persons or places. This defendant expressly denies that the quoting of rates from far western points to seaboard points in the manner above set out, without discrimination as to persons or places, leads to all sorts of irregularities and manipulations of rates, and unjust discriminations in favor of particular shippers and against Chicago, as a locality of the commercial interest centring at that place; the rates so made up are quoted as public rates from time to time in the usual way; they are not confined to any particular person, town, locality, or district, or to any particular commodity.

And this defendant, further answering said division, says that it has had no special or secret rates since the Act of Congress above mentioned became operative; that it has not adjusted its rates with a view to securing any preference or advantage to any person or place against any other, and that all rates which have been made by it have been open to the use of any and all persons who desire to use the through lines, of which it forms a part, for purposes of through transportation.

And this defendant, further answering the eighth division of said petition, says that the proposition that rates upon the basis of Chicago rates be made with reference to a line drawn north and south through said city is impracticable, and will so remain until Saint Louis, Peoria, Springfield, and other commercial centres south and west of Chicago are moved and established upon the proposed line.

ANSWER OF BALTIMORE & OHIO R. Co.

(Filed September, 1888.)

To the Honorable, the Interstate Commerce Commission:

The answer of the Baltimore & Ohio Rail-

road Company to the petition filed respectfully shows:

1. This defendant adopts as its own the answer of its codefendant, the Chicago, Rock Island, & Pacific Railway Company, as to all matters and facts in that answer set out, as fully as if the same were repeated verbatim herein.

2. And for further answer this defendant says that the rate of 24½ cents from Chicago to Baltimore was in force from January 2, 1888, to March 5, 1888, and was not unreasonably high; and that the rate of 22 cents per 100 pounds, which went into effect March 5, 1888, is the rate that has prevailed for many years during the season of open navigation, the reasonableness of which has never been questioned.

3. This defendant denies the allegations in the fifth division of the petition, that "if grain consigned to Chicago be stored in elevators for future sale and shipment it is transferred to and from these elevators with great despatch without charge to the carrier, and without delay or expense to the carrier over a through shipment." On the contrary, the defendant alleges the truth to be that on every car sent from defendant's track to said elevators it has to pay heavy switching and trackage charges, ranging from \$2.50 to \$6.50 per car, except in case of the Illinois Central elevator, which almost immediately adjoins defendant's track, where the charge is 37½ cents. These charges are in addition to engine service by the defendant, and are not borne by it in the case of a through shipment.

4. In answer to the alleged overcharge made to H. F. Dousman, as set forth in the sixth division of the petition, defendant says that said Dousman has never presented any claim or bill therefor to this defendant; that in common railroad usage and practice the carrier on whose lines the shipment originates—that issues the through bill of lading—is the one that adjusts such claim with shippers. This defendant says that its codefendant has full power to refund to said Dousman such overcharge, if any be shown, and to charge this defendant with its proportion, but defendant is advised that no claim has been presented by said Dousman to its codefendant, though the latter has been ready and willing to settle the matter at any time.

5. This defendant denies the allegations, in the third paragraph of the seventh division of the petition, that it has pursued a practice of temporary discriminating rates, established and revoked or charged in numerous instances and at short intervals of time, which practice it is intending to renew as soon as the present season of lake and water navigation and transportation ends.

This defendant denies all the allegations in said petition of discrimination on its part between particular persons or localities, and denies that it has made any rates for the purpose of unjustly discriminating between persons or between localities.

6. And, further answering, this defendant says that the rule of comparison adopted in the petition between the through rates from the Iowa points named, to Baltimore, and the rates from the same points to Chicago, and

from Chicago eastward to Baltimore, is not a proper or just rule of comparison. That rule seeks to measure the difference that should exist between the sum of two locals—viz., the sum of the rate to Chicago plus the rate from Chicago to Baltimore and the joint through rate—solely by the difference in the cost of transferring the shipment at Chicago.

This defendant avers that through rates are not and cannot be made on any such basis; that through rates between Chicago and seaboard cities are not made on that basis, and will not be found to differ from the sum of the locals at any intermediate point by simply the cost of a transfer at that point.

This defendant avers that the through tariff rates from the Iowa points mentioned, to Baltimore, complained of in the petition, were made as other through rates are made; that they in no way work any unjust discrimination against the city of Chicago or the present plaintiffs, and that they were in no respect contrary to law.

[Signed and verified.]

LITTLE ROCK & MEMPHIS R. CO.

v.
EAST TENNESSEE, VIRGINIA, & GEORGIA R. CO. and St. Louis, Iron Mountain, & Southern R. Co.

(No. 142.)

COMPLAINT filed August 29, 1888, charging violations of § 3 of the Act to Regulate Commerce, in refusing equal facilities for interchange of traffic, etc.

The Little Rock & Memphis Railroad Company is engaged in operating the railroad between the cities of Memphis, in the State of Tennessee, and Little Rock, in the State of Arkansas, formerly known as the Memphis & Little Rock Railroad. Its traffic has consisted principally in the transportation of through passengers and freight from points east of the Mississippi River bound to western and southern points in the State of Texas, and elsewhere, and in the reverse direction.

The St. Louis, Iron Mountain, & Southern Railway Company operates a railroad from the city of St. Louis, in the State of Missouri, passing through the city of Little Rock, to the town of Texarkana, on the boundary between the States of Arkansas and Texas, where it makes connection with extensive systems of railroads in Texas.

The East Tennessee, Virginia, & Georgia Railroad Company is engaged in operating a number of railroads in the States for which it is named, with its western terminus in the city of Memphis, which it reaches over the Memphis & Charleston Railroad, owned and operated by it.

The last named system is one of the largest feeders of the road operated by the complainant, contributing during the half year ending June 30, 1888, 3,387 passengers, of whom 1,591, or nearly one half, came upon through tickets over the Little Rock & Memphis Railroad and the St. Louis, Iron Mountain, & Southern Railway, with a traffic substantially equal in the opposite direction. The St. Louis, Iron Mountain,

& Southern Railway is by far the most important connection of the complainant, the exchange of passengers with it during the six months ending June 30, 1888, amounting to 11,139.

Recently the St. Louis, Iron Mountain, & Southern Railway has opened a branch from Bald Knob, in the State of Arkansas, to said city of Memphis, running parallel with complainant's line, and built for the express purpose of competing with it. Over this new route the distance between the cities of Memphis and Little Rock is 15 miles greater than over the complainant's road, and its facilities for accommodating the through traffic at Memphis are much inferior to those of complainant. To reach its depot in Memphis from that of the East Tennessee, Virginia, & Georgia Railroad, a transfer of about two miles in an omnibus over rough streets is necessary, while to the complainant's track passengers can be transferred in the trains in which they arrive. The trains of the Bald Knob branch of the St. Louis, Iron Mountain, & Southern Railroad and those of the East Tennessee, Virginia, & Georgia Railroad run without reference to one another, so that passengers going west are detained 5 hours and 45 minutes when they arrive on the evening train, and nearly 12 hours when they arrive on the train in the morning. The trains of the complainant make close connection, so that no one is subjected to delay. The trains over the Bald Knob branch likewise fail to connect at Little Rock with an important train of the St. Louis, Iron Mountain, & Southern Railway, which makes close connection at Texarkana with the train over the Texas & Pacific Railway for northern Texas, a locality largely settled by people from the southeast; while the complainant runs a train that makes these connections without delay. For these reasons, notwithstanding the opening of the Bald Knob branch, the traffic of the complainant has remained substantially unchanged, the traveling public preferring its road to that of its adversary.

For the purpose of breaking down the legitimately acquired business of the complainant and of crushing a rival, the St. Louis, Iron Mountain, & Southern Railway Company has directed all railroads connecting at Memphis to call in all through tickets reading over the Little Rock & Memphis Railroad and thence over the St. Louis, Iron Mountain, & Southern Railway, leaving on sale only the through tickets over the Bald Knob branch; and the East Tennessee, Virginia, & Georgia Railroad Company has signified its assent to this direction, and has actually withdrawn the tickets over the complainant's line in connection with the St. Louis, Iron Mountain, & Southern Railway, but still continues to sell tickets over said Bald Knob branch in connection with said St. Louis, Iron Mountain, & Southern Railway.

The object of this is to force the traveling public to purchase tickets exclusively over the Bald Knob branch, or else to pay the higher local rates, and be subjected to the annoyance of repeated purchases of tickets and rechecking of baggage; and unless something is done for the protection of the complainant, all through traffic will be diverted over said Bald Knob branch, to the great inconvenience of

the public and great and unjust pecuniary loss to the complainant.

The Kansas City, Springfield, & Memphis Railroad Company is operating a railroad from Memphis westward, crossing the St. Louis, Iron Mountain, & Southern Railway at Hoxie, and is a line competing with that of complainant; and said companies, defendants herein, are selling through tickets over said line by way of the St. Louis, Iron Mountain, & Southern Railway to points in Texas and the west, while declining to sell similar tickets over the complainant's road.

The complainant submits that this proceeding is in direct contravention of § 3 of the Interstate Commerce Act, and it prays that an order be made requiring said railroad companies, if they sell tickets over said Bald Knob branch and Kansas City, Springfield, & Memphis Railroad, to sell them also over the line of the complainant when so requested, and requiring said St. Louis, Iron Mountain, & Southern Railway Company to honor the tickets reading over the complainant's line, and to refrain from further efforts to induce other railroad companies to withhold from sale tickets over the road of the complainant.

U. M. & G. B. Rose, Attorneys,
Little Rock, Ark.

LOUISVILLE SOUTHERN R. CO.

v.

LOUISVILLE & NASHVILLE R. CO. and
Louisville Railway Transfer Co.

(No. 147.)

COMPLAINT filed August 30, 1888, alleging refusal to furnish equal facilities for interchange of traffic.

Messrs. Bullit & Shield and F. F. Tra-
bin, attorneys for plaintiff.

Your petitioner, the Louisville Southern Railroad Company, states that it is a corporation created, organized, and existing under and by virtue of the laws of the State of Kentucky; that the Louisville & Nashville Railroad Company, hereinafter called the defendant, is a corporation created, organized, and existing under and by virtue of the laws of the States of Kentucky and Tennessee; and said Louisville Railway Transfer Company is a corporation created, organized, and existing under and by virtue of the laws of the State of Kentucky.

Your petitioner owns and operates a railroad commencing at the city of Louisville in the State of Kentucky, and extending through Jefferson, Shelby, Anderson, and Mercer Counties, and via the towns of Shelbyville, Lawrenceburg, and Harrodsburg, to a junction with the Cincinnati Southern Railroad at Bergen, in the said county of Mercer.

The defendant, the Louisville & Nashville Railroad Company, owns and operates a railroad extending from the said city of Louisville southwardly through the State of Kentucky to the city of Nashville in the State of Tennessee; also a line of railroad extending from Louisville, Kentucky, to Cincinnati, Ohio; and owns, controls, and operates various branch lines from the said railroad, and controls railroads connecting with its said main railroad

and branches, and extending through many of the States south of Kentucky.

Said Louisville Railway Transfer Company owns a line of railroad connecting, at the city of Louisville, said two lines of the Louisville & Nashville Company; to wit, the line extending from Louisville to Nashville on one side, and to Cincinnati on the other. The Louisville & Nashville Railroad Company owns the entire capital stock of said Railway Transfer Company, and controls, uses, and operates the said connecting line of road as a part of its system.

Your petitioner further states that at or near Eleventh and Magnolia streets in the city of Louisville its railroad is connected with the railroad of the Kentucky & Indiana Bridge Company, over which your petitioner operates its locomotives and railroad cars under an agreement with said Bridge Company, and by means of said connection your petitioner is connected with the Ohio & Mississippi Railroad and with the Louisville, New Albany, & Chicago Railroad, and by means thereof your petitioner has railroad connection with a great number of railroads in the State of Indiana and other States north of the Ohio River, and thereby reaches all principal points of commerce in the United States north of said river. By means of the said connection with the railroad of the Kentucky & Indiana Bridge Company your petitioner is also connected with the Chesapeake, Ohio, & Southwestern Railroad, by means of which it is enabled to reach the city of Memphis and many other points in the State of Tennessee, and also to connect with other railroads extending into various States in the south and southwest.

At Bergen, in Mercer County, Kentucky, your petitioner's railroad is connected with the Cincinnati Southern Railroad, and by means thereof is enabled to reach, over the Cincinnati Southern Railroad and its connections, the city of Cincinnati in the State of Ohio, and the railroad system generally centering in said city; and is also able to reach the city of Chattanooga and other points in the State of Tennessee, and practically to connect with the whole railroad system of the south and southeast.

Your petitioner's railroad crosses the railroad of the defendant in the city of Louisville, at or near the intersection of defendant's railroad with Fourth Street, and at that point the railroad of the petitioner connects with the railroad of the defendant, which connection was made with the consent of the defendant. Said connection is complete, and affords an easy and convenient means of interchange of cars, freight, and all business between the defendant and your petitioner, and said interchange of business can be made without any use, by your petitioner, of the tracks or terminal facilities of the defendant. By § 18 of the charter of the defendant as contained in an Act of the Legislature of Kentucky entitled "An Act to Incorporate the Louisville & Nashville Railroad Company", approved March 15, 1850, it is provided that any railroads or railways thereafter constructed under the authority of the Legislature of the Commonwealth of Kentucky may connect and join with the railroad of said defendant; and the railroad of peti-

tioner has been constructed pursuant to the authority of the Legislature of said State, since the approval of the charter of the defendant.

There is no other connection between the railway of the defendant and that of the petitioner, and no opportunity of interchanging business between their railroads except at the said point of connection.

Your petitioner is a common carrier over its railroad aforesaid, and is engaged in the transportation of passengers and property by railroad under agreement and arrangement with said Cincinnati Southern Railroad Company and other railroads connecting therewith, and under agreement and arrangement with the Kentucky & Indiana Bridge Company and other railroads connected therewith, whereby such passengers and property are received for continuous carriage or shipment wholly by railroad from other States into and through the State of Kentucky and beyond Kentucky into other States, and are received in Kentucky for such continuous carriage or shipment into other States.

The defendant is likewise a common carrier of passengers and property by railroad over its railroad aforesaid, and is engaged in the transportation of passengers and property wholly by railroad for continuous carriage or shipment, between the said State of Kentucky and various other States, and especially the States of Tennessee, Georgia, Alabama, Florida and Louisiana; and such passengers and property transported over the lines of the petitioner and the defendant are subject to the provisions of an Act of Congress entitled "An Act to Regulate Commerce;" and both petitioner and defendant habitually hold themselves out to the public as common carriers of passengers and property over their respective lines of railroad, subject to the said Act of Congress.

Your petitioner further states that by its charter it is required to receive from and for the said Cincinnati Southern Railroad Company, the Kentucky & Indiana Bridge Company, the Ohio & Mississippi Railroad Company, the Louisville, New Albany, & Chicago Railroad Company, the Chesapeake, Ohio, & Southwestern Railroad Company, and various railroad companies controlling railroads both in the State of Kentucky and in other States, and from all companies, persons, or shippers demanding it, carloads of freight destined to points on or beyond or via its line in either direction, and to points on or reached by the Louisville & Nashville Railroad and the roads controlled and operated by defendant; and in course of its business your petitioner has received from time to time and is now receiving large amounts of freight of every description from said several railroad companies, coming from States other than the State of Kentucky, for continuous shipment or carriage to points beyond the line of the petitioner and upon the lines of the defendant, or points reached by the lines of the defendant, on lines operated by it in Kentucky and in States other than Kentucky; and your petitioner has at sundry times tendered to the defendant, at the aforesaid point of connection between said railroads, freights such as are above described, and which are a part of the interstate commerce

controlled by the Act aforesaid, and has requested the defendant to receive and transport the same over its lines to its destination or to points where it should be delivered to connecting lines of railroad for transportation to its destination.

The defendant, from time to time, likewise has received and is now receiving freight from States other than Kentucky, for transportation by it to Louisville aforesaid, and thence over the petitioner's line of railway to points thereon or on the line of railways connecting with the petitioner's railroad in Kentucky and beyond Kentucky.

It is within the corporate and physical powers of the defendant to maintain said connection between said railroads of petitioner and defendant, and to exchange cars of freight and other traffic between their railroads at said point; and such exchange would be reasonable and proper.

Your petitioner avers that the defendant, in violation of the law and of the said Act of Congress, and for the purpose of preventing the transfer of freight over the plaintiff's railroad, and with a view of injuring the plaintiff, and in disregard of the public interests, has refused and now refuses to interchange such interstate traffic between the railways of said petitioner and defendant, and has refused and is now refusing to receive from petitioner, at said point of connection, cars of freight tendered to the defendant for transportation over its railroad to points thereon or beyond and via said railroad, and has refused and is now refusing to deliver to the petitioner freight arriving on defendant's railroad at Louisville for or consigned to points on petitioner's railroad, or on any railroad connecting therewith, although the defendant makes such interchange and affords all reasonable facilities for such interchange with other railroads in the city of Louisville, and to all such railroads except the petitioner and the Kentucky & Indiana Bridge Company, and defendant specifically refuses to make such interchange with reference to freights originating on or destined to points on said Railway Transfer Railroad, or any points on defendant's line in Louisville or its vicinity.

Your petitioner further states that in one instance only the Louisville & Nashville Railroad Company has offered to receive such interstate freights from or coming over the line of the petitioner, viz., certain lumber coming from Chattanooga, Tennessee, via the Cincinnati Southern Railroad and the Louisville Southern Railroad, consigned to Charles J. Clark, in Louisville, Kentucky, to be delivered to him at the Cotton Mill switch, a point on a line of railroad controlled and operated by the said Louisville & Nashville Railroad Company, viz., said Transfer Railroad; but said offer was coupled with the condition that the freight should be prepaid to the defendant at the rate of 3 cents per 100 pounds for the transfer over a distance not exceeding one half mile. The cars of freight so offered to be

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transferred contained on an average exceeding 30,000 pounds per car, and the freight so to be charged by the Louisville & Nashville Railroad Company would, upon the terms imposed by it, exceed \$10 per car.

Your petitioner states that said defendant daily performs for other persons and corporations like service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, at a charge not exceeding \$2 per loaded car. Your petitioner avers that even if this Commission shall order and direct the defendant to interchange traffic with petitioner as herein sought, without imposing any special duty or obligation in respect to the terms upon which the same shall be interchanged, defendant will impose upon your petitioner a charge greater than it imposes upon other persons and corporations for similar service under similar circumstances and conditions, and will make such charge in effect prohibitory against such interchange.

Wherefore, the plaintiff prays that the Louisville & Nashville Railroad Company, defendant herein, may be required by the order of this Commission to interchange traffic with the petitioner at said point of connection between their lines, near the intersection of defendant's railroad with Fourth Street in Louisville, and to afford for such interchange all reasonable and proper facilities, and facilities equal to those afforded to other railroad companies whose lines connect with the lines of or controlled by the said defendant, and for the receiving, forwarding, and delivering all interstate freight tendered by the petitioner to said defendant for transportation to points on, beyond, and via its railroad or railroads, or railroads controlled and operated by it; and that the defendant may be required to deliver to the petitioner, at said point of connection, all freights originating at Louisville on any of the lines owned, controlled, or operated by said defendant, or arriving at Louisville over its railroad or connecting lines, and consigned to the petitioner or to persons at points on the line of the petitioner's railroad, or to points on other railroads connected with and reached by petitioner's railroad.

And that said Louisville Railway Transfer Company may be required to furnish like facilities for interchange and permit the transportation of freights between petitioner's railroad and said Louisville Transfer Railway, and that such interchange shall be made upon just and equitable terms without discrimination in their rates and charges as between the petitioner and other railroad lines connecting with the defendant's railroad, and without greater charges against the petitioner, or persons shipping over its line, than are made to other persons and corporations for like service in transporting like kinds of traffic under similar circumstances and conditions. And your petitioner prays for all further relief in the premises as to the Commission may seem right and proper.

UNITED STATES SUPREME COURT.

Edward LOLOUP, *Plff. in Err.*,
v.

PORT OF MOBILE.

(From Lawyers' ed. U. S. Reports, Bk. 32.)

1. Where a **telegraph company** is doing the business of **transmitting messages between different States**, and has accepted and is acting under the telegraph law passed by Congress July 24, 1866, **no State** within which it sees fit to establish an office **can impose** upon it a **license tax**, or require it to take out a license for the transaction of such business.
2. **Telegraphic communications are commerce**, as well as in the nature of postal service, and, if carried on between different States, are **interstate commerce**, and within the power of regulation conferred upon Congress, free from the control of State regulations, except such as are strictly of a police character; and any State regulations by way of tax on the occupation or business, or requiring a license to transact such business, are unconstitutional and void.
3. A **general license tax** on a telegraph company affects its entire business, interstate as well as domestic or internal, and is **unconstitutional**.
4. The property of a telegraph company, situated within a State, may be taxed by the State as all other property is taxed; but its **business of an interstate character cannot be thus taxed**.
5. The Western Union Telegraph Company established an office in the city of **Mobile, Alabama**, and was required to **pay a license tax under a city ordinance** which imposed an annual license tax of \$225 on all telegraph companies, and the agent of the company was fined for the nonpayment of this tax. In an action to recover the fine he pleaded the charter and nature of occupation of the company, and its acceptance of the Act of Congress of July 24, 1866, and the fact that its business consisted in transmit-

ting messages to all parts of the United States, as well as in Alabama. *Held*, a good **defense**.

(Submitted May 2, 1888. Decided May 14, 1888.)

IN ERROR to the Supreme Court of the State of Alabama to review a judgment of that court, affirming a judgment of the Mobile Circuit Court in favor of plaintiff, in an action brought by the Port of Mobile, a municipal corporation, against an agent of a telegraph company, to recover a penalty imposed for the violation of an ordinance, by neglecting to pay a license tax imposed on the company. *Reversed*.

The facts are fully stated in the opinion.

Mr. Gaylord B. Clark, for plaintiff in error:

A State cannot legally impose a license or privilege tax such as that demanded by the Port of Mobile.

Brown v. Maryland, 25 U. S. 12 Wheat. 419, 439 (6: 678, 685); *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1 (24: 708); *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 (21: 164); *Hall v. DeCuir*, 95 U. S. 485 (24: 547); *License Tax Cases*, 72 U. S. 5 Wall. 462 (18: 497); *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 (21: 470); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29: 785); *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489 (30: 694); *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347 (30: 1187); *Moran v. New Orleans*, 112 U. S. 69 (28: 653); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29: 158).

(No counsel appeared for defendant in error.)

Mr. Justice Bradley delivered the opinion of the court:

This was an action brought in the Mobile Circuit Court, in the State of Alabama, by the Port of Mobile, a municipal corporation, against Edward Leloup, agent of the Western Union Telegraph Company, to recover a penalty imposed upon him for the violation of an ordinance of said corporation, adopted in pursuance of the powers given to it by the Legislature of Alabama, and in force in August, 1883. The ordinance was as follows, to wit: "Be it ordained by the Mobile Police Board, that the license tax for the year, from the 15th of

NOTE—Telegraph Companies; Interstate Commerce.

The following cases bearing upon the exemption of the interstate business of telegraph companies from State regulation or control by taxation or otherwise, cited in the above opinion of the United States Supreme Court, are reported in full in the Interstate Commerce Reports as follows: *Western U. Tele. Co. v. Pendleton*, 1 Inters. Com. Rep. 306; *Ratterman v. Western U. Tele. Co.* 2 Inters. Com. Rep. 59.

Other cases involving the question of State interference in matters of interstate commerce, cited in the above opinion, are to be found in the Interstate Commerce Reports as follows: *Robbins v. Shelby County Taxing Dist.* 1 Inters. Com. Rep. 45; *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, *Id.* 308; *Gloucester Ferry Co. v. Pennsylvania*, *Id.* 382; *Wabash, St. L. & P. R. Co. v. Illinois*, *Id.* 31.

On the general subject of the rights and disabilities of the States in relation to corporations or in-

dividuals engaged in interstate commerce, see also *Corson v. Maryland* (U. S. Sup. Ct.) 1 Inters. Com. Rep. 50; *Fargo v. Stevens* (U. S. Sup. Ct.) *Id.* 51; *Re Hennick* (D. C. Sup. Ct.) *Id.* 66; *Barron v. Burnside* (U. S. Sup. Ct.) *Id.* 295; *State v. Pratt* (Vt. Sup. Ct.) *Id.* 299; *Quachita & Miss. River Packet Co. v. Aiken* (U. S. Sup. Ct.) *Id.* 379; *Stockton v. Baltimore & N. Y. R. Co.* (U. S. Cir. Ct.) *Id.* 411; *Decker v. Baltimore & N. Y. R. Co.* (U. S. Cir. Ct.) *Id.* 434; *Little Rock & F. S. R. Co. v. Hamiford* (Ark. Sup. Ct.) *Id.* 580; *New Orleans & Memphis Packet Co. v. James* (U. S. Cir. Ct.) *Id.* 599; *State v. Fitzpatrick* (R. I. Sup. Ct.) *Id.* 713; *List v. Commonwealth* (Pa. Sup. Ct.) *Id.* 785; *Indiana v. Woodruff Sleeping & Parlor Coach Co.* (Ind. Sup. Ct.) *Id.* 798; *Smith v. Alabama* (U. S. Sup. Ct.) *Id.* 804; *Bowman v. Chicago & N. W. R. Co.* (U. S. Sup. Ct.) *Id.* 823; *Alabama v. Agee* (Ala. Sup. Ct.) 2 Inters. Com. Rep. 21; *Pembina Cons. Sil. M. & M. Co. v. Pennsylvania* (U. S. Sup. Ct.) *Id.* 24; *State v. Newton* (N. J. Sup. Ct.) *Id.* 63.

March, 1883, to the 15th of March, 1884, be, and the same is hereby, fixed as follows: * * *

"On Telegraph Companies, \$225 * * *

"Be it further ordained: For each and every violation of the aforesaid ordinance the person convicted thereof shall be fined by the recorder not less than one nor more than fifty dollars."

The complaint averred that the defendant, being the managing agent of the Western Union Telegraph Company, a corporation having its place of business in the said Port of Mobile, and then and there engaged in the business and occupation of transmitting telegrams from and to points within the State of Alabama and between the private individuals of the State of Alabama, as well as between citizens of said State and citizens of other States, committed a breach of said ordinance by neglecting and refusing to pay said license to the said municipal corporation. The complainant further averred that for this breach the recorder of the Port of Mobile imposed on the defendant a fine of five dollars, for which sum the suit was brought.

The defendant pleaded that at the time of the alleged breach of said ordinance, he was the duly appointed manager, at the Port of Mobile, of the Western Union Telegraph Company. That said company "was, prior to the fifth day of June, 1867, a telegraph company duly incorporated and organized under the laws of the State of New York, and by its charter authorized to construct, maintain, and operate lines of telegraph in and between the various States of the Union, including the State of Alabama. That on said fifth day of June, 1867, the said telegraph company duly filed its written acceptance with the Postmaster-General of the United States of the restrictions and obligations of an Act of Congress entitled 'An Act to Aid in the Construction of Telegraph Lines and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes,' approved July 24, 1866. That in accordance with the authority of its said charter and the said Act of Congress, and by agreement with the railroad companies, the said telegraph company constructed its lines and was at the time of the said alleged breach of said ordinance, maintaining and operating said lines of telegraph on the various public railroads leading into or through the said Port of Mobile: to wit, the Mobile & Ohio Railroad, a railroad extending from the said Port of Mobile, in Alabama, through the States of Mississippi, Tennessee, and Kentucky, to Cairo, in the State of Illinois; the Louisville & Nashville Railroad, extending from Cincinnati, in the State of Ohio, through said Port of Mobile to New Orleans, in the State of Louisiana, with a branch extending from said State of Alabama over the Pensacola & Louisville Railroad to Pensacola, in the State of Florida. That the said telegraph lines so running into or through said Port of Mobile connected with and extended beyond the termini of the said railroads over other railroads, making continuous lines of telegraph from the office of said company, in said Port of Mobile, to, through, and over all of the principal railroads, post roads, and military roads in and of the United States, and having offices for the transaction of telegraph business in the de-

partments at Washington, in the District of Columbia, and in all the principal cities, towns, and villages in each of the United States and in the Territories thereof. That all of said railroads so leading into and through the said Port of Mobile and elsewhere in the United States are public highways, and that the daily mails of the United States are regularly carried thereon, under authority of law and the direction of the Postmaster-General, and that said railroads and each of them are post roads of the United States. That said telegraph lines are also constructed under and across the navigable streams of the United States, in the State of Alabama and in the other States of the Union, but in all cases said lines are so constructed and maintained as not to obstruct the navigation of such streams and the ordinary travel on such military and post roads. That the said telegraph company was, before and during said year, commencing March 15, 1883, and now is, engaged in the business of sending and receiving telegrams over said lines for the public between its said office in the Port of Mobile and other places in other States and Territories of the United States, and to and from foreign countries; also in sending telegraphic communications between the several departments of the Government of the United States and their officers and agents, giving priority to said official telegraphic communications over all other business. And defendant avers that said official telegrams have been and are sent at rates which have been fixed by the Postmaster-General annually since the said 5th of June, 1867. And defendant avers that as the manager of said company, and in its name and under its direction and appointment, and in no other manner or capacity, was he engaged in said telegraph business at the time and the manner as alleged in said complaint."

To this plea a demurrer was filed and sustained by the court, and judgment was given for the plaintiff; and, on appeal to the Supreme Court of Alabama, this judgment was affirmed. The present writ of error is brought to review the judgment of the supreme court. That court adopted its opinion given on a previous occasion between the same parties, in which the circuit court had decided in favor of the defendant, and its decision was reversed. In that opinion the supreme court said: "The defense was that the ordinance is an attempt to regulate commerce and violative of the clause of the Constitution of the United States which confers on Congress the 'power to regulate commerce with foreign nations and among the several States.' The circuit court held the defense good and gave judgment against the Port of Mobile. Is the ordinance a violation of the Constitution of the United States? We will not gainsay that this license tax was imposed as a revenue measure—as a means of taxing the business, and thus compelling it to aid in supporting the city government. That no revenue for state or municipal purposes can be derived from the agencies or instrumentalities of commerce, no one will contend. The question generally mooted is, how shall this end be attained? In the light of the many adjudications on the subject, the ablest jurists will admit that the line which separates the

power from its abuse is sometimes very difficult to trace. No possible good could come of any attempt to collate, explain, and harmonize them. We will not attempt it. We confess ourselves unable to draw a distinction between this case and the principle involved in *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 [21:470]. In that case the license levy was upheld, and we think it should be in this. *Joseph v. Randolph*, 71 Ala. 499."

In approaching the question thus presented, it is proper to note that the license tax in question is purely a tax on the privilege of doing the business in which the telegraph company was engaged. By the laws of Alabama, in force at the time this tax was imposed, the telegraph company was required, in addition, to pay taxes to the State, county, and Port of Mobile, on its poles, wires, fixtures and other property, at the same rate and to the same extent as other corporations and individuals were required to do. Besides the tax on tangible property, they were also required to pay a tax of three-quarters of one per cent on their gross receipts within the State.

The question is squarely presented to us, therefore, whether a State, as a condition of doing business within its jurisdiction, may exact a license tax from a telegraph company, a large part of whose business is the transmission of messages from one State to another and between the United States and foreign countries, and which is invested with the powers and privileges conferred by the Act of Congress passed July 24, 1866, and other Acts incorporated in title LXV. of the Revised Statutes. Can a State prohibit such a company from doing such a business within its jurisdiction, unless it will pay a tax and procure a license for the privilege? If it can, it can exclude such companies, and prohibit the transaction of such business altogether. We are not prepared to say that this can be done.

Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed. But we fail to see how a State can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax, as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business.

Now, we have decided that communication by telegraph is commerce, as well as in the nature of postal service, and if carried on between different States, it is commerce among the several States, and directly within the power of regulation conferred upon Congress, and free from the control of State regulations, except such as are strictly of a police character. In the case of *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 [24:708], we held that it was not only the right, but the duty of Congress to take care that intercourse among the States and the transmission of intelligence between them be not obstructed or unnecessarily incumbered by State legislation; and that the Act of Congress passed July 24, 1866, above referred to, so far as it declares that the erection of telegraph lines shall, as against state interference, be free to all who accept its terms and conditions, and that a telegraph company of one State shall not, after accepting them, be

excluded by another State from prosecuting its business within her jurisdiction, is a legitimate regulation of commercial intercourse among the States, and is also appropriate legislation to execute the powers of Congress over the postal service. In *Western Union Tel. Co. v. Texas*, 105 U. S. 460 [26:1067], we decided that a State cannot lay a tax on the interstate business of a telegraph company, as it is interstate commerce, and that if the company accepts the provisions of the Act of 1866 it becomes an agent of the United States, so far as the business of the government is concerned; and State laws are unconstitutional which impose a tax on messages sent in the service of the government, or sent by any persons from one State to another. In the present case, it is true, the tax is not laid upon individual messages, but it is laid on the occupation, or the business of sending such messages. It comes plainly within the principle of the decisions lately made by this court in *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489 [30:694], and *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 336 [30:1200].

It is parallel with the case of *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6:678]. That was a tax on an occupation, and this court held that it was equivalent to a tax on the business carried on,—the importation of goods from foreign countries,—and even equivalent to a tax on the imports themselves, and therefore contrary to the clause of the Constitution which prohibits the States from laying any duty on imports. The Maryland Act which was under consideration in that case declared that "all importers of foreign articles or commodities, etc., and all other persons selling the same by wholesale, etc., shall, before they are authorized to sell, take out a license, * * * for which they shall pay fifty dollars," etc., subject to a penalty for neglect or refusal. *Chief Justice Taney*, referring to the case of *Brown v. Maryland* in *Almy v. California*, 65 U. S. 24 How. 169, 173 [16:644, 646], in which it was decided that a State stamp tax on bills of lading was void, said: "We think this case cannot be distinguished from that of *Brown v. Maryland*. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question." * * * "The opinion of the court, delivered by *Chief Justice Marshall*, shows that [the case] was carefully and fully considered by the court. And the court decided that this State law [the Maryland law under consideration in *Brown v. Maryland*], and the mode of imposing it, by giving it the form of a tax on the occupation of the importer, merely varied the form in which the tax was imposed, without varying the substance."

But it is urged that a portion of the telegraph company's business is internal to the State of Alabama, and therefore taxable by the State. But that fact does not remove the difficulty. The tax affects the whole business without discrimination. There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation, without the imposition of a tax which covers the entire operations of the company.

The State court relies upon the case of *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 [21:470],

which brought up for consideration an ordinance of the city requiring every express company or railroad company doing business in that city and having a business extending beyond the limits of the State, to pay an annual license of \$500; if the business was confined within the limits of the State, the license fee was only \$100; if confined within the city, it was \$50; subject in each case to a penalty for neglect or refusal to pay the charge. This court held that the ordinance was not unconstitutional. This was in December Term, 1872. In view of the course of decisions which have been made since that time, it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon Congress to regulate commerce among the several States.

A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years, which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts.

In our opinion such a construction of the Constitution leads to the conclusion that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation

or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary. As a matter of convenient reference we give the following list: *Case of State Freight Tax*, 82 U. S. 15 Wall. 232 [21:146]; *Pensacola Tel. Co. v. W. U. Tel. Co.* 96 U. S. 1 [24:708]; *Mobile County v. Kimball*, 102 U. S. 691 [26:238]; *W. U. Tel. Co. v. Texas*, 105 U. S. 460 [26:1067]; *Moran v. New Orleans*, 112 U. S. 69 [28:653]; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 [29:158]; *Brown v. Houston*, Id. 622 [29:257]; *Walling v. Michigan*, 116 U. S. 446 [29:691]; *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 [29:785]; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30:244]; *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489 [30:694]; *Philadelphia & S. M. Steamship Co. v. Pennsylvania*, 122 U. S. 326 [30:1200]; *W. U. Tel. Co. v. Pendleton*, Id. 347 [30:1187]; *Ratterman v. W. U. Tel. Co.* 127 U. S. 411 [32:229].

We may here repeat, what we have so often said before, that this exemption of interstate and foreign commerce from state regulation does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from regulating matters of local concern which may incidentally affect commerce, such as wharfage, pilotage, and the like. We have recently had before us the question of taxing the property of a telegraph company, in the case of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 [31:790].

The result of the conclusion which we have reached is, that *the judgment of the Supreme Court of Alabama must be reversed, and the cause remanded with instructions to reverse the judgment of the Mobile Circuit Court; and it is so ordered.*

INTERSTATE COMMERCE COMMISSION.

Re CHICAGO, ST. PAUL, & KANSAS CITY R. CO.

1. The Commission has no power to compel a railroad company to **increase its rates** which are supposed to be so low as to be ruinous to itself or to its rivals.
2. The provisions in the **Act to Regulate Commerce**, that all **rates shall be just and reasonable**, was a provision inserted for the **protection of the general public**, and **not** for the protection of the **carriers** against the action of their own officers or against the action of rivals. The carriers were supposed to have means of self-protection against unreasonably low rates in the power they had to make the rates themselves.
3. The **fact that a railroad** which is subject to the Act to Regulate Commerce **makes** between two points **charges unreasonably low** does **not authorize** a **rival**, extending between the same points, **to make** on its line **greater charges for the shorter haul** in the

same direction to intermediate points than it does to the termini.

4. The **competition** of the two roads does **not alone make out the dissimilar circumstances and conditions** which will authorize the making of such greater charge upon the shorter haul.
5. On the question of what are **just and fair rates** to any particular locality, it is necessary to see what rates are given to other localities. They cannot be considered by themselves.
6. **Low rates** to one place may not be just and fair if still lower rates are given to another.
7. Where a road makes the same **charge** to one point that it does to another only one third or two thirds the distance on the same line, **presumptively** its charges to the last-mentioned point are **unjust and illegal**.

(No. 143.)

(Heard at Dubuque, Iowa, July 25, 1888.—Decided September 19, 1888.)

ON order of the Commission for hearing in justification of *prima facie* violation of the fourth section of the Act to Regulate Commerce.

Messrs. A. B. Stickney and C. W. Bunn for the Chicago, St. Paul, & Kansas City Railway Co.

Mr. D. S. Wegg for the Wisconsin Central Railroad Co.

Mr. J. W. Lozey for the Chicago, Burlington, & Northern Railroad Co.

Mr. W. C. Goudy for the Chicago & Northwestern Railway Co.

Mr. J. T. Fish for the Chicago, Milwaukee, & St. Paul Railway Co.

Messrs. E. M. Pope and A. D. Keyes for the Faribault Board of Trade.

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

The Chicago, St. Paul, & Kansas City Railway Company operates a line of railway from Chicago, Illinois, through Dubuque, Iowa, to St. Paul, Minnesota, and Minneapolis, with a branch line from Allwein, Iowa, to Des Moines, in the same State. On June 6, 1888, the Commission received from this company, herein after called the respondent, the following communication:

St. Paul, Minn. June 2, 1888.

To the Honorable Interstate Commerce Commission,

Washington, D. C.:

Gentlemen,—Owing to the action of competing lines covering rates between Chicago, St. Paul, and Minneapolis, this company has been obliged to promulgate since the 7th day of last February no less than nine different tariffs, and, having regard to the principles of the interstate commerce law, this has required us nine times in 113 days to readjust rates all over our line.

No longer ago than May 22 last, at a meeting of all the roads interested in the traffic between Chicago, St. Paul, and Minneapolis, a unanimous agreement was arrived at to put into effect, on June 4, a tariff covering this traffic, schedules printed, and the necessary ten days' notice was given by all the companies.

Before the ten days expired we were notified by the Chicago, Burlington, & Northern Company that on the 4th day of June, 1888, instead of the tariff agreed upon, it would put in effect between Chicago and St. Paul and Minneapolis a materially lower schedule of rates.

This company is not prepared to surrender its business between these points, and at the same time does not desire to disturb rates all over Minnesota, Iowa, and the States west of the Missouri River for the tenth time in less than three months, which a readjustment of its rates over the whole line in accordance with the long and short haul clause of the Interstate Commerce Law would necessarily bring about, and has therefore determined to assume the responsibility of meeting this competition between Chicago and St. Paul and Minneapolis without readjusting its rates at intermediate points, and if complaint is made will attempt to justify its action under the law.

We feel it our duty to at once notify you of

our action, and enclose the tariff which we propose to put into effect June 4.

Yours truly, J. A. Hanlen,
Traffic Manager.

Accompanying this was a tariff sheet, issued by the respondent, by which rates for the transportation of merchandise between Chicago and St. Paul, Minneapolis or Minnesota Transfer, were fixed as follows: First class, 40 cents per hundred pounds; second class, 33 cents; third class, 26 cents; fourth class, 18 cents; fifth class, 12½ cents. They had immediately previous to this been as follows: First class, 60 cents; second class, 50 cents; third class, 35 cents; fourth class, 25 cents; fifth class, 17 cents. Other rates between the points above named were by the same tariff sheet reduced in proportion to the reduction made in the class rates. No reduction was at the same time made in the rates between the terminal points above named and the intermediate stations; and, as a consequence, the rates made by respondent for transportation from Chicago to all stations beyond Dubuque were considerably higher than the rates to St. Paul, Minneapolis or Minnesota Transfer, and the rates in the other direction from these northern terminal points to intermediate stations were correspondingly higher than the rates to Chicago. Thus, from Chicago to Oneida, half the distance to St. Paul, the rates were: First class, 54 cents; second class 44 cents; third class, 32 cents; fourth class, 23 cents; fifth class, 17 cents,—which, as compared with the rates to St. Paul, as above given, will sufficiently illustrate the differences which the new tariff sheet then made. The highest intermediate rate before reaching St. Paul is 60 cents.

After the receipt of this communication the following order was entered:

At a Session of the Interstate Commerce Commission held in the city of Washington June 20, 1888.

Present: All the Commissioners.

In the Matter of the Chicago, St. Paul, & Kansas City Railway Company.

Whereas a communication has been received from the Chicago, St. Paul, & Kansas City Railway Company informing the Commission that rates have been put in effect upon its line between Chicago and St. Paul which are less than the rates in effect from said cities to intermediate points on the same line, the same being a *prima facie* violation of § 4 of the Act to Regulate Commerce,—

It is therefore ordered that said company be notified that a public session of the Commission will be held at the United States court house, in the city of Dubuque, in the State of Iowa, on the 25th day of July, A. D. 1888, at 11 A. M., at which time and place said matter will be investigated, and an opportunity will then and there be given to said company to introduce evidence and be heard in justification of said rates. And, whereas the citizens of the several localities upon said line which are affected by the aforesaid rates are entitled to be heard upon said matter,—

It is further ordered that an opportunity be given them for that purpose at said time and place, and that they be notified thereof by

publication of a copy of this order in certain newspapers published in said localities, to be hereafter designated for that purpose. And, whereas other railroad companies engaged in traffic between Chicago, St. Paul, and Minneapolis are also interested in the matter above stated, and in the basis upon which rates may lawfully be made in respect to said traffic,—

It is further ordered that an opportunity be also given them at said time and place to be heard thereon, and that notice thereof be given by mailing a copy of this order to the following named companies, to wit: the Chicago, Milwaukee, & St. Paul Railway Company, the Wisconsin Central Railroad Company, the Chicago, St. Paul, Minneapolis, & Omaha Railway Company, the Chicago & Northwestern Railway Company, the Chicago, Burlington, & Northern Railroad Company, the Minneapolis & St. Louis Railway Company,—

And it is further ordered that any other persons or corporations interested in the matter aforesaid by reason of residence upon any of said lines of road, or otherwise, may also be heard thereon at the time and place above designated.

Subsequent to the receipt of this order the respondent filed with the Commission a response, as follows:

To the Interstate Commerce Commission:

For answer to the complaint of the Commission against the Chicago, St. Paul, & Kansas City Railway Company, dated June 20, 1888, that this company has in effect upon its line between Chicago and St. Paul rates which are less than the rates in effect from said cities to intermediate points on the same line, this company desires to state what the facts are, and the reasons which induced its action in the premises, and point out the theory whereby its action is justified by, and not in conflict with, the Interstate Commerce Law.

This company commenced to operate its line between Chicago and St. Paul on the 1st day of August, 1887, and from that date to June 4, 1888, endeavored to and did conform all its tariffs to the provisions of § 4 of the Interstate Commerce Act; that between February 3, 1888, and said 4th day of June, owing to frequent changes of through rates between Chicago and St. Paul, which were all forced upon this company by reductions and alterations made by competing lines, this company, in its efforts to comply with § 4 of the Interstate Commerce Law, was compelled many times to alter its local rates, and actually printed and issued between August 1, 1887, and June 4, 1888, 498 distinct tariffs, many of which were in force but for a few days; and that, besides local tariffs actually issued, local rates were often disturbed by the general direction, in all its through tariffs, that local rates should not exceed in any event said through rates.

The company admits that on or about the 24th day of May, 1888, it duly published a certain tariff of rates between Chicago and St. Paul, to take effect June 4, 1888, a copy of which is hereto attached and marked "Exhibit A," which rates it believes and affirms to be reasonable and just and in all respects conformable to law; and said tariff has been since that date in effect upon its line except as here-

inafter stated. That after the publication of said tariff had been commenced, but before it became effective, the Chicago, Burlington, & Northern Company gave this company and the public notice that on the 4th day of June, 1888, it would put into effect on its line between Chicago and St. Paul a lower schedule of rates, to wit:

| Class | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|----------------|-----|-----|-----|-----|------|------|-----|-----|-----|-----|
| Cents per cwt. | .40 | .33 | .26 | .18 | .12½ | .17½ | .15 | .13 | .10 | .08 |

—and that said Chicago, Burlington, & Northern Company did, on or before said 4th day of June, put into effect on its line said last mentioned schedule of rates, and has ever since continued said schedule and lower schedules in effect upon its line. That after said rates between Chicago and St. Paul had become effective upon the Chicago, Burlington, & Northern Company's line, and in no instance before they became effective, this company adopted and put into effect on its line the same schedule of rates between the points mentioned; and this company admits that said rates are lower than some of the rates at the same time charged by this company on its line for intermediate distances and for shorter hauls.

This company claims that the rates now in force between Chicago and St. Paul are lower than reasonable and just rates, and are therefore unreasonable and unjust; and that such rates were not made by this company of its own free will, but solely on account of the competition before mentioned. That, as this company is informed and verily believes, the said tariffs now in force, and which have been since June 4, 1888, upon the Chicago, Burlington, & Northern railroad, have not produced revenue enough to pay the operating expenses of that road, and if applied to the whole system of this company they would produce like results.

At the same time, so far as this company is concerned, the larger part of its operating expenses are substantially a constant charge whether this company does any part of said business between Chicago and St. Paul, Minneapolis and Minnesota Transfer or not; that, irrespective of whether it does any portion of said business, it is obliged to employ the same number of station agents, section men, switchmen, and other track employees; it is obliged to pay the same amount of interest; the damage to its roadbed and property from the elements is the same; its general office expenses are the same, as well as many other expenses unnecessary to mention particularly; that, having said constant and fixed expenses to be paid whether any through traffic is done or not, this company is better off to do business between Chicago and St. Paul, Minneapolis and Minnesota Transfer, even at the present rates, than not to do business at all. For example, it costs, approximately, 27 cents per mile to run an additional through freight train over its road. The distance being 420 miles, this gives an approximate expense of \$113.40 per through train. Add to this \$80, which is \$4 per car terminal charges, and the result—\$193.40—shows, approximately, the additional cost to this company of adding one through train of twenty cars to the trains already being operated by it.

The revenue obtained from such train would

be, approximately, as follows: Taking the lowest revenue per ton per mile furnished by any part of said traffic, which would be the revenue arising from coal and wheat,—.0032 per ton per mile, multiplying this by 320, the approximate number of tons in the supposed train over the road of this company, gives a gross revenue of \$1.024 per mile for said train, or for 420 miles gives \$430.08 as the approximate gross revenue of said train over the road; deducting \$193.40, the approximate additional expense to the company of putting on said train, and we arrive at \$236.68, which is revenue arising to this company from the putting on of the supposed through train in addition to its other trains; which revenue this company would not receive but for the putting on of said additional train, and which is applicable by it toward the payment of its general operating expenses, such as the expenses of station agents, trackmen, and general office, and the payment of its interest, thus actually relieving the local traffic of said company from the payment of a portion of said expenses; that if the company abandoned its said through business entirely, it would consequently be compelled to raise its local rates to a point still above what they are at present, in order to produce the same revenue as if it engaged also in said through business.

That the competition of said Chicago, Burlington, & Northern Railroad at the points before mentioned was in actual existence on the 4th day of June, 1888, and was of controlling force in respect to traffic important in amount; that the volume of business between Chicago and St. Paul, Minneapolis, and Minnesota Transfer is very large, and consists of all classes and descriptions of articles referred to in said tariffs; that said competition was not merely temporary or accidental, or upon the transportation of a single class of articles, but was permanent so long as said tariff should be maintained and existing upon all varieties of freight, and actually controlling and securing the traffic unless met by this company; that said through traffic has furnished heretofore from 25 to 30 per cent of the gross revenues of this company, and, as this company believes, it will be compelled to sacrifice, approximately, one third of its gross income unless it is allowed to meet said tariffs made by the Burlington & Northern road irrespective of its local tariffs. That this company is advised and believes that the said Burlington & Northern Railroad Company has failed to pay its operating expenses during each month in the year 1888, except during the month of February; that while its net earnings for January, February, and March, 1887, were \$185,843, its operation for the first three months of 1888 has not furnished a revenue sufficient to pay actual operating expenses; that, as this company is advised and believes, said revenue for the first four months of 1888 was insufficient to pay actual operating expenses by the sum of \$2,698. This company alleges that, as a matter of fact, said tariffs before mentioned, and which have been in force on the Burlington & Northern railroad since the 4th day of June, cannot by any possibility be made to pay the actual operating expenses of that railroad, and are entirely unjust, being unreasonably low. That, as this company is advised and be-

lieves, the said tariffs at present in force on said Burlington & Northern road do not pay, and cannot be made to pay, an actual gross revenue of .005 per ton per mile, and this company believes and alleges that the actual operating expenses of said railroad have not been and cannot be made less than about the sum of .005 per ton per mile; that said company is now, and has been ever since the said 3d day of February, 1888, transporting its traffic at an actual loss, not realizing sufficient gross revenue therefrom to meet the actual expenses of doing the business.

This company alleges for several years past the actual operating expenses of the best built, best equipped, and best managed railways in United States, of railways having the largest volume of traffic, have never at anytime fallen very much below the sum of .005 per ton per mile of freight moved, and cannot be brought very much below that sum by any known methods applicable to railway management. That, as a matter of fact, those railway companies in the United States which are best located, best constructed, best equipped and managed, and which have the largest volume of traffic, and which are surrounded by the most favorable possible circumstances and conditions, have collected and received upon the traffic transported by them a sum largely in excess of .005 per ton per mile, seldom falling below .007 per ton per mile. That the rates hereinbefore referred to have reference to the classification known as the Western classification; that besides said tariffs above named the said Chicago, Burlington, & Northern Railroad Company, on or about June 1, 1888, put into effect upon its line, and has since maintained, a certain tariff applicable only on proportion of through rates on shipments originating at or east of the western termini of the trunk lines,—namely, Buffalo, Black Rock, Suspension Bridge, Pittsburgh, Salamanca, from Chicago, Illinois, to St. Paul, Minneapolis or Minnesota Transfer. By the last tariff named, the proportion of said through rates charged and received by the company between Chicago and St. Paul, Minneapolis or Minnesota Transfer is as follows, subject to the classification known as the official classification:

| | 1 | 2 | 3 | 4 | 5 | 6 |
|----------------|-----|-----|-----|-----|-----|-----|
| All rail..... | .31 | .22 | .23 | .17 | .11 | .09 |
| Part rail..... | .20 | .19 | .17 | .10 | .06 | .03 |

That the classes referred to cover all possible merchandise, articles, or commodities carried from points east of Buffalo, etc., to St. Paul, Minneapolis or Minnesota Transfer; that the rates referred to therein are lower than the said rates charged from Chicago to St. Paul, Minneapolis, or Minnesota Transfer upon business originating at Chicago or west of Buffalo, etc., above referred to; that all the allegations herein with respect to the unreasonableness of rates applied with still greater force to the said through tariffs last mentioned; that they are in every respect unreasonably and unjustly low,—cannot possibly pay for the expense of handling and moving the merchandise carried thereunder over the road.

This company alleges and insists that its local rates to and between all points upon its road are reasonable and just rates, and the

same could not be reduced by this company so as to be within said through tariff forced on this company by competition without reducing the revenue of this company below a point which would pay its operating expenses.

This company further alleges that if its local rates shall be reduced so as to be within said through rates to points on its direct line between Chicago and St. Paul, said reductions would become effective at many local points in the State of Iowa, where this company competes with other railroads from the city of Chicago; that consequently a reduction by said competing railroads to said local Iowa points would be compelled, and this in turn would necessitate reductions to still other Iowa points; and the inevitable result would be the lowering of local tariffs to such a point as would be unreasonably low and unproductive to all the railroads running through the said State of Iowa.

This company respectfully submits that when the Chicago, Burlington, & Northern Company, for some reason best known to itself, has deliberately adopted tariffs which it is susceptible of demonstration will not, if it can secure the whole tonnage between its two terminals, produce revenue more than sufficient to pay its operating expenses; and said Burlington & Northern Company being a competitor of this company at said terminal points, the Interstate Commerce Law does not compel this company to adopt such unreasonably low and unproductive tariffs over its whole line, or abandon important competitive business, which at the prices it can get in competition is of some advantage to it by contributing something towards its expenses and fixed charges.

Wherefore this company prays that it may be exempted, by order of your honors, from observing the Interstate Commerce Law, § 4, with respect to business between its terminal points, and be allowed to fix its rates between Chicago and St. Paul, Minneapolis and Minnesota Transfer to meet competitive rates without corresponding reductions of intermediate local rates; or, if this relief cannot be granted to it, that your honors proceed to investigate the reasonableness of said competitive rates, and, if found lower than reasonable and just rates, that you order all parties concerned to put in force such through rates as shall be reasonable and just.

Chicago, St. Paul, & Kansas City
Railway Company,
By A. B. Stickney, President.

On the day assigned for the hearing, by the order above recited, counsel appeared for the respondent, and also for the Wisconsin Central Railroad Company, the Chicago, Burlington, & Northern Railroad Company, the Chicago & Northwestern Railway Company, and the Chicago, Milwaukee, & St. Paul Railway Company. Counsel also appeared for the Faribault Board of Trade; and other interests were represented by parties concerned.

The chairman, in opening the session, after stating its purpose, called attention to the "long and short haul clause" of § 4 of the Act to Regulate Commerce, and remarked that "it has been generally understood, and the Commission has so assumed in some cases, that certain things of a general nature might constitute the

dissimilar circumstances and conditions which were in the contemplation of Congress when the Act was passed. That, for example, a competition by water routes might make out these dissimilar circumstances and conditions in some cases, and that perhaps the competition of railways that were not subject to the regulation of the Act might also establish the dissimilar circumstances and conditions. The Chicago, St. Paul, & Kansas City Railway Company has made and put in force a tariff sheet whereby there will be made upon its line charges for shorter hauls in the same direction which exceeded those made for longer hauls over the same line; and it has assumed in making that tariff, as we understand it, that there are existing on its line the dissimilar circumstances and conditions to warrant it. But we do not understand that the dissimilar circumstances and conditions are supposed to be competition by water routes, or that they are found in the competition of carriers not subject to the regulation of the Act mentioned. When, therefore, the Commission was notified that such a tariff was to be put in force, it deemed the case one demanding consideration, and which it ought at once to take up, that the managers of the road might have the opportunity of explaining to the Commission what were the circumstances and conditions that in their view warranted their putting such a tariff in force. The matter is now before the Commission for the purposes of that explanation, and the managers can proceed to make it in such manner as they may deem best."

Mr. Stickney, the president of the respondent, thereupon proceeded, with a map before him, to explain the location of his road, and that of its competitors, between Chicago and St. Paul and Minneapolis,—these being the Chicago, Milwaukee, & St. Paul Railway Company, the Chicago & Northwestern, the Wisconsin Central, the Chicago, Rock Island, & Pacific, in connection with the Minneapolis & St. Louis, and the Chicago, Burlington, & Quincy, in connection with the Chicago, Burlington, & Northern. He also showed how the line of respondent was crossed by other lines, whose rates would be affected and disturbed if respondent was obliged to reduce intermediate rates to the level of those it had been compelled to make between its termini, and after pointing out the line of the Chicago, Burlington, & Northern railroad,—whose rates to St. Paul and Minneapolis, made in concert with the Chicago, Burlington, & Quincy, had compelled a reduction of respondent's rates to those cities,—he went on to say that if respondent were required to reduce its rates to the level of the lowest rates made by the Chicago, Burlington, & Northern the result would be that from a point 25 miles out of Chicago there would be one level rate the whole distance to Minneapolis.

Mr. Stickney then proceeded to read a printed argument, in which, having referred to what has been heretofore said by the Commission as to the general purpose of the Act to regulate commerce, he proceeded to say:

"There is one section of the law which has not yet been considered by the Commission in any of its reported cases, which to our mind is the key to the whole law. A proper and

natural construction of this section will correct all the evils complained of, and regulate the business in accordance with the requirements of justice; the other sections,—§§ 3 and 4,—which have thus far been appealed to by complainants and adjudicated by the Commission, in themselves, as we shall attempt to show hereafter, cannot remedy the evils, but, on the contrary, tend to increase them, and utterly fail in doing full justice to anyone. The section we have referred to as the key is the last clause of § 1, which reads as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

"It is our contention that this clause prohibits and makes unlawful a rate or charge which is too low, as well as a rate or charge which is too high, to be just and reasonable; that this is the plain, ordinary meaning of the language used; and that, if this interpretation prevails, the objects of the law, as the Commission has conceived them, are effectuated. With any other interpretation the law becomes ineffectual for any such purpose."

"It is our contention that the law is a general law, and its protection is extended to all persons,—to the companies, the widows and orphans whose little or big fortunes may be invested in railways; to the investment of trust funds, savings banks, and even the capitalists, as well as the persons who may be customers and patrons of railways. All equally need and are equally entitled to the protection of the law upon principles of equity. That a law expressly enacted to prevent unjust discriminations ought not to be so administered or construed as to produce discrimination. It is our contention that the law is broad enough, when the whole law is considered, to give this protection and to do equity to all, but that §§ 3 and 4 alone cannot give protection, nor do equity to any, and, at most, but partial justice to a few. Heretofore it appears to have been assumed that the law extended no protection to the companies, or that large portion of the public who are investors and owners of railways. It has perhaps been assumed that the companies were competent to protect their own interests, therefore needed no protection under this law; and that the only persons needing protection were the customers of the companies; and that the rights of customers could be protected without protecting the rights of the companies. The law has now been in force fifteen months, and I shall attempt to point out to the Commission how, up to this time, it has failed to accomplish for the customers of the companies the correction of any of the evils it was intended to correct, and, further, that it is impossible to do equity to that portion of the general public which I designate as customers of the companies without enforcing those provisions of the law which we claim are intended to do equity to the other portion of the general public,—the companies and the owners of railway property, as well as the customers."

"It is our contention that the root of all the evils named which the law is intended to cure, to both branches of the general public named, is the 'cutting of rates.' By a 'cut rate' we mean a rate made by a railway company which is lower than the just and reasonable rate which it is entitled to receive for the services performed. Without a 'cut rate' none of the evils complained of could possibly exist, and, as long as a 'cut rate' can be made or is in existence anywhere, none of the evils complained of can possibly be prevented."

"If § 1 can be construed to prohibit and make unlawful a rate which is so low as to be unreasonable and unjust, as well as a rate which is so high as to be unreasonable and unjust, then we have a law which in theory is perfect, and if it can be perfectly administered will be a perfect remedy; but if such a construction cannot be given to it, then, as we have before said, the law is imperfect, and its administration or enforcement will aggravate and increase, rather than remedy, most of the evils."

Mr. Stickney then pointed out at length, and with illustrations, the evils that flowed from the unrestricted exercise of a right by one carrier to make rates at discretion; how this resulted in the favoring of localities not only on its own line, but necessarily also on the lines of other carriers; he contended that an unreasonably low rate was a "cut rate," and that no adequate regulation of railroads was possible unless it could be restrained and prevented. He closed his argument by saying:

"Now what is the remedy? We contend that an adequate remedy can easily be found in the principle that all rates must not only be reasonable, but just. We contend that the last clause of § 1 of the Act is more than an enactment into statute of the common law that all charges of the common carrier must be reasonable in the sense that none must be excessive. This statute goes further, and says that rates must be just, and 'every unjust charge is prohibited and declared to be unlawful.' Webster defines the word 'just' to mean exact, proper, accurate, equitable, impartial, conformed to the rules of justice; and 'justice' is defined to mean 'the virtue of giving to every one what is his due: practical conformity to the laws and the principles of rectitude in the dealings of men with each other: honesty; integrity in commerce or mutual intercourse.'"

"We claim that under this law no railway company is at liberty to make an unreasonable or unjust rate. It may not make a rate so high as to be excessive nor so low as to be unjust."

"We claim that the essence of the law—the vital principle which makes the law what the Commission has declared it to be, an Act to regulate commerce, intended for the protection of the general public, and its prevailing principles equality for all persons and communities—is contained in the last clause of § 1, and subsequent sections are cumulative, explanatory, and designed to aid in enforcing the vital principle."

"The power to make an unjustly low rate, which we have heretofore denominated a 'cut rate,' is the 'root of all evil,' and unless the

law has eradicated that root and devastated the companies of that power, it must utterly fail to accomplish the purposes of 'equity to all persons and localities,' which the Commission has declared, and which we fully believe, was its purpose.

"But it may be asked, has not a man the right to do with his own what he pleases?—and shall the law interfere with a railway company which may desire to give away its services?"

"We do not think it necessary to answer this objection to the Commission, as the principle is too well understood by it; but to the general public we might say that it is our understanding that no principle of law is better established than that a man may not in all cases do what pleases him with his own. A man may not burn his own house when the probable result would be to burn his neighbor's house also.

"It has been repeatedly held that railroads are a public agency. The authority to construct them with extraordinary privileges in management and operation is an expression of sovereign power only given from a consideration of great public benefits which might be expected to result therefrom. Every grant of such a privilege involves not only the right, but the duty, of protection and regulation, so as to secure equity for all persons and communities."

At the conclusion of Mr. Stickney's argument, counsel for the Chicago, Burlington, & Northern Railroad Company made a brief statement of the position of his company, claiming for it the best line in point of grades and curvatures of all the competing lines, and an ability to do profitable business at the lowest rates. "We claim," he said, "that it can carry freight less than the other lines, and we claim that it has a right to carry freight at any figure it pleases, and that it has a right to compete on its own basis. Nobody complains against it, but Mr. Stickney comes and says that this road is doing its business too low. It seems to us that this road has a right under the law to fix its own rates; and that it should not be called upon to show that its rates are not remunerative to itself, or such that these other roads cannot meet. Now, that is the question before this Commission." In the same connection something was said by counsel about the right of "survival of the fittest," but without explanation of the designed application in the case. Whether it was meant that the Chicago, Burlington, & Northern, having, by reason of its more favorable gradients and curvatures, the power to destroy its rivals in a life-and-death struggle, might rightfully do so, was left to conjecture.

Respondent then proceeded to produce evidence; and witnesses were also called by the Chicago, Burlington, & Northern, and by other parties.

W. B. Hamblin, general traffic manager of the road last named, was called for respondent, and was examined with the purpose, principally, to show that the rates of his company were such as precluded its doing a profitable business.

From his testimony it appears that the rates

on his road from Chicago were the same to Prairie du Chien as to Minneapolis, 202 miles beyond, and were the same to all intermediate stations between the two named.

At the time the Chicago, Burlington, & Northern went into operation, in 1886, it appears that rates between Chicago and St Paul, by all the lines, were as follows:

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|----|
| 40 | 30 | 20 | 15 | 10 |

This was by joint tariff issued by agreement. At that time rates to intermediate stations were in many cases higher than to the terminal stations. Since that time the rates between the terminal stations have sometimes been higher and sometimes lower. The rates now in force on class 5 and the lettered classes are precisely the same which were put in force by the respondent road in August, 1887, without consultation with its competitors. Class 5 and the lettered classes constitute a very large proportion of all the business of the roads.

On May 29, 1888, the witness sent the following letter to Chairman Faithorn of the Northwestern Freight Association:

Dear Sir: We desire to notify you that on June 4, 1888, our rates between Chicago and St. Paul, Minneapolis, and Minnesota Transfer will be—

| 1 | 2 | 3 | 4 | 5 |
|----|----|----|----|-----|
| 40 | 33 | 26 | 18 | 12½ |

Our reasons for making rates as above are as follows: At a meeting of the Northwestern Association, of which our line is not a member, but at which we were notified to be present, all the other lines urged us to assent to the rates (the 60-cent scale) which all said lines had adopted. We assented to said rates, against our own interests, for the sole purpose of assisting our competitors to regulate their local rates in accordance with their necessities, which they alleged to be very pressing. No sooner had our assent been given to the 60-cent scale than many of our competitors began to make an improper use of the advance, by alleging that the advance was made by us for the definite purpose of discriminating against Chicago trade, when in fact said rates were made for the sole purpose of enabling said competing lines to rearrange their local rates on, as they alleged, a fairly consistent basis.

Finding that many of our patrons would be discriminated against by the 60-cent scale, owing to the extremely low rates from the seaboard prevailing by Lake Superior lines, we have decided upon the scale above given.

Yours truly,
W. B. Hamblin.

N. B. Hinckley, auditor of the Chicago, Burlington, & Northern, gave the gross earnings of his company for the first six months of 1887, as follows:

| | |
|---------------|----------------|
| January..... | \$155,656 30 |
| February..... | 163,448 76 |
| March..... | 282,397 98 |
| April..... | 207,742 18 |
| May..... | 238,403 18 |
| June..... | 202,637 29 |
| Total..... | \$1,270,285 69 |

The same for five months in 1888:

| | |
|---------------|--------------|
| January..... | \$108,834 96 |
| February..... | 165,124 39 |
| March..... | 73,322 55 |
| April..... | 127,986 68 |
| May..... | 146,089 27 |
| June..... | 174,003 75 |
| Total..... | \$795,361 60 |

The net earnings for the first six months of 1887, above operating expenses, the witness stated to have been \$331,575.81. The surplus above operating expenses for the first five months of 1888 was \$3,896.62. But in operating expenses the witness did not include taxes—\$56,704.50—nor rent of tracks,—\$29,040.48,—which, if added to the operating expenses for these five months, would make an excess of some \$80,000 above gross earnings. Nor in the operating expenses was any account taken of depreciation of rolling stock or other property, nor of the keeping up of the equipment, nor of the road.

The great falling off in the business of 1888 from that of 1887 the witness accounted for by a strike of engineers on the Chicago, Burlington, & Quincy system. For the year 1887 the witness claimed his road earned its operating expenses and fixed charges.

The gross earnings of the road from freights the witness estimated to average about $4\frac{1}{2}$ mills per ton per mile.

J. A. Hanley, traffic manager of the respondent, testified that since the 1st of August, 1887, his company had printed 498 different tariffs. He had been compelled to change the local tariffs as often as there was a change in the through tariffs by any competing road. There was a cut in rates, he said, February 3 of this year, again February 8, again February 10, again on the 15th, on the 20th, on the 25th, and on March 2. His company put in force the tariff it is now acting under, because of the action of the Chicago, Burlington, & Northern. It would have been impossible for his company to have done any part of the through business if it had not reduced its through rates to meet the rates of the other road.

Witness believes the rates to the intermediate stations, as now fixed, to be reasonable.

President Stickney testified that he thought the present local rates were reasonable; to reduce them to the St. Paul rate would seriously affect the revenues of his company. If the company were to advance its through rates to the 60-cent standard, it would have to go out of the through business, and that would reduce the revenue of the road about 25 per cent.

Witness gave figures from official reports, which he claimed showed that the Chicago, Burlington, & Northern was steadily falling behind, and that it was doing business lower than any successful road in the country. In his opinion the tariffs at present in force between St. Paul and Chicago are not sufficient to pay anything substantial over and above operating expenses to any railroad. A reduction of the local rates on his road would affect very materially all rates over Iowa and Southern Minnesota, and away out into Kansas and Nebraska more or less.

Witness testified that the 60-cent rate was carried by his road to the last station before reaching St. Paul, and which was 14 miles dis-

tant therefrom. He also testified that the competition by way of Duluth is between St. Paul and eastern points; it is not between Chicago and Duluth. There is no competition by lake between Chicago and St. Paul by way of Duluth; so that on business that originates at Chicago and south of there Duluth has no influence on rates.

William H. Truesdale, receiver of the Minneapolis & St. Louis Railway Company, testified that in his opinion no road would be able to transact its business, however large, on the basis of $4\frac{1}{2}$ mills per ton per mile for its freight, which had been stated to be the gross revenue of the Chicago, Burlington, & Northern. Figures were submitted to show that the receipts per ton per mile by leading lines in the country—the Pennsylvania, the Lake Shore, the New York Central, the Michigan Central, and the Pittsburgh, Fort Wayne, & Chicago—were much in excess of this, ranging for 1886 from 6.39 to 7.6 mills per ton per mile.

Much other evidence was given, but the points to which it was principally directed sufficiently appear from what is above stated. The evidence showed very conclusively that the rates in force on the Chicago, Burlington, & Northern, between Chicago and its northern termini, were very low, perhaps ruinously so; but it also demonstrated that the managing officers of respondent were chargeable with no small share of responsibility for the unsettled condition of rates in the Northwest.

Briefs were filed in the case on behalf of the respondent, and also on behalf of the Chicago, Milwaukee, & St. Paul Railway Company, supporting the same views. In opposition were filed briefs for the Chicago, Burlington, & Northern Railroad Company and for the Faribault Board of Trade.

The foregoing statement of the case has been made very full, that the position of respondent might be clearly seen and its merits fairly presented. In now entering upon a discussion of the case upon its facts, it is important, first of all, that the exact question which awaits decision should be distinctly brought to the front. Much of the discussion by counsel has apparently assumed that the question chiefly involved was one of reasonable rates, and that, when satisfied in this regard, the Commission might deal with the rates as justice should seem to require. This assumption might be warranted if the authority of the Commission over rates was unlimited, which is far from being the case. All its powers come from the statute, and none can be exercised which are not expressly or by plain implication conferred. It is not uncommon for the Legislature, in the exercise of its unquestionable authority, to prescribe rules of general justice which judicial and administrative tribunals are not at liberty to depart from, even when in particular cases they are found to be productive of hardship. It prescribes such rules because convinced that their operation will commonly be beneficial, and, on the whole, promotive of the general welfare. If they so operate in exceptional cases as to cause hardship, they are not the less law for that reason.

Such a rule prescribed by the supreme legislative authority for the regulation and limitation of railroad rates is now in question. It

is prescribed by § 4 of the Act to Regulate Commerce, which, among other things, provides that "it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of the like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction; the shorter being included in the longer distance." There is a proviso which empowers the Commission, on application in special cases, to relieve a carrier from the operation of this rule; but in all other cases the rule admits of no exception. Wherever, therefore, on any line of railway to which the Act applies, a carrier transports persons or property in the same direction for shorter and longer distances under substantially similar circumstances and conditions, the charge made or compensation received for the shorter haul, if greater than that made or received for a longer which includes it, is illegal unless such a relieving order exists.

The respondent has put out and is enforcing a tariff of rates for the transportation of property, which in a large number of cases makes the greater charge for the shorter haul on the same line and in the same direction. On first-class merchandise transported from Chicago in the direction of St. Paul and Minneapolis, the rate increases with some degree of regularity until it is 60 cents, and this rate is then continued to the last station before reaching St. Paul, when it drops suddenly to 40 cents at that city, and is the same at Minneapolis. At Oneida, half way from Chicago to St. Paul, the rate is 54 cents; and this, in comparison with the St. Paul rate, will sufficiently illustrate the relative inequalities which the new tariff introduces. The general rule of justice which the statute prescribes is thus seen to be unlawfully departed from, unless it is made to appear that the transportation from Chicago to Oneida—taking the single station for illustrative purposes for the sake of brevity—is under circumstances and conditions not substantially similar to those under which the transportation is made by respondent from Chicago to the northern termini of its road. In putting out this tariff, respondent has assumed that dissimilar circumstances and conditions exist in the two cases; and the purpose of the hearing which has been had was to give it the opportunity to point out the supposed differences.

By the evidence brought forward, it was not made to appear that the transportation to Oneida is more expensive than the transportation to St. Paul; and, with the great disparity of distance in its favor, it may well be assumed to be less. Neither was it shown that there are any special difficulties or peculiar circumstances attending the transportation to Oneida that make delivery of Chicago freights at that point in any respect exceptional; it is not even suggested that such is or may be the fact. We are, on the contrary, left to understand, and must assume in disposing of the case, that so far as concerns the mere handling of freights, their transportation and delivery is made at the two stations named, under circumstances and conditions affecting the cost and the val-

ue of the service, which are not substantially dissimilar.

But respondent contends that dissimilar conditions are established at St. Paul to those which exist at Oneida, by the action of the Chicago, Burlington, & Northern Railroad Company. That company forming, with the Chicago, Burlington, & Quincy, a through line from Chicago to St. Paul, offers to the public a 40-cent rate between the two cities. This offer is a controlling circumstance in the situation. Respondent must meet this rate, or it must abandon the Chicago and St. Paul and Minneapolis business to its rival. No such circumstance controls or affects the rates to Oneida and other intermediate stations. Respondent then calls the attention of the Commission to the fact that in the early case, *Re Louisville & N. R. Co.* 1 Inters. Com. Com. Rep. 31 [Inters. Com. Rep. 278], the fact was recognized by the Commission that competition with carriers by water or with other carriers not subject to control under the Act to regulate commerce might make out the dissimilar circumstances and conditions which the Act contemplates; and respondent insists that the competition of carriers which come under the Act, unless it is actually restrained by the Commission, must be just as effective in making out the dissimilar circumstances and conditions as would be the competition of carriers which the Commission has no authority to restrain. It is the unrestrained competition, it is said, affecting the longer haul, and not the shorter, that makes the conditions dissimilar; and counsel remark upon the fact that neither in the Act itself nor in any of the proceedings or discussions which led to its passage was any distinction taken between the competition of carriers who come under the Act and of those who do not. It is therefore contended that the Commission is not warranted in taking any such distinction.

The argument for the respondent begins with the laying down of the following proposition:

"One of two conclusions must be accepted: either—

"First. One of several competing lines cannot, by deliberately making rates which are below the cost of carriage, destructive of all net revenue, destructive of its own property as well as the properties of its rivals, compel its rivals to abandon important competitive business, or adopt over their whole systems such non-productive and destructive rates. Its competitors must be allowed to meet the low rates at terminal competitive points, and maintain reasonable local rates, not necessarily lower than through rates.

"Or—

"Second. Any denial of the above conclusion must be placed on the sole grounds that such competition is subject to the Act of Congress and will be controlled by the Commission. The Commission must take cognizance of such unreasonable and destructive competition, and regulate it under the provision in § 1 of the Act, that all charges shall be 'reasonable and just,' and every 'unjust and unreasonable, charge for such service is prohibited and declared to be unlawful.'"

Respondent then claims to have shown that

the rates made by the Chicago, Burlington, & Northern Railroad Company on business between Chicago and St. Paul and Minneapolis are unreasonable and destructively low, and insists, as it did in the opening argument by its president, that the Commission should compel the rival road to establish reasonably remunerative rates in the place of the unreasonably low rates it now makes. The position of the Chicago, Milwaukee, & St. Paul Railway Company is shown in the closing paragraphs of the brief filed on its behalf:

"If all the lines were permitted to meet the through rate of the Chicago, Burlington, & Northern Railway Company, the purpose of that company in making a through rate lower than any company can willingly adopt for its local intermediate business, and thus monopolizing the through traffic, would be defeated, without subjecting the other companies to disadvantage and loss that is needless and benefits no one. Here is the extraordinary case of a road that has no local business, and makes a through rate lower than is fair or remunerative when applied to all the business of the other roads between the same points, for the purpose of monopolizing all the through business. It is therefore unjust to compel the other roads either to forego the through business or to reduce local rates."

Of the fact stated in this brief, that the Chicago, Burlington, & Northern is without local business, no proof was given to the Commission; but it is not important in the discussion which follows, and will not be further noticed. The tariffs of that company show that no higher rates are charged to intermediate points than to the terminal stations.

In considering the argument made by the respondent and by the Chicago, Milwaukee, & St. Paul Railway Company, it is proper to state in this place that the Commission has never expressed the opinion that the competition of carriers who are under the Act can on no state of facts make out the dissimilar circumstances and conditions which might justify or excuse the greater charge on the shorter haul. The Commission has only gone so far as to say that it must be seldom that such could be the case, thereby recognizing a distinction between the competition of carriers which are, and of those which are not, subject to the Act, but leaving itself entirely at liberty to consider on its merits any case which might subsequently be presented, and which the parties concerned might think to be specially exceptional. We are therefore prepared to consider this case entirely unembarrassed by what has been said in any other case, and to give such judgment upon it as its peculiar facts may seem to require.

First of all, in taking up the case, we direct attention to the claim advanced on behalf of respondent, that the rates made by the Chicago, Burlington, & Northern are unreasonable and unjust, because they are too low to be remunerative, and that they are therefore illegal under the Act which requires all charges to be "reasonable and just," and declares "every unjust and unreasonable charge" to be unlawful.

At the outset it may be pointed out that, with entire propriety, we might dismiss this claim

with the simple remark that no complaint of illegality is made against the Chicago, Burlington, & Northern, and its rates have not been questioned in any such form or manner as would warrant a judgment upon them. That company is not a party to this proceeding. Its officers have appeared on request to give evidence, and its counsel has filed a brief, as have other counsel representing interests that might indirectly be affected by the action taken, and as any citizen who might suppose he was concerned would be permitted to do. But the only party before the Commission is the respondent, and an order adjudging any other party guilty of illegalities would be inadmissible, because entirely wanting in jurisdiction. The rates of the Chicago, Burlington, & Northern are involved in the controversy, but they come in only incidentally. The record presents no issue upon them, and warrants no judgment that would bind the party making them.

But though it is only incidentally that these rates are brought into controversy, yet if any question of law arises upon them which is important to any right of respondent involved in the case, it may be proper, for the purposes of a decision upon such question of law, that the record, by amendment or otherwise, should be put in such form as to admit of the decision being made. To that end the Chicago, Burlington, & Northern Railroad Company might be brought in as a party, and the reasonableness and lawful character of its rates directly put in issue. It is therefore proper to consider now, on the record as it stands, whether, if the railroad company just named were a party to the record, the Commission would have the authority to compel an increase in its rates as respondent contends it should do, in case, on a record presenting the question, they should be found to be unreasonably low.

This question of authority, now for the first time presented to the Commission, is raised upon the express words of the statute, which declare that "all charges shall be reasonable and just." To be so the charges ought to be fair to both parties,—to the carrier as well as to the party it serves; the rights and interests of both should be considered. There is consequently no little force in the claim made by respondent that charges are not reasonable and just when they are so low as to be unremunerative to the carrier,—so low that its action in continuing to make them would lead directly to bankruptcy. Possibly, if the statute were to be interpreted without any aid from its history, and with no other knowledge of its purposes, aims, and ends than such as may be derived from its provisions, a holding that a rate unreasonably low was forbidden might be justified, or at least might be urged upon plausible arguments.

But every statute is to be read in the light of its history and of the evils it was intended to redress. And as matter of public history nothing can be more notorious than that the Act to Regulate Commerce had for its leading and general purpose, to which other purposes were subordinate, to provide effectual securities that the general public, in making use of the means of railroad transportation provided by law for its service, should have the benefits which the law had undertaken to give, but of

which in very many cases it was found the parties entitled to them were deprived by the arbitrary conduct, the favoritism, or the unreasonable exactions of those who managed them. It may be affirmed with entire confidence that the Act was not passed to protect railroad corporations against the misconduct or the mistakes of their officers, or even primarily to protect such corporations against each other. The Act does, indeed, require them to afford reasonable, proper, and equal facilities for the interchange of traffic between their respective lines; but even this requirement was for the public benefit more particularly than for the benefit of the carriers themselves. Everywhere in the Act the primary purpose apparent in its provisions is that individuals dealing in matters of transportation with the carriers regulated by it shall not, in respect to the conveniences the carriers are supposed to offer to the public, be wronged by arbitrary conduct, or by favoritism, or be subjected to extortion. It is to this end that the Act declares that all charges made by the carriers it regulates shall be reasonable and just; and the purpose of the declaration is to establish the rule that the charges shall not be extortionate.

If such was the primary purpose of the statute, as unquestionably it was, then the proper meaning of the term "just and reasonable," as employed in it, is apparent. They were employed to establish a maximum limitation for the protection of the public, not a minimum limitation for the protection of reckless carriers against their own action. That a minimum limitation was not in the mind of Congress we may easily satisfy ourselves by considering what would have been the probable fate of any distinct proposition to confer upon the Commission the power which it is now urged to assume. There is not the least reason to suppose that any such proposition would have been seriously entertained in Congress, or that it could have received any considerable support. It would, on the other hand, in all probability, have been promptly rejected as wholly unnecessary for the protection of those who had complete powers of protection in their own hands, and as being little short of impertinent intermeddling. If such would have been the fate of the proposition expressed in plain terms, then the conclusion is unavoidable that the general terms made use of in the statute do not confer the power the proposition would involve. We cannot, as a matter of construction, deduce from the general terms of a statute a legislative intent which there is no reason to suppose existed in fact, but which, on the other hand, the circumstances all tend to show was not suggested when the law was under consideration, and, if it had been suggested, would have been received with no favor.

While confident in this conclusion, we shall at the same time concede that in the history of railroad competition the respondent finds abundant evidence that in a great many cases railroad companies temporarily establish rates that are not only below a fair compensation for their services, but are so unreasonably low that if persisted in they must be destructive of their own interests as well as of the interests of rivals. It is upon the basis of this unquestion-

able fact that respondent contends that, if the power thus to sacrifice interests is subject to no restraint at the hands of the Commission, then the distinction made by the Commission in the reported case above referred to, between the carriers who are and the carriers who are not subject to the Act, cannot be well founded. Unrestrained competition, it is said, is just as damaging and just as powerful in coercing the action of the parties who are subjected to it, when it is the competition of carriers who come under the Act, as when it is not. This is doubtless true.

But we cannot agree that, because the Commission has no authority to require a carrier to increase the rates it has voluntarily established on its line, the competition of carriers who come under the Act to Regulate Commerce is subject to no more restraint than is that of others. It may perhaps be subject to no restraint directly applied; but many of the requirements of the Act must have an important restraining influence. The obligation all the carriers are under to make to the Commission a complete exhibit of their operations must have at least a conservative tendency; for managers know that if they recklessly engage in destructive competition, the fact they have done so can hardly fail to appear in their annual reports. Then a carrier not subject to statutory control may perhaps sacrifice its rates deliberately for a time in the hope that it may thereby crush or cripple a rival, expecting when that has been accomplished to advance the rates sufficiently not only to pay for the service rendered, but to recoup the losses it has suffered in the destructive warfare. A carrier which is subject to the Act to Regulate Commerce cannot do this. When it engages in reckless or unfair warfare, it will understand that nothing which is lost thereby can be made up by exactions from the public which would be inadmissible if no such losses had been suffered. The carrier will understand, further, that in making exceedingly low rates it is giving the public to understand that those rates are reasonable and remunerative; it is, in effect, saying so to Legislatures and to other public authorities, and thereby doing very much to establish, as against itself, a low standard of rates for all time. Moreover, the carrier that declares a 40-cent rate from Chicago to St. Paul is not too low, but is a fair and reasonable compensation for the service performed on its line, is very likely to have demand made for lower rates to intermediate stations; and it is not easy to see how it would answer the claim that if a 40-cent rate to St. Paul fully pays for the service rendered, the same rate for one third or two thirds the distance must more than pay for the service rendered, and therefore be unjust and unlawful. The same section of the Act which forbids the making of the greater charge for the shorter haul expressly declares that it is not to be construed as authorizing the carrier to charge as much for such shorter haul; and when the charge is challenged the carrier must support it by proof that it is reasonable. It assumes the responsibility of doing this in every instance when it makes charges which are alike for distances that greatly vary.

Other requirements of the law operate as

restraints to a large extent. The long and short haul clause of § 4 makes reductions to competitive points, when they must be followed by reductions to intermediate points, a more serious matter to the roads which come under the Act than to others, and the prohibition against raising rates, except upon ten days' notice; the rule that all reductions must be public and free to all, not as formerly they often were by secret arrangements with leading shippers and favored individuals; the proviso that rates made must not work a preference against localities and among business interests,—are all important; for the carriers subject to the Act must conform to them in whatever competition they see fit to engage in.

It is unfortunately true that the reckless or unfair competition of one carrier may sometimes compel another, whose management would willingly do its business fairly and at remunerative rates, to retire from some lines of business at competitive points; but the course of conduct which compels this is likely to be temporary, and to be persisted in only until the parties guilty of it are brought to more reasonable action by their losses, or by the interference of stockholders, who are not likely to submit quietly to a permanent drain upon their resources from such a cause.

In all that is now said upon this subject, we have in mind only carriers operating in a field of legitimate competition whose business they mutually contend for. A case may be supposed of long circuitous lines formed by a combination of carriers for the purposes of a competition not justifiable on any business or prudential reasons, but wholly illegitimate. But as no such case is presented by the facts before us, we abstain from any discussion of questions it might present.

For the reasons stated, we think we have no occasion for qualifying in this case the language made use of in *Re Louisville & N. R. Co.* We think now, as we said then, that it must be very seldom that the competition of carriers who are subject to the Act to Regulate Commerce can make out the dissimilar circumstances and conditions which are intended by § 4 of the Act.

What is there that is specially exceptional in the case before us? Upon what ground can it be claimed that respondent is so peculiarly situated that it may be warranted in making the greater charge upon the shorter haul, because of the competition of carriers subject to the Act, when such competition in general would not justify it? This is the question respondent has been called upon to answer.

The only answer respondent makes is that one of its rivals and competitors is charging, between the termini of their respective roads, rates so very low that it is impossible to grade down the intermediate rates to the same maximum and at the same time do upon the rates so graded a profitable or even living business. While, therefore, respondent is compelled to meet the rates of its rival at the termini, it claims that it is at the same time compelled by the great law of self-preservation to maintain the higher rates to intermediate stations. The transportation of freights to the termini and to the intermediate stations is for this reason carried on under conditions which differ in vital

particulars. Such is the claim made by the respondent.

If the position is a sound one, it must be the existence of competition, rather than the very low rates, which makes out the dissimilar circumstances and conditions warranting a departure from the long and short haul rule of the statute. The fact that the rival road makes rates which are very low is important only as it enables it to obtain the business; and, as this is the object for which they are made so low, it may be assumed that the competitors in any case will yield in rates at the competitive point to any extent they may deem necessary to that end, unless some controlling reason of policy or of law renders an abandonment of the competitive business preferable. If respondent is right in its views of the law, then it must be perfectly lawful for the carriers of the country at every point of contact or of competition to give rates which pay to such points the bare cost of movement, and then draw their profits exclusively from the higher rates which they impose upon intermediate stations. The Chicago, Burlington, & Northern can at pleasure establish for all its competitors at St. Paul and Minneapolis the dissimilar circumstances and conditions which entitle them to levy greater rates for a transportation of 200 miles than are charged for more than twice the distance; and these extraordinary differences in rates between the towns on all the roads in the Northwest will thereby be legalized.

If this is a correct view of the law, then it must be admitted that one of the leading purposes of the Act to Regulate Commerce is very easily, and may be very generally, defeated. It was unquestionably one of the chief purposes of the Act to preclude the giving of such unreasonable preferences and advantages to particular localities as had been gross and flagrant in many cases before its passage. Section 3 of the Act expressly forbids and makes unlawful any such preferences. Now, no one can question that to charge on a consignment of goods from Chicago to St. Paul but 74 per cent of the charge upon a precisely similar consignment from Chicago to Oneida, one half the distance, is to give a preference to the one town which *prima facie* at least is unjust to the other; and if *prima facie* unjust, it is also *prima facie* undue and unreasonable.

The respondent does not deny the apparent injustice, but contends that the rate from Chicago to St. Paul is unreasonably and unjustly low, made so under compulsion, and only because the perverse and unreasonable course of the Chicago, Burlington, & Northern renders it unavoidable. The charge made to Oneida, on the other hand, is claimed not to be too high; it is no more than a fair compensation for the service rendered; it is perfectly reasonable in and of itself; it is a fair rate, and therefore fault cannot justly be found with it by the people who pay it. It is no injustice to charge the people at Oneida fair rates, and no undue preference of another place where the charging of fair rates by reason of the competition is out of the question. This is the contention on which the rates are sought to be supported.

On the hearing, the president of the respondent, and other witnesses produced, were asked to give a definition of fair rates; to state the

elements that were to be taken into account in determining what fair rates should be. The inquiries did not elicit very satisfactory responses; witnesses were very free to say that the 40-cent rate, Chicago to St. Paul and Minneapolis was unreasonably low, but they were not prepared to give the Commission much aid in determining what a reasonable rate should be.

The Commission is of the opinion that the phrase "rates reasonable in and of themselves," which is often made use of in similar cases to the present, is very likely to be misleading. It is a phrase which seems to imply that the particular rates may be considered by themselves as if they were and could be affected by no others, and, applying the phrase to the Oneida rates, that their reasonableness was to be determined without taking any others into account. But it is not the theory of the Act to Regulate Commerce that the reasonableness of rates can thus be separately and independently determined. On the contrary, it is assumed in the Act that persons, corporations, and localities are interested, not only in the rates charged to them, but in the rates which are charged to others also; and while the Act does not require all rates to be proportional, it nevertheless makes the element of proportion an important one when the rates for any locality are to be determined. No rates can therefore be reasonable in and of themselves, within the contemplation of the Act, which are made regardless of proportion. A 54-cent rate, Chicago to Oneida, may be perfectly just and reasonable "in and of itself" when the St. Paul rate is 60 cents, but be plainly unjust and unreasonable when the St. Paul rate is reduced to 40 cents. When the St. Paul rate is reduced a new element is brought into the consideration of the Oneida rate,—an element that must certainly have some influence; it cannot be ignored altogether, as it has been in this instance. On this point we refer to what is said in *Boards of Trade Union, etc. v. Chicago, Milwaukee, & St. Paul Railway Co.* 1 Inters. Com. Rep. 215 [1 Inters. Com. Rep. 608], and *Raymond v. Same Defendant*, Id. 230 [627], where relative rates were somewhat considered. We do not think, as the case stands before us, that the Oneida rates appear to be "in and of themselves" in any legal sense fair rates. The disparity between them and the rates for the greater distance makes them *prima facie* unjust and unreasonable.

But neither do we think that, within the contemplation of the Act to Regulate Commerce, respondent has shown that the transportation to Oneida is under dissimilar circumstances and conditions to the transportation to its northern termini. The showing is merely that a perverse rival makes unreasonably low rates to such termini. But if this makes out the dissimilar circumstances and conditions intended by the Act, then any one railroad manager in the Northwest may at pleasure, by a foolish or a perverse tariff sheet, give to one or more points of railroad competition a preference and advantage over all others, which would defeat one of the leading purposes had in view in adopting the Act. The Act itself would therefore, as to one of its leading purposes, be dependent on the will of any single railroad man-

ager who from policy or perversity may see fit to nullify it.

It may be quite true, as respondent contends, that unless other carriers are suffered to meet the competition of a rival at an important point without reducing intermediate rates, they will suffer unreasonably, perhaps destructively, in their resources. But this question is not to be decided on the interest of the carriers only; the communities which the Act undertakes to protect are to be regarded also. The Act has doubtless conferred upon the Commission a greater power to protect localities against the carriers than it has to protect the carriers against themselves or against each other. It was probably thought in Congress that with the liberty of action left to the carriers they would not needlessly rush to destruction. The assumption may not prove to be well founded; but nothing seems plainer than that, under the law as it stands, the protection of carriers against destructive rivalry, and rates that lead directly to bankruptcy, must be found chiefly in prudent management, in the cultivation of reasonable relations among themselves, in mutual forbearance, and the application of a sense of justice to their mutual dealings and in their rivalries. If they deliberately proceed to destroy each other, the law must take care that in doing so they injure as little as possible individuals and communities dependent upon them for transportation facilities.

The proceedings on the hearing of this case showed a want of harmony among railroad managers that is lamentable, because it is every way harmful. It is harmful most particularly to railroad property, but it is harmful to the general public also, because it produces a general unsettling of rates. Every change in rates affects values; it disturbs trade and alters to some extent the value of contracts. The general public is therefore interested in rates being steady; and a cut in rates for a time, of which a few vigilant dealers may take advantage, may, when all its effects are taken into consideration, be found to be more harmful than beneficial. But if the benefits for the time are undoubted, a cut below living rates, followed by an advance, is always likely to beget a sense of wrong in the community, which will do much to establish and perpetuate a prejudice against railway management. And a prejudice thus created is not directed solely against the party who may be responsible for the action; it extends to the whole body of railway managers. The public regards them as a class, and perhaps, in its legislation, punishes the class for the misbehavior of individuals. This is a fact which cannot be ignored; and it is one which ought to have more influence in restraining mischievous railroad contentions than it seems to have had hitherto.

The effect of the doctrine contended for on the part of respondent is that the railroad companies, if they please to do so, may at will build up a single point in the Northwest to a preponderating and conclusive ascendancy at the expense of all others. Giving it rates which in proportion are less than half what other localities must pay may fix that ascendancy with little regard to natural or other advantages. Oneida, if its natural advantages were equal to those of St. Paul, would be

doomed to perpetual obscurity if it must begin its rivalry with such enormous difference in rates as respondent has now established. This is very plain.

The Act to Regulate Commerce in the interest of justice and relative fair dealing forbids the charging on transportation from Chicago to Oneida of higher rates than are charged from Chicago to St. Paul and Minneapolis, the greater distance, unless the carriage to the one place is under dissimilar circumstances and conditions to those which attend the carriage to the others. Nobody points out any dissimilar circumstances or conditions, except that at one place there is railroad competition and at the other there is not. If this fact of competition makes out the dissimilar circumstances and conditions intended by the statute, then the laying down of the general rule prescribed by § 4 was an absurdity. As is said above, a railroad manager may disregard it at pleasure, and his doing so is warrant for every competitor to follow the example. But the competitors need no example, they have the same right to begin the cut that they have to follow it. Respondent may at pleasure, if its position is sound, charge more to Gretna, 20 miles, than to Dubuque, ten times as far, because at the latter place it has competition and at the former not.

But this would not be the sort of fair dealing and justice as between localities which the Act to Regulate Commerce seeks to establish. It is very true, as was said on respondent's behalf, that that Act intended to preserve competition, not to annihilate it; but it did not intend that competition should be allowed to run riot, to the destruction of business interests or of localities. Competition formerly prospered very largely on rebates and personal preferences, which are now forbidden; but forbidding these is not supposed to put upon competition any improper restraint, or any that is not perfectly consistent with reason. So competition also prospered on favoring the large towns at the expense of the small; the long and short haul clause of § 4 of the Act regulates this in the interest of relative justice. It does not preclude competition, but seeks to keep it within something like reasonable bounds. Respondent may reduce its rates as much as it pleases at terminal stations, but it must do so subject to the rule which the statute prescribes, that at intermediate stations they shall be in the aggregate no higher, and shall also be reasonable and just. Nothing short of this can prevent the reductions at the termini being harmful to all stations which do not share in them.

It is not unlikely that this conclusion may to some extent work a hardship to respondent in view of the excessive competition to which it is now exposed. If so, it is to be regretted; but it is neither lawful nor just that respondent shall relieve the hardship to itself by imposing excessive rates upon the people at its local stations. That is what it is now doing. The rates to local stations are excessive because they are greater than to the termini, and the statute does not under the circumstances admit of their being so; but they are unjust also. The relative inequality makes them unjust, because it puts all business at the local stations at a great and unreasonable disadvantage, as

compared to the business at the terminal stations which are given rates that are so much more favorable.

The Commission feels the full force of what is said on behalf of respondent, that an enforced modification of its rates will affect all rates in the Northwest, and will result in a great many inequalities, and work much injustice. To some extent, unquestionably, this is true. Regarding these results, it may be said:

1. They are results that are unavoidable, because they follow from the necessary conformity of respondent's action to the rule the statute prescribes. The Commission does not make the law; it simply calls upon respondent to observe it.

2. The statutory rule is intended to be general, though admitting of exceptions. The more general it can be made the more just will it be. Every exception has an appearance of injustice, and is therefore to be avoided if possible. To the man who is not an expert it always seems wrong that more should be charged for the transportation of the same sort of merchandise for the shorter than for the longer distance over the same line in the same direction; and it is sound policy in railroad managers to limit the cases as much as possible in which it will be done. But the position taken by the respondent converts the exception into the rule. There is competition at every important point in the country, and at thousands of unimportant points as well. At every one of these, if the position of respondent is sound, each competing railroad manager by his zeal for business, or perhaps by less worthy motives, will create for his competitor the dissimilar circumstances and conditions which entitle him to disregard the general rule which the statute has prescribed in the interest of justice. We cannot accept this construction of the provision in question, for the reason, already stated, that we think that in effect it nullifies it.

3. However great and numerous may be the inequalities which, as respondent contends, are likely to result from a rigid application on its line of the general rule of the long and short haul clause, it is not, in our opinion, at all probable that they will exceed, either in number or extent, those which now exist under the violent competition which prevails in the Northwest. The exact opposite ought to be the case; and there is every reason to believe it will be when the rule of the statute is accepted as imperative, and railroad managers in good faith and with mutual forbearance apply themselves to the task of making it as little harmful as possible.

The Commission therefore finds and adjudges that the transportation of freights by respondent upon its road from Chicago to St. Paul, Minneapolis and Minnesota Transfer, and from such northern termini to Chicago, is made under substantially similar circumstances and conditions to those under which like freights are transported on the same line from the same initial point or points in the same direction to intermediate stations, and, such being the case, that the greater charges which respondent makes to such intermediate stations are illegal; and order will be entered that respondent cease and desist from making such illegal charges.

Commissioner Schoonmaker reserves any

expression of opinion on the question discussed, of the power of the Commission to order the correction of a rate unjust and unreasonable because manifestly too low for the safe and proper conduct of the business, or otherwise in contravention of law.

David Hostetter and Milton L. Meyers, Partners Engaged in Business as HOSTETTER & CO.

v.

The PENNSYLVANIA COMPANY, a Corporation of the Commonwealth of Pennsylvania, Operating the Pittsburgh, Fort Wayne, & Chicago Railroad, and other Railroads, and their Branches; Baltimore & Ohio R. Co.; Lake Shore & Michigan Southern R. Co.; Pittsburgh & Lake Erie R. Co.; New York Central & Hudson River R. Co.; Allegheny Valley R. Co.; and Pennsylvania R. Co.,—all of whom have agencies in Pittsburgh, Pa.

(No. 148.)

COMPLAINT filed September 12, 1888, charging the exaction of unjust rates for the transportation of "Hostetter's Stomach Bitters."

To the *Honorable* Thomas M. Cooley, William R. Morrison, Augustus Schoonmaker, Aldace F. Walker, and Walter L. Bragg, members of the Interstate Commerce Commission:

The petition of David Hostetter and Milton L. Meyers, partners engaged in business as Hostetter & Co., respectfully represents:

1. That your petitioners are citizens of the United States, residing in the city of Pittsburgh, Pennsylvania, and extensively engaged in the manufacture and sale of a certain proprietary medicine known to druggists and dealers as Hostetter's Stomach Bitters; that they and their predecessors (said David Hostetter and George W. Smith, the latter now deceased) have been so engaged in said city for more than thirty years last past; that said Stomach Bitters are by your petitioners, and were by their predecessors, put up in square bottles, each bottle holding one and a half pints, and securely packed in square boxes containing one dozen bottles each; that said boxes, when so packed, weigh about 35 pounds each, and are shipped by your petitioner to all parts of the United States and to other countries, said shipments over defendants' railroads amounting to between 70,000 and 80,000 boxes annually, upon which your petitioners pay the freight.

2. Your petitioners further state that said shipments are by them made in carload lots of about 700 boxes each, and also in less than carload lots, as occasion requires, and that in all cases your petitioners sign releases of all claims for "all shortage and damage in packages;" that, unless said release was executed and delivered, said defendant companies have refused, and do refuse, to transport your petitioners' goods unless paid double the ordinary rate, being classified as "C. R. D. 1," as your petitioners are prepared to show.

3. Your petitioners further state that prior to the enactment of the Interstate Commerce Law

said Stomach Bitters were by defendant companies placed "4th class" when in carload lots, and "3d class" when in less than carload lots; but since that time they have changed the classification and placed said Stomach Bitters wholly in "class 1," and advanced the rate to an unfair and unreasonable extent, and make no reduction for full carload over small shipments, the rate or charge being now the same for each. Prior to April, 1887, the rate to Chicago by the Pittsburgh, Fort Wayne, & Chicago, paid by your petitioners, was 25 cents per hundred, which has been since that time advanced to 42½ cents, in less than carload lots; to New York, in carload lots, 35 cents which is advanced to 45 cents; to St. Louis 38 cents, advanced to 58½ cents in less than carload lots; San Francisco, in carload lots, 83½ cents, advanced to \$1.40 (the same rate now, namely \$1.40, is also charged in carload shipments from New York to San Francisco, the distance being 550 miles greater than from Pittsburgh to San Francisco); New Orleans, in less than carload lots, 60 cents, advanced to \$1.05; San Antonio and Waco, Texas, in less than carload lots \$1.33, advanced to \$1.50; Dallas \$1.32, advanced to \$1.50; Cincinnati, in less than carload lots, 16 cents, advanced to 37 cents, more than double the rate formerly charged; Cleveland, in less than carload lots, 16 cents, advanced to 25 cents; Peoria, Illinois, 31 cents, advanced to 48½ cents,—and to all points enormous advances are exacted.

4. Your petitioners further state that said charges for transportation, which are now, and have been since April 5, 1887, exacted by defendants, are excessive, unjust, and unreasonable; that the cost of bars, ties, and other railroad materials used in maintaining, and the expense of operating, defendants' several lines of roads, have not become greater than prior to April 5, 1887; that when shipments of a carload entire is made, said defendants, and each of them, are relieved of all the expense of loading and unloading, and other expenses, and the rate should consequently be less than when a small shipment is made, which necessarily requires the employment of labor to load and to unload, a delay, also, and the employment of clerks, agents, etc.; and that also, by reason of the payment of the freight by your petitioners, they are justly and equitably entitled to have their goods replaced in the classes occupied prior to 1887, and transported at the same rate; the rates now charged being unfair, unreasonable, and an unjust discrimination against your petitioners, as they are informed and believe, and expect to be able to show.

5. Your petitioners further state that the said advance in rate from the price or charge formerly paid is most unreasonable and unjust, and contrary to the provisions of § 1 of "An Act to Regulate Commerce," and as well, also, contrary to the provisions and requirements of §§ 2 and 3 of said Act, as your petitioners are advised and believe.

6. Whereupon your petitioners show that they are greatly injured and damaged by the acts of defendants, their agents and servants, and pray that the evil complained of may be inquired into and remedied in accordance with the provisions in said Act made and

provided, and your petitioners will ever pray,
etc.

David Hostetter,
A. H. Clarke, Milton L. Meyers.
Solicitor for Complainants.

SEPARATE ANSWER OF PITTSBURGH & LAKE
ERIE R. R. CO.

(Filed October 10, 1888.)

To the Honorable the Interstate Commerce
Commission:

The separate answer of the Pittsburgh & Lake
Erie Railroad Company to the complaint of
Hostetter & Company respectfully represents:

1. That it believes the first paragraph of pe-
tition to be true.

2. That it believes the second paragraph to
be true.

3. That it is true that since April 4, 1887, the
said Stoniach Bitters are placed in Class 1 of
classification of freight used by this respondent,
and that the rate is the same for carload
lots as for less than carload lots. It denies,
however, that the rates charged have been ad-
vanced to an unfair or unreasonable extent,
or that to all points enormous advances are ex-
acted. So far as said petition sets forth the
rates charged before April 4, 1887, it respect-
fully submits that the same is not relevant, and
that under the rules adopted by your Honor-
able Commission, it is not required to answer
the allegations of said petition in relation there-
to. It does not admit the truth or correctness
of said allegations, and should your Honorable
Commission deem the same relevant, this res-
pondent demands proof thereof.

4. Respondent denies the allegations of the
fourth paragraph of said petition, excepting
the allegation "that the cost of bars, ties, and
other railroad material used in maintaining,
and the expense of operating defendants' lines
of roads have not become greater than prior
to April 5, 1887," which it submits is not rel-
evant, but which it does not admit, and if
deemed relevant, demands proof thereof. It
especially does not know, and does not admit
the truth thereof, so far as it relates to the other
respondent companies in this case.

5. Respondent denies the fifth paragraph of
said complaint.

6. Respondent denies that complainants are
entitled to any relief as set forth in the sixth
paragraph of said complaint.

7. For further answer, respondent says that
the present classification of, and rates now
charged for the transportation of, petitioners'
goods, is similar to that of other similar articles,
and that no discrimination has been made or
now exists, either in classification of, or rate
charged for, the transportation of petitioners'
goods.

[Signed, etc.]

Mary O. Stone and Thomas Carten, Compos-
ing the Firm of STONE & CARTEN,

v.

DETROIT, GRAND HAVEN, & MIL-
WAUKEE R. CO.

(No 149.)

COMPLAINT filed September 24, 1888, alleg-
ing discrimination in favor of Grand Rap-
ids, and against Ionia, Michigan, in delivering

goods at the doors of consignees in Grand Rap-
ids, but only at the freight house in Ionia,
and compelling Ionia consignees to pay an
additional charge for delivery at their doors.

The petition of Mary O. Stone and Thomas
Carten, a copartnership doing business under
the name of Stone & Carten, would respect-
fully show unto your Honorable Commission as
follows, viz.:

1. That your petitioners are engaged in the
sale, at retail, of goods, wares, and merchan-
dise in the city of Ionia, county of Ionia, and
State of Michigan, and purchase said goods,
wares, and merchandise at Philadelphia, New
York, and points east of Detroit.

2. That the Detroit, Grand Haven, & Mil-
waukee Railway Company, the defendant
herein, is a corporation duly incorporated un-
der the laws of the State of Michigan, and is a
common carrier engaged in the transportation,
for hire, of passengers and property, partly by
railroad and partly by water, and both being
under a common control and management for
a continuous carriage or shipment from and to
the city of Detroit, in the State of Michigan,
westerly by railroad, through and across said
State, to the city of Grand Haven, in said Stat-
of Michigan; thence by water or line of steam
boats westerly across Lake Michigan, to and
from Milwaukee, in the State of Wisconsin;
and that it is, as above stated, a continuous
line to and from said terminal points, as well
as between and through the various stations
on its said line, including Grand Rapids and
the city of Ionia (the place of business of your
petitioners); and that it is subject to the pro-
visions of the "Act to Regulate Commerce,"
approved February 4, 1887.

3. That the said Detroit, Grand Haven, &
Milwaukee Railway Company, for its services
as such common carrier in carrying merchan-
dise of all kinds and classes from Detroit to
stations on its line of transportation, as above
indicated, has established and published a tar-
iff of freights and charges which makes, on all
freights from Philadelphia, New York, and
all other points east of Detroit, the same rates
for your petitioners at Ionia that are charged
for the same class of freights to the merchants
of Grand Rapids.

4. That shipments of freights from Phila-
delphia, New York, and points east of Detroit,
transported over the line of the defendant rail-
way company, pass through Ionia before
reaching Grand Rapids; that it is a shorter
distance from Detroit to Ionia than from De-
troit to Grand Rapids, and over the same line
and in the same direction, the shorter being
included in the longer distance.

5. That the said defendant railway company,
as your petitioners are informed and believe,
while openly charging your petitioners no
more for the transportation of freights from
Philadelphia, New York, and points east of
Detroit, than is charged for similar freights so
consigned to the merchants of Grand Rapids,
secretly discriminates in favor of Grand Rap-
ids merchants, and against your petitioners,
by delivering all such freights at the ware-
house in Ionia, and at the doors of the con-
signees at Grand Rapids, thus charging your
petitioners and the merchants of Ionia more
on freights consigned from Philadelphia, New

York, and points east of Detroit, delivered at their doors, than the said defendant railway company charges on similar shipments delivered to merchants doing business at the city of Grand Rapids. That the said defendant railway company, as a means of transportation of such freights, and as an instrumentality thereof, employs, under contract, a system of drays, which take the freight at the warehouse at Grand Rapids and delivers the same to the merchants of that city free of charge, while the same service costs your petitioners and the merchants of Ionia from 10 to 33 per cent of the freight charges, as aforesaid, in addition thereto; so that your petitioners and the merchants of Ionia are compelled to pay for transportation from Philadelphia, New York, and points east of Detroit from 10 to 33 per cent more than is charged for transportation by the defendant railway company for similar shipments to the merchants of Grand Rapids.

6. That the discrimination complained of is in violation of §§ 2, 3, and 4 of the Act to Regulate Commerce, in this, to wit: (a) in charging, collecting, and receiving from your petitioners and the merchants of Ionia a greater compensation for service rendered in the transportation of property from Philadelphia, New York, and points east of Detroit than the said defendant corporation charges, demands, or receives from the merchants of Grand Rapids for the like service of transportation of property under substantially similar circumstances; (b) in giving an undue and

unreasonable preference and advantage to the merchants of Grand Rapids, and, to the same extent, subjects your petitioners and the merchants of Ionia to undue and unreasonable prejudice and disadvantage; and (c) in charging more for a shorter than for a longer distance over the same line and in the same direction, the shorter being included in the longer distance.

7. Your petitioners further show that they have not brought any suit in their behalf for the money of the damages for which the said defendant railway company may be liable under the provisions of said Act, but have elected to adopt this procedure as the sole means of obtaining relief.

8. Your petitioners therefore pray that an investigation of these charges may be made; and, if the facts are found to sustain them, that the said Detroit, Grand Haven, & Milwaukee Railway Company may be ordered to discontinue the free draying of freights for the merchants of Grand Rapids on merchandise consigned from Philadelphia, New York, and points east of Detroit; or to render like service to your petitioners and the merchants of Ionia; or for such other or further relief as may be necessary to carry into effect the true intent and meaning of said Act, and to which your petitioners may be entitled.

Thomas F. McGarry,
Petitioners' Solicitor,
Ionia, Michigan.

UNITED STATES SUPREME COURT.

PEOPLE OF THE STATE OF CALIFORNIA, *Plffs. in Err.*,

v.

CENTRAL PACIFIC RAILROAD COMPANY.

SAME, *Plffs. in Err.*, *v.* SOUTHERN PACIFIC RAILROAD COMPANY.

SAME, *Plffs. in Err.*, *v.* NORTHERN RAILWAY COMPANY.

SAME, *Plffs. in Err.*, *v.* CALIFORNIA PACIFIC RAILROAD COMPANY.

SAME, *Plffs. in Err.*, *v.* CENTRAL PACIFIC RAILROAD COMPANY.

SAME, *Plffs. in Err.*, *v.* CENTRAL PACIFIC RAILROAD COMPANY.

(From Lawyers' Ed. U. S. Reports, Bk. 32.)

*1. By the Constitution of California two modes of **assessment for taxation** are prescribed; one, by a State Board of Equalization; the other, by county boards and local assessors. All property is directed to be assessed in the county, city, etc., in which it is situated, except that the franchise, roadway, roadbed, rails, and rolling stock of any railroad operated in more than one county are to be assessed by the state board and apportioned to the several counties, etc. By an Act of the Legislature the state

board is required to include in their assessment **steamers engaged in transporting passengers and freights across waters which divide a railroad**. This Act was held by the Supreme Court of California, in *San Francisco v. Central Pac. R. R. Co.* 63 Cal. 469, to be contrary to the Constitution; and steamboats were held to be **assessable by the county board**, and not by the state board. This court, following that decision and that of *Santa Clara County v. Southern Pac. R. R. Co.* 118 U. S. 394 [30:118], holds that the **assessment of the steamers of a railroad company by the state board is in violation of the Constitution of California, and void**, and, being inseparably blended with the other property assessed, it makes the **whole assessment void**.

2. The State Board of Equalization of California having included in their assessment all the franchises of a railroad company, amongst which were franchises, conferred by the United States, of constructing a railroad from the Pacific Ocean across the State as well as across the Territories of the United States, and of taking toll thereon,—*Held*, that the **assessment of these franchises was repugnant to the Constitution and laws of the United States and the power given to Congress to regulate commerce among the several States**.

3. **Franchises** conferred by Congress cannot, without its permission, be **taxed** by the States.

4. Congress has authority, in the exercise of its **power to regulate commerce among the several States**, to construct or authorize individuals or corporations to construct, railroads across the States and Territories of the United States.

(Argued Jan. 11, 12, 13, 1888. Decided April 30, 1888.)

IN ERROR to the Circuit Court of the United States for the Northern District of California, to review judgments in favor of defendants, Railroad Companies, in actions to recover taxes. *Affirmed*.

The facts are fully stated in the opinion.

Messrs. J. M. Wilson, and George A. Johnson, Atty-Gen. of California, and S. Shellabarger, for plaintiffs in error:

The State has the right not only to tax according to its discretion, but also to classify property for assessment and taxation.

Union Pac. R. R. Co. v. Peniston, 85 U. S. 18 Wall. 5 (21:787); *Williams v. Albany County*, 122 U. S. 163, 164 (30:1089); *Kentucky R. R. Tax Cases*, 115 U. S. 321 (29:414); *State R. R. Tax Cases*, 92 U. S. 611 (23:672).

This power of classification is not one that is unlimited.

Cooley, Const. Lim. 175; *Stuart v. Palmer*, 74 N. Y. 189; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 657, 658 (7:553); *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43 (3:650); *Von Hoffman v. Quincy*, 71 U. S. 4 Wall. 550 (18:408); *Sinking Fund Cases*, 99 U. S. 719 (25:501).

The assessment is not an attempt to take the property of the defendant without "due process of law."

State R. R. Tax Cases, 92 U. S. 575 (23:663); *McMillen v. Anderson*, 95 U. S. 37 (24:335); *Davidson v. New Orleans*, 96 U. S. 97 (24:616); *Kentucky R. R. Tax Cases*, 115 U. S. 331 (29:416).

There was notice in the State Constitution that this property would be assessed. The Legislature made provision for such assessment, and for hearing.

Here is not only notice to the Company, but an actual appearance by the Company before the board; this is notice,—"due process of law."

Does the Fourteenth Amendment affect this case?

Strauder v. West Virginia, 100 U. S. 306 (25:665); *Ex parte Virginia*, Id. 344 (25:678); *Elk v. Wilkins*, 112 U. S. 94 (28:643); *Ins. Co. v. New Orleans*, 1 Woods, 87; *Santa Clara County v. Southern Pac. R. R. Co.* 118 U. S. 396 (30:118); *Philadelphia Fire Asso. v. New York*, 119 U. S. 121 (30:347).

Laws which have received judicial sanction as valid laws must perish if the position of the defense is sustained.

Commonwealth v. People's Sav. Bank, 5 Allen, 428; *Illinois Cent. R. R. Co. v. McLean County*, 17 Ill. 291; *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 366; *Vicksburg, S. & P. R. R. Co. v. Dennis*, 116 U. S. 665 (29:770); *Tennessee v. Whitworth*, 117 U. S. 129 (29:830); *Ruggles v.*

Kimball, 12 Mass. 337; *Boody v. Watson*, 1 New Eng. Rep. 2, 63 N. H. 320; *Ramsey County v. Chicago, M. & St. P. R. Co.* 33 Minn. 537; *Nassau-Gaslight Co. v. Brooklyn*, 89 N. Y. 409.

This case is not distinguishable from *Thomson v. Union Pac. R. R. Co.* 76 U. S. 9 Wall. 579 (19:792); and *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 (21:787); *U. S. v. Union Pac. R. R. Co.* 98 U. S. 619 (25:156).

A railroad cannot be regarded as mere land; its value depends upon the whole line as a unit.

Union Pac. R. Co. v. Cheyenne, 113 U. S. 517 (23:1099); *San Mateo County v. Southern Pac. R. R. Co.* 13 Fed. Rep. 725.

Railroad property should be assessed as a unit.

Porter v. Rockford, R. I. & St. L. R. R. Co. 76 Ill. 584, 595; *Cincinnati, N. O. & T. P. R. R. Co. v. Commonwealth*, 81 Ky. 492; 1 *Desty*, Tax. pp. 392, 393; *Pacific Hotel Co. v. Lieb*, 83 Ill. 606.

So long as the State does not violate the Constitution of the United States, this court cannot afford no relief against State taxation.

Kelly v. Pittsburgh, 104 U. S. 79 (26:658); *State R. R. Tax Cases*, 92 U. S. 575 (23:663); *Kennard v. Louisiana*, Id. 480 (23:478); *Davidson v. New Orleans*, 96 U. S. 97 (24:616); *Kirtland v. Hotchkiss*, 100 U. S. 491 (25:558); *Missouri v. Lewis*, 101 U. S. 22 (25:989); *German Nat. Bank v. Kimball*, 103 U. S. 732 (26:469).

Defendants are not denied the equal protection of the laws.

Central Pac. R. R. Co. v. State Equalization Board, 60 Cal. 59; *Post v. Kendall County*, 105 U. S. 669 (26:1205); *Beckman v. Skaggs*, 59 Cal. 541; *Stanley v. Albany County*, 121 U. S. 545, 550 (30:1002, 1003); *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 30 (21:791); *Kentucky R. R. Tax Cases*, 115 U. S. 336 (29:418); *Delaware R. R. Tax*, 85 U. S. 18 Wall. 231 (21:896); *Chicago, B. & Q. R. R. Co. v. Iowa*, 94 U. S. 163 (24:95).

Apportionment of taxation is purely a legislative function.

Milwaukee & M. R. R. Co. v. Waukesha County, 9 Wis. 431, note; *Johnson v. Roberts*, 102 Ill. 655; *People v. Brooklyn*, 4 N. Y. 419; *State v. Ogden*, 10 La. Ann. 402; *New Orleans v. Kaufman*, 29 La. Ann. 283; *State v. Lathrop*, 10 La. Ann. 402; *Missouri River Ft. S. & G. R. R. Co. v. Morris*, 7 Kan. 210; *Kittanning Coal Co. v. Commonwealth*, 79 Pa. 104, 105; *Vasser v. George*, 47 Miss. 713; *Woodbridge v. Detroit*, 8 Mich. 274; *Waring v. Savannah*, 60 Ga. 97; *Athens v. Long*, 54 Ga. 320; *Gatlin v. Tarboro*, 78 N. C. 119; *Burr. Tax*, § 77, pp. 147-159.

The absence of a provision in the State Constitution for an opportunity for parties to be heard in defense of their rights before the State Board of Equalization is not in violation of the Fourteenth Amendment to the Federal Constitution.

Beers v. People, 83 Ill. 488; *Hallo v. Helmer*, 12 Neb. 93; *Dundy v. Richardson County*, 8 Neb. 508; *Gillet v. Lyon County Treasurer*, 30 Kan. 166; *McMillen v. Anderson*, 95 U. S. 37, 41 (24:335); *Cooley*, Tax. 238, 246, 169-170; *State v. Runyon*, 41 N. J. L. 98; *Kelly v. Pittsburgh*, 104 U. S. 79 (26:658); *State R. R. Tax Cases*, 92 U. S. 575 (23:663); *Kennard v. Louisiana*, Id. 480 (23:478); *Davidson v. New*

Orleans, 96 U. S. 97 (24:616); *Kirtland v. Hotchkiss*, 100 U. S. 491 (25:558); *Missouri v. Lewis*, 101 U. S. 22 (25:989); *German Nat. Bank v. Kimball*, 103 U. S. 732 (26:469).

The claim of a federal franchise.

Thomson v. Union Pac. R. R. Co. 76 U. S. 9 Wall. 587 (19:796); *Huntington v. Central Pac. R. R. Co.* 2 Sawy. 504; *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 34 (21:792).

What is a special law within the meaning of the constitutional provision?

Hingle v. State, 24 Ind. 34; *Heridia v. Ayres*, 12 Pick. 344; *Potter's Dwarrr*, Stat. 53; *Toledo, L. & B. R. Co. v. Nurdyke*, 27 Ind. 95; *Longworth v. Evansville*, 32 Ind. 322; *McRoberts v. Washburne*, 10 Minn. 23; *Von Phul v. Hammer*, 29 Iowa, 222; *State v. Squires*, 26 Iowa, 340; *Brown v. State*, 23 Md. 503; *State v. Baltimore County*, 29 Md. 516; *State v. Boone County Ct.* 50 Mo. 317; *People v. Bowen*, 30 Barb. 24; *State v. Hitchcock*, 1 Kan. 178.

Messrs. **George F. Edmunds, William M. Everts, Creed Haymond and Harvey S. Brown**, for defendant in error:

The Central Pacific Railroad Company is one of the means and instrumentalities employed by Congress to carry into operation the powers granted to the General Government. A tax upon its franchises is, within the meaning of all the authorities, a tax upon the means and instrumentalities of the General Government. Without the express consent of Congress no State can impose such a tax.

Union Pac. R. R. Co. v. Myers, 115 U. S. 1 (29:319); *U. S. v. Union Pac. R. R. Co.* 91 U. S. 79 (23:228); *Wiseman v. McNulty*, 25 Cal. 239; *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 421 (4:605); *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5, 32 (21:787, 792); *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 738, 862, 863 (6:204, 233, 234); *Weston v. Charleston*, 27 U. S. 2 Pet. 449, 466 (7: 481, 487); *Buffington v. Day*, 78 U. S. 11 Wall. 127 (20: 126); *Wood v. Truckee Turnpike Co.* 24 Cal. 486; *Thomas v. Armstrong*, 7 Cal. 286; *Munroe v. Thomas*, 5 Cal. 470; *Van Brocklin v. Tennessee*, 117 U. S. 151 (29:845); *Philadelphia & S. Mail Steamship Co. v. Pennsylvania*, 122 U. S. 335 (30:1201).

The Constitution and laws of California, in respect to the taxation of railway corporations, are in violation of the Fourteenth Amendment to the National Constitution, in so far as they require the assessment of their property at its full money value, without making deduction for mortgages covering the property; thus imposing upon defendant unequal burdens, and, to that extent, denying to it the equal protection of the law.

Ah Koe v. Nunan, 5 Sawy. 557; *Virginia v. Rives*, 100 U. S. 318 (25:669); *Ex parte Virginia*, Id. 339, 346 (25:676, 679); *Campbell v. Morris*, 3 Harris & McH. 554; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Ward v. Morris*, 4 Harris & McH. 338; *Wiley v. Parmer*, 14 Ala. 632; *Crandall v. State*, 10 Conn. 343; *State Bank v. Cooper*, 2 Yerg. 599; *Devine v. Cook County*, 84 Ill. 592; *Citizens Sav. & Loan Asso. v. Topeka*, 87 U. S. 20 Wall. 662 (22:461); *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627 (7:542).

The power to alter, amend or repeal is not unlimited; sheer oppression and wrong cannot

be inflicted under the guise of an amendment or alteration.

Shields v. Ohio, 95 U. S. 324 (24:359); *Sinking Fund Cases*, 99 U. S. 721 (25:502); *New Jersey v. Yard*, 95 U. S. 104 (24:352); *Miller v. New York & E. R. R. Co.* 21 Barb. 518; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 175 (24:98); *Chicago, B. & Q. R. R. Co. v. Iowa*, Id. 155 (24:94); *Dodge v. Woolsey*, 59 U. S. 18 How. 360 (15:412); *Sage v. Dillard*, 15 B. Mon. 340; *Commonwealth v. Essex Co.* 13 Gray, 239; *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43 (3:650).

The assessment is void because it includes property which the State Board of Equalization had no jurisdiction to assess.

San Francisco v. Central Pac. R. R. Co. 63 Cal. 467; *Santa Clara County v. Southern Pac. R. R. Co.* 118 U. S. 413 (30: 124).

The taxing power has limitations inherent in the very subject itself.

Cooley, Const. Lim. 36, 37; *Citizens Sav. & Loan Asso. v. Topeka*, *supra*; *Ang. & Ames, Corp.* § 436; 2 Kent, 331, 332; 1 Potter, Law of Corp. § 217, p. 192; *People v. Brooklyn*, 6 Barb. 214; *Wilkinson v. Leland*, 27 U. S. 2 Pet. 627 (7:542); *Hatch v. Vermont Cent. R. R. Co.* 25 Vt. 49; *Raleigh & G. R. Co. v. Davis*, 2 Dev. & B. L. 451.

To allow one person to deduct the value of a debt secured by mortgage upon his property, and to deny this right to another, is the equivalent of taxing the latter at a higher rate than the former.

Savings & L. Society v. Austin, 46 Cal. 415; *Burke v. Badlam*, 57 Cal. 600; *Miller v. Heilbron*, 58 Cal. 133; *National Albany Exchange Bank v. Wells*, 18 Blatchf. 478; *People v. Weaver*, 100 U. S. 543 (25: 706).

A corporation is a person within the meaning of the Fourteenth Amendment.

Santa Clara County v. Southern Pac. R. R. Co. 118 U. S. 394 (30: 118); *Central Pac. R. R. Co. v. State Board of Equalization*, 60 Cal. 58; *Ah Koe v. Nunan*, 5 Sawy. 557; *Virginia v. Rives*, 100 U. S. 318 (25: 669); *Ex parte Virginia*, Id. 339, 346 (25: 676, 679).

The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.

Campbell v. Morris, 3 Harris & McH. 554; *Corfield v. Coryell*, 4 Wash. C. C. 371; *Ward v. Morris*, 4 Harris & McH. 338; *Wiley v. Parmer*, 14 Ala. 632; *Crandall v. State*, 10 Conn. 343; *Ward v. Flood*, 48 Cal. 50.

An assessment is of the very essence of taxation.

Burr. Tax. 194; *Cooley, Tax.* 244, 245; *Hill. Tax.* 290, 291; *People v. Hastings*, 29 Cal. 451.

There must be uniformity in the mode of assessment.

Knowlton v. Rock County, 9 Wis. 410; *Exchange Bank v. Hines*, 3 Ohio St. 15; *People v. Whyler*, 41 Cal. 351.

What is a general law?

Potter's Dwarrr, Stat. 52; *Sedg. Stat. & Const.* L. 30; *Smith, Const. L.* § 795, p. 913; *Desmond v. Dunn*, 55 Cal. 252; *Vanzant v. Waddel*, 2 Yerg. 268; *Wally v. Kennedy*, Id. 554; *State Bank v. Cooper*, Id. 599; *Devine v. Cook County*, 84 Ill. 592.

Congress may select its means or instrumentalities.

McCulloch v. Maryland, 17 U. S. 4 Wheat. 316, 421 (4: 579, 605); *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 32 (21: 792).

The State cannot destroy the agent selected. *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 738 (6: 204); *Weston v. Charleston*, 27 U. S. 2 Pet. 466 (7: 487).

The power to tax is the power to destroy.

Dobbins v. Erie County, 41 U. S. 16 Pet. 435 (10: 1022); *U. S. v. Union Pac. R. R. Co.* 91 U. S. 79 (23: 228); *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 (21: 787); *Van Brocklin v. Tennessee*, 117 U. S. 151 (29: 845); *Pollard v. Hagan*, 44 U. S. 3 How. 225 (11: 571); *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 6 (24: 708); *San Francisco v. Central Pac. R. R. Co.* 63 Cal. 467; *Santa Clara County v. Southern Pac. R. R. Co.* 118 U. S. 413 (30: 124).

Mr. Justice **Bradley** delivered the opinion of the court:

These cases are substantially similar to those of *Santa Clara County v. Southern Pac. R. R. Co.* and the other cases decided at the same time, and reported in 118 U. S. 394 [30: 118]. It will be unnecessary, therefore, to set out many provisions of the Constitution and laws of the United States and of California, which are involved in the present cases in common with those referred to. The actions were brought by the State of California in the Superior Court for the County of San Francisco, and were removed into the Circuit Court of the United States, where a jury was waived in each case and the causes were tried by the court, whose findings of fact and conclusions of law are contained in the respective records. One of the cases (No. 660 on the docket) was brought against the Central Pacific Railroad Company for the recovery of the state and county taxes due upon the assessment of the company's property made by the State Board of Equalization for the year 1883; said assessment being \$18,000,000, and the taxes amounting to \$276,865.10, 60 per cent of which was tendered and paid, without prejudice to either party, after the suit was brought. Another case (No. 1157) is an action against the same Company for the taxes of 1884, due upon a like assessment of \$24,000,000. A third (No. 664), against the same Company, is for the taxes of 1884, upon an assessment of \$22,000,000. No. 661 is a similar action against the Southern Pacific Railroad Company for the taxes of 1883. No. 662 is a similar action against the Northern Railway Company for the taxes of 1883. No. 663 is a similar action against the California Pacific Railroad Company for the taxes of 1883. Tender and payment of 60 per cent of the taxes were made in all the cases except 1157, in which the amount tendered and paid was 50 per cent. Similar defenses were set up in these cases as in the cases reported in 118 U. S. It was claimed, as in those cases, that in making the assessments no deduction was made for the mortgages on the Companies' property, whilst such deduction was made on the property of other citizens, by assessing to the mortgagees the amount of the mortgages as an interest in real estate; thus discriminating against the Company, and denying to it the equal protection of the laws, contrary to the Fourteenth Amendment of the Constitution. It was also

alleged in defense that the Board of Equalization included in the assessments a valuation of rights, franchises and property which they had no authority to assess; as, for example, franchises granted to the companies by the United States, and ferryboats, fences and other property subject to be assessed by the local county boards and not by the state board; and that the assessments were for aggregate amounts, not showing on their face what part of the valuation represented the property illegally included therein; thus rendering the entire assessment in each case void. It was on this latter ground that the judgments for the defendants in the former cases were affirmed. If these defenses, or either of them, are supported by the facts, it is unnecessary for us to decide the question raised under the Fourteenth Amendment of the Constitution. The questions arising under that amendment are so numerous and embarrassing, and require such careful scrutiny and consideration, that great caution is required in meeting and disposing of them. By proceeding step by step, and only deciding what it is necessary to decide, light will gradually open upon the whole subject, and lead the way to a satisfactory solution of the problems that belong to it. We prefer not to anticipate these problems when they are not necessarily involved.

The ground on which it is alleged that the assessments in question were made to include property which the state board had no authority to assess, is to be found in article XIII, sections 9 and 10, of the State Constitution. Those sections are as follows:

"Sec. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office, after those first elected, shall be four years, whose duty it shall be to equalize the valuation of the taxable property in the several counties in the State for the purposes of taxation. The controller of State shall be *ex-officio* a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation: *Provided*, Such state and county Boards of Equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to the county assessments, and under such rules of notice as the state board may prescribe as to the action of the state board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

"Sec. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board

of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships and districts."

The last section shows explicitly that, in regard to a railroad, the state board has power to assess only five things,—the franchise, roadway, roadbed, rails and rolling stock; the county boards are authorized to assess all the rest of the property. If the state board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void. If the unlawful part can be separated from that which is lawful, the former may be declared void, and the latter may stand; but if the different parts, lawful and unlawful, are blended together in one indivisible assessment, it makes the entire assessment illegal. This is so well settled that it needs no citation of authorities farther than to refer to the opinion of this court in the former cases. 118 U. S. [30:118]. In the present assessments, all parts of the property are blended together and are inseparable. If it be true, therefore, that property not authorized to be included in the assessments is included therein, the assessments must be declared void.

The Legislature of California, in passing laws for carrying out the principles and methods of taxation laid down in the Constitution, has deviated from its words, and has adopted some provisions which would seem to be a departure from it. As the State Board of Equalization in making the assessments in question undertook to follow the law, it will be necessary to examine it. By section 3628 of the Political Code, as amended in 1880, it was provided as follows:

"The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization as hereinafter provided for. Other franchises, if granted by the authorities of a county, city, or city and county, must be assessed in the county, city, or city and county within which they were granted; if granted by any other authority, they must be assessed in the county in which the corporations, firms, or persons owning or holding them have their principal place of business. All other taxable property shall be assessed in the county, city, city and county, town, township, or district in which it is situated. * * * The assessor must, between the first Mondays of March and July in each year, ascertain the names of all taxable inhabitants, and all property in his county subject to taxation, except such as is required to be assessed by the State Board of Equalization, and must assess such property to the person by whom it was owned or claimed, or in whose possession or control it was at 12 o'clock of the first Monday next preceding."

By section 3665 of the same Code, as amended by the Act of March 9, 1883, it is, amongst other things, provided as follows:

"The State Board of Equalization must meet at the state capitol on the first Monday in August, and continue in open session from day to day, Sundays excepted, until the third Monday in August. At such meeting the board

must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. Assessment must be made to the corporation, person, or association of persons owning the same, and must be made upon the entire railway within the State, and must include the right of way, bridges, culverts, wharves, and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road. The depots, stations, shops, and buildings erected upon the space covered by the right of way are assessed by the assessor of the county wherein they are situate. Within ten days after the third Monday of August the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties and cities and counties."

Here, it will be perceived, that the Legislature undertakes to define what things are, and what are not, comprised within the five categories of railroad property assessable by the state board, and declares that they include not only the entire railway within the State, the right of way, bridges and culverts, but also the "wharves and moles upon which the track is laid, and all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road." This is clearly an enlargement of the terms of the Constitution. Steamers, at least, are not, and have been held by the Supreme Court of California not to be, embraced in the five categories.

Now, one of the grounds of defense set up by the Central Pacific Railroad Company in Nos. 660 and 1157, by the Northern Railway Company in No. 662, and by the California Pacific Railroad Company in No. 663, is, that the value of their steam ferryboats was blended by the State Board of Equalization with the other values contained in the assessments. The Central Pacific Company, in its answers (and the others contain similar averments), says:

"The western terminus of the said railroad of defendant is in the City of San Francisco, on the west side of the Bay of San Francisco. The distance across said bay is five miles, and the whole thereof is part of the navigable waters of said bay. The cars of the Company are transported from the end of the railroad track of said road, on the eastern side of said bay, to the end of the railroad track on the western side of said bay, on steam ferryboats belonging to the defendant, built, owned, and constructed for that purpose, and are of great value. For more than four years past the defendant has been the owner of two steam ferryboats, one of the tonnage of 1,566 tons and one of the tonnage of 1,012 tons, and during the whole of that time has used said boats for the purposes aforesaid. Said boats now are, and for more than four years last past have been, of a class which are by law required to be registered, and now are, and for more than four years last past have been, duly registered and enrolled in the City and County of San Francisco, State of California.

"The State Board of Equalization, in making said pretended assessment of the said roadway, roadbed, rails, and rolling stock of defendant, did willfully and designedly include in the valuation thereof the value of said boats; and the value of said boats is blended in said pretended assessment with the value of said roadway, roadbed, rails, and rolling stock; and there is no means by which such value can be separated from the valuation placed by said board upon said roadway, roadbed, rails, and rolling stock, or either of them."

This allegation is sustained by the court below in its findings of facts in the cases referred to. The finding in 660, and substantially the same in the other cases, is as follows:

"That on the 18th day of August, 1883, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the Constitution of the State of California, did make a pretended assessment, for the purposes of taxation for the fiscal year of said State then next ensuing, upon the franchise, roadway, roadbed, rails, and rolling stock of said railroad, against defendant. Said pretended assessment was not made separately upon the franchise, roadway, roadbed, rails, and rolling stock, or any properties of said railroad, but all of said property was blended together in making said assessment, which assessment was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based, and no other assessment than the aforesaid was ever made of said property or any part thereof for said fiscal year. Said assessment included all property and kinds of property mentioned in section 3665 of the Political Code of California, as amended March 9, 1883, except depots, stations, shops, and buildings erected upon the space covered by the right of way, which last-mentioned property was assessed, as provided in said section, by local assessors."

This is a clear affirmation of the allegation of the answer. Section 3665 of the Political Code, as amended March 9, 1883, requires the State Board of Equalization to include in their assessment of railroad property "all steamers which are engaged in transporting passengers, freights, and passenger and freight cars across waters which divide the road." It is a matter of public notoriety—as much so as the existence of the railroad itself, or that of the Sierra Nevada, or any other geographical feature on the route—that the Railroad Companies in the cases referred to have steam ferryboats engaged in the transportation of passengers and freight across the Bay of San Francisco and the straits of Carquinez; and that without such means of transportation those waters could not be crossed.

The question whether steamers and ferryboats should be included in the property assessed by the State Board of Equalization, or in that assessed by the county board, was distinctly raised in the case of *San Francisco v. Central Pacific R. R. Co.* 63 Cal. 469, and decided in favor of the county board. That was an action brought by the City and County of San Francisco against the Company to recover taxes imposed upon it by virtue of an assess-

ment made by the county board upon the same ferryboats now assessed by the state board. The Company resisted the tax on the ground that these boats were assessable by the state board, and not by the county board. The Supreme Court of California decided against the Company. Its finding of facts was as follows, namely: "That the defendant is a corporation existing under the law of the United States, and of this State, * * * owner of a line of railroad known as the Central Pacific Railroad, extending from a point in the City of San Francisco * * * to Ogden in the Territory of Utah; that the length of said road in the City and County of San Francisco is four miles from a point within said city to the eastern shore of the southern arm of the Bay of San Francisco; that from said point on the eastern shore * * * to a point on the western shore of said bay, where the railway of defendant again commences, is about twelve miles; that across said bay no line of railroad has been constructed; and freight and passengers carried upon said road are taken across said bay upon steam ferryboats; * * * that upon the decks of said vessels are laid railroad tracks, etc." After giving judgment for the plaintiff upon these facts, the court says: "The sole question presented for decision herein is whether the steamers Thoroughfare and Transit, mentioned in the above findings, are to be assessed by the assessor of the City and County of San Francisco or by the State Board of Equalization. The property to be assessed by the board is defined in the 10th section of article XIII of the Constitution of 1879. It is the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in the State. All property other than the above mentioned is to be assessed by the local assessors. Are the steamers above named embraced within the category of property named in the section above referred to? The relation of such steamers to the Central Pacific Railroad Company is set forth in the findings." The court then proceeds to show that the ferryboats cannot be included in either of the five categories mentioned in the Constitution, namely, in either the franchise, roadway, roadbed, rails or rolling stock; and concludes as follows: "We are of opinion that the assessment of the steamers above mentioned pertained to the local assessor, and was properly made by the assessor of the City and County of San Francisco." This decision was made in June, 1883, and is a construction of the Constitution of California. It follows that the Act of March 9, 1883, as reproduced in section 3665 of the Political Code, departs from the constitutional provision; and that the assessments, in following the Act, are also unconstitutional and void.

In No. 1157, one of the cases against the Central Pacific Railroad Company, being for the taxes of the year 1884, the court finds that the State Board of Equalization, in making the assessment, did knowingly and designedly include in the valuation of the roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. This brings that case precisely within the decision made in the former cases reported in 118th United States Reports [30: 118].

Another defense set up by the Central Pacific

Railroad Company in the three cases against it, namely, Nos. 660, 664 and 1157, and by the Southern Pacific Railroad Company, in No. 661, is that the State Board of Equalization included in their assessments in said cases the value of the franchises conferred upon said companies by the United States, which, it is contended, is repugnant to the Constitution and laws of the United States, and therefore void. Thus, in No. 660, the Central Pacific Railroad Company, in its answer, after reciting the various Acts of Congress conferring franchises and privileges and imposing duties upon the Company, avers that it is a federal corporation, and holds its corporate powers and franchises under the Government of the United States, and that the said government has never given to the State of California the right to lay any tax upon the franchise, existence or operations of the Company. Similar averments are made in the other cases, 664, 1157 and 661. The court finds in each of these cases that the assessment made by the State Board of Equalization included the full value of all franchises and corporate powers held and exercised by the defendant. The first question, then, is whether the defendants in these cases held any franchises granted to them by the Government of the United States. Of this there can hardly be a doubt.

The Central Pacific Railroad Company was constituted by the consolidation of two state corporations of California, but derived many of its franchises and privileges from the Government of the United States. The findings of the court below on this subject are as follows, to wit:

"That on the 28th day of June, 1861, a corporation was formed and organized, under the laws of the State of California, under the corporate name of the Central Pacific Railroad Company of California. Said Corporation was formed for the purpose of constructing, owning and operating a line of railroad and telegraph, commencing at the City of Sacramento in said State and running thence through the Counties of Sacramento, Placer, Sierra and Nevada to the eastern boundary of said State, in the expectation that its proposed railroad would when constructed constitute part of a line of railroad extending from the Missouri River to the Pacific Ocean, which line it was then supposed was about to be constructed under the legislative supervision and authority of the Government of the United States, and which line of railroad was afterwards so constructed.

"That on or about the 1st day of July, 1862, the Government of the United States undertook to construct, or to cause to be constructed, a line of railroad from the Missouri River to the Pacific Ocean, and to that end Congress passed an Act entitled 'An Act to Aid in the Construction of a Railroad from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the Same for Postal, Military, and Other Purposes.' See 12 Stat. at L. p. 489.

"That to facilitate the construction of said road the Government of the United States, by said Act of Congress, conferred upon the said Central Pacific Railroad Company of California the same powers and clothed it with the

same privileges and immunities which it conferred upon and clothed the said Union Pacific Railroad Company, except that the said Central Pacific Railroad Company of California was to commence the construction of said railroad at the Pacific Ocean and build east until it met the said Union Pacific railroad, building west.

"That on or about the 2d day of July, 1864, Congress passed an Act entitled 'An Act to Amend an Act Entitled An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government of the United States the Use of the Same for Postal, Military and Other Purposes,' approved July 1, 1862. See 13 U. S. Stat. at L. p. 356.

"That said Central Pacific Railroad Company of California filed in the Department of the Interior its acceptance of the terms and conditions of said Act of Congress of July 1, 1862, within the time therein designated.

"That on or about the 31st day of October, 1864, said Central Pacific Railroad Company of California sold and assigned all its rights under the aforesaid Acts to a corporation then existing under the laws of the State of California, and known as the Western Pacific Railroad Company, so far as said rights related to the construction of said railroad and telegraph between the cities of San José and Sacramento, in said State of California. Said assignment was ratified and confirmed by the United States by an Act of Congress passed on the 3d day of March, 1865, entitled 'An Act to Amend an Act Entitled An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military and Other Purposes, Approved July 1, 1862, and to Amend an Act Amendatory Thereof, Approved July 2, 1864.' See 13 U. S. Stat. at L. p. 504.

"That the said line of railroad from the Pacific Ocean to Ogden, in Utah Territory, was completed and put in operation in 1869, and has been in operation from that time until the present, and still is in operation, and the whole of the railroad mentioned in the said Acts of Congress has long since been completed, and is now, in accordance with the spirit and intent of said Acts of Congress, operated as one continuous line from the Missouri River to the Pacific Ocean, and is so operated and maintained for the uses and purposes mentioned in said Acts.

"That in August, 1870, acting under the said Acts of Congress, said Central Pacific Railroad Company of California and the said Western Railroad Company formed themselves into one corporation under the name of the Central Pacific Railroad Company. Said Company is the defendant herein, and has, from the completion of said railroad as aforesaid until the present time, owned (except in the respect hereinafter stated) and operated said railroad under and by virtue of said Acts of Congress and for the uses and purposes therein mentioned."

If we turn to the Acts of Congress referred to by the court, we shall find that franchises of the most important character were conferred on this Company. Originally, the Central Pacific Railroad Company of California had only

power to construct a railroad from Sacramento to the eastern boundary of the State. Congress, by the Act of 1862, authorized the Company (in the words of the Act) "to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this Act for the construction of said railroad and telegraph line first mentioned [the Union Pacific], and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California." Sec. 9. In the following section it was enacted, that, after the completion of its road to the eastern boundary of California, the Central Pacific might unite upon equal terms with the Union Pacific Railroad Company in constructing so much of said railroad and telegraph line and branch railroads and telegraph lines through the Territories, from the State of California to the Missouri River, as should then remain to be constructed, on the same terms and conditions as provided in relation to the Union Pacific Railroad Company. Thus, without referring to the other franchises and privileges conferred upon this company, the fundamental franchise was given, by the Acts of 1862 and the subsequent Acts, to construct a railroad from the Pacific Ocean across the State of California and the federal Territories until it should meet the Union Pacific; which it did meet at Ogden in the Territory of Utah. This important grant, though in part collateral to, was independent of, that made to the Company by the State of California, and has ever since been possessed and enjoyed. The present Company has it by transfer from, and consolidation of, the original companies, by which its existence and capacities were constituted. Such consolidation was authorized by the 16th section of the Act of Congress of July 1, 1862, and the 16th section of the Act of July 2, 1864, taken in connection with the second section of the Act of March 3, 1865, referred to in the findings of the court. The last named Act ratified the transfer by the Central Pacific to the Western Pacific of a portion of its road extending from San José to Sacramento, and conferred upon the latter company all the privileges and benefits of the several Acts of Congress relating thereto, and subject to all the conditions thereof. If, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises, including that of constructing a railroad from the Pacific Ocean to Ogden city, were conferred upon it by Congress.

It cannot at the present day be doubted that Congress, under the power to regulate commerce among the several States, as well as to provide for postal accommodations and military exigencies, had authority to pass these laws. The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in

former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject. Of course the authority of Congress over the Territories of the United States, and its power to grant franchises exercisable therein, are, and ever have been, undoubted. But the wider power was very freely exercised, and much to the general satisfaction, in the creation of the vast system of railroads connecting the East with the Pacific, traversing States as well as Territories, and employing the agency of state as well as federal corporations. See *Pacific R. R. Removal Cases*, 115 U. S. 1, 14-18 [29:319, 323-325].

Assuming, then, that the Central Pacific Railroad Company has received the important franchises referred to by grant of the United States, the question arises whether they are legitimate subjects of taxation by the State. They were granted to the Company for national purposes and to subserve national ends. It seems very clear that the State of California can neither take them away, nor destroy nor abridge them, nor cripple them by onerous burdens. Can it tax them? It may undoubtedly tax outside visible property of the Company situated within the State. That is a different thing. But may it tax franchises which are the grant of the United States? In our judgment, it cannot. What is a franchise? Under the English law Blackstone defines it as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." 2 Com. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power, of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry or railroad, or charge tolls for the use of the same, without authority from the Legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a fran-

chise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely.

In view of this description of the nature of a franchise, how can it be possible that a franchise granted by Congress can be subject to taxation by a State without the consent of Congress? Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As *Chief Justice Marshall* said in *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316 [4:579], "the power to tax involves the power to destroy." Recollecting the fundamental principle that the Constitution, laws and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a State. The power conferred emanates from, and is a portion of, the power of the government that confers it. To tax it is not only derogatory to the dignity, but subversive of the powers, of the government, and repugnant to its paramount sovereignty. It is unnecessary to cite cases on this subject. The principles laid down by this court in *McCulloch v. Maryland*, *supra*; *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 738 [6:204], and *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6:678], and in numerous cases since which have followed in their lead, abundantly sustain the views we have expressed. It may be added that these views are not in conflict with the decisions of this court in *Thomson v. Union Pac. R. R. Co.* 76 U. S. 9 Wall. 579 [19:792], and *Union Pac. R. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 [21:787]. As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises or operations. 85 U. S. 18 Wall. 35, 37 [21:793].

The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of a franchise is not measured like that of property, but may be \$10,000 or \$1,000,000, as the Legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid. It is not an idle objection, therefore, made by the Company against the tax imposed in the present cases.

It only remains to consider whether the Southern Pacific Railroad Company, as well as the Central Pacific, was invested with any franchises derived from the Government of the United States. Of this we think there can be no question. The court below, in its findings of fact in the *Southern Pacific Case* (No. 661), finds that the defendant is a corporation existing under the laws of California, except in so far as its existence, rights, privileges, duties and obligations have been affected by various Acts of Congress. It then describes the course of the defendant's road, which commences on the waters of the Pacific Ocean, in the City of San Francisco, and extends thence southerly to Tres Pinos, in the County of San Benito, from which place to Huron, a distance of forty or fifty miles, a portion of the road is yet unfin-

ished, and the road of the Central Pacific Company is temporarily used in its stead. From Huron the route of the road extends easterly to Goshen, and thence southerly to Mojave. At Mojave it separates into two main branches, one extending in an easterly direction to the Colorado River, near the 25th parallel of north latitude, where it meets and connects with the Atlantic and Pacific Railroad, leading to Springfield, in the State of Missouri; the other branch extends southerly to Los Angeles and thence easterly to Fort Yuma, and connects with the Southern Pacific Railroad of Arizona, and by means of other roads forms a continuous line to New Orleans. The findings then continue to state as follows, namely:

"That on the 27th day of July, 1866, the Government of the United States undertook to construct or cause to be constructed a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route, to the Colorado River at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean; and to that end Congress passed an Act entitled 'An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from the States of Missouri and Arkansas to the Pacific Ocean,' which Act was approved on said 27th day of July, 1866. See 14 U. S. Stat. at L. p. 292. By said Act certain persons therein named were made and erected into a corporation under the name and style of the 'Atlantic and Pacific Railroad Company.'

"That to facilitate the construction of said road the Government of the United States, by said Act of Congress, adopted the defendant as the instrument or agent of the United States, and conferred upon the defendant (the Southern Pacific Railroad Company), the same powers and clothed defendant with the same privileges and immunities which it conferred upon and clothed the Atlantic and Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado River and the City and County of San Francisco.

"That said Atlantic and Pacific Railroad Company organized under said Act * * * and said company and defendant, immediately after the passage of said Act, accepted the terms and conditions thereof, and have duly complied therewith.

"That said Atlantic and Pacific Company has fully completed the whole of said road from Springfield to the Colorado River; and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out.

"That on the third day of March, 1871, the Government of the United States undertook to construct or cause to be constructed a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado River to construct or cause to be constructed a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the Act of Congress of July 27, 1866, hereinbefore referred to, and by

means of said connecting road to connect the road from Marshall to San Diego with the City of San Francisco; and to that end Congress passed an Act entitled 'An Act to Incorporate the Texas Pacific Railroad Company and to Aid in the Construction of its Road and for Other Purposes,' approved March 3, 1870, and subsequently, on the second day of May, 1873, passed an Act entitled 'An Act Supplementary to an Act Entitled An Act to Incorporate the Texas Pacific Railroad Company and to Aid in the Construction of Its Road, and for Other Purposes,' approved March 3, 1871. See 16 U. S. Stat. at L. 573; Vol. 17 *Id.* 59.

"That immediately after the passage of said Act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said Acts of 1871 and 1873, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said Acts have completed the roads mentioned in the third finding" [to wit, the line of the defendant's railroads hereinbefore described].

An examination of the Acts referred to in these findings shows that Congress authorized the Southern Pacific Railroad Company to connect with the Atlantic and Pacific Railroad at such point near the boundary line of the State of California as it should deem most suitable for a railroad line to San Francisco; and, to aid in the construction of such a railroad line, Congress declared that the Company should have similar grants of land, and should be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific. Like powers were also given to the Southern Pacific Railroad Company to construct a line of railroad from Tehachapa

Pass, by way of Los Angeles, to the Texas Pacific road at the Colorado River (Fort Yuma). The Southern Pacific Railroad Company was not authorized by its original charter to extend its railroad to the Colorado River, as we already know by other cases brought before us, and as appears by the Act of the State Legislature passed April 4, 1870, which assumed to authorize the Company to change the line of its railroad so as to reach the eastern boundary line of the State; thus duplicating the power given to it by the Act of Congress. See the State Act quoted in 118 U. S. 399 [30: 118]. This state legislation was probably procured to remove all doubts with regard to the Company's power to construct such roads. It is apparent, however, that the franchise to do so was fully conferred by Congress, and that franchise was accepted, and the roads have been constructed in conformity thereto.

It conclusively appears, therefore, that the Southern Pacific Railroad Company did receive from the United States Government, and still enjoys, important franchises connected with its railroads.

It follows that in each one of the cases now before us the assessment made by the State Board of Equalization comprised the value of franchises or property which the board was prohibited by the Constitution of the State from including therein; and that these values are so blended with the other items of which the assessment is composed that they cannot be separated therefrom. The assessments are, therefore, void. This renders it unnecessary to express any opinion on the application of the Fourteenth Amendment, as the result would not be different whatever view we might take on that subject.

The judgments in all the cases are affirmed.

INTERSTATE COMMERCE COMMISSION.

Nathaniel W. HOWELL, Hiram A. Pooler, Charles M. Thompson, Cornelius B. Wood, and A. T. Moshier, as a Committee of the Farmers and Milk-Producers of Orange County, New York,

NEW YORK, LAKE ERIE, & WESTERN R. CO., New York, Ontario, & Western R. Co., New York, Susquehanna, & Western R. Co., and Lehigh & Hudson River R. Co

(No. 4.)

1. **The question of the reasonableness of rates** is always a perplexing one; a great variety of considerations are necessarily involved in each instance; theory and conjecture merely are not enough; a comparison of one isolated rate with another is not sufficient; the whole filed must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation.

2. **The element of value** in the commodity transported forms a proper consideration to be taken into account in the establishment of a rate, since the greater the value the greater the carrier's liability as an insurer of freight.

3. **A prima facie case of unreasonableness of rates** is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier. When a question of reasonable rates is presented, the whole subject should be laid open, with all the attending circumstances and relations.

4. **The practice of making a uniform rate upon milk** destined for the daily consumption of the New York City market, from all stations within a distance of about 200 miles upon railroads running through the southern counties in the State of New York, west of the Hudson River to Jersey City, is **not**, under the circumstances and demands of the traffic, an **unjust discrimination** in favor of the more distant shipping points, as against those nearer the common terminus.

5. No opinion is expressed or intimated by the Commission, in respect to how far the **grouping of rates** can be properly carried upon considerations founded solely upon the competition of business, or as to whether such considerations are to such an extent, admissible.

6. The **propriety** of the application of the principle of **grouping** is properly open to challenge in every case, and every case must be justified upon its own facts and peculiar circumstances.
7. The **system** of grouping rates is **not** of itself **necessarily illegal**; it only becomes illegal when it can be shown that illegal results flow from it, in the infliction of actual injury.
8. Upon the question of the **reasonableness of the uniform milk rate** complained against, the petition is retained by the Commission to enable the complainants to produce evidence of additional facts, if they so desire.

(Complaint Filed April 23, 1887.—Answers Filed June 2, 1887.—Assigned for Trial and Hearing Commenced July 13, 1887.—Hearing continued October 13, 1887.—Filing of Briefs and Arguments Completed May 13, 1888.—Decided September 24, 1888.)

COMPLAINT charging the exaction of unreasonable and unjust rates for the transportation of milk. See Pleadings, 1 Inters. Com. Rep. 467-472.

Mr. Henry Bacon for complainants.

Mr. James A. Buchanan, for New York, Lake Erie, & Western Railroad Company:

The position of this respondent differs somewhat from that of the other respondents, namely, that inasmuch as the evidence shows that its trains in which milk and cream were carried were specially equipped for and exclusively used for that species of traffic, no comparison as between the rates charged for the transportation of milk and cream, and the transportation of other articles in other and totally different cars and trains, is legitimate in order to determine whether the rates charged by this respondent for the transportation of milk and cream are reasonable and proper, or not.

But apart from, and in addition to, the above point, I beg leave to submit that it is never, under the Interstate Commerce Law, permissible to endeavor to ascertain the reasonableness or unreasonableness of the rates charged for the transportation of a particular kind of merchandise, by instituting a comparison between such rates and those charged for the transportation of other and totally different kinds of traffic under circumstances and conditions wholly dissimilar.

See *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754, 1 Inters. Com. Com. Rep. 436; *Boards of Trade v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 608, 1 Inters. Com. Com. Rep. 215. See also the First Annual Report of this Commission to the Secretary of the Interior, on December 1, 1887, *Reasonable Charges*, pp. 37, 38, 1 Inters. Com. Rep. 671, 1 Inters. Com. Com. Rep. 312, where the mode of considering and determining the reasonableness of charges is considered and determined.

And I submit that even if the counsel for the petitioners is warranted in instituting, as he has done, the comparison between the rates charged for the transportation of milk and cream, and those charged by this and the

other respondents for the transportation of other articles of merchandise, the rates charged for the transportation of milk and cream will (when tested by the rule laid down by this Commission, applied to the evidence in this case) be found reasonable and proper.

It remains to consider whether this respondent and the others, by charging as much for the transportation of milk and cream for a short as long distance, have violated any of the provisions of the Interstate Commerce Law, as claimed by the counsel for the petitioners.

I respectfully submit that an examination of the causes which led to the passage of the Law and the language thereof, will demonstrate that the contention of the petitioners' counsel cannot be successfully maintained. He relies upon the Interstate Commerce Law, §§ 9 and 13, to show that the petitioners have a standing before this Commission, notwithstanding the very small interests they have in the proceeding, and the very inconsiderable damages, if any, which they may be able to show they have sustained because of the acts of the respondents of which they complain. If this be the true construction of the sections cited, it is very fortunate for the petitioners, as otherwise it is manifest, from all the evidence in the cause, the petition would be dismissed under the familiar legal maxim, *De minimis non curat lex*.

But even if the petitioners have such a legal standing before this Commission as will enable it to pass upon the questions involved in this proceeding, I submit that, under the evidence in this cause and the provisions of the Interstate Commerce Law, the petition must be dismissed.

The counsel for the petitioners contends that the respondents, by charging as much for the short as for the long haul, violate the provisions of the Interstate Commerce Law, as their action gives undue preferences to certain persons and localities.

I infer from the petition that the sections of the Interstate Commerce Law upon which the counsel relies to sustain this position are §§ 1, 2, and 3. Let us examine these sections in the order cited; for I believe that, upon a correct construction thereof, this Commission will be satisfied that none of the acts of the respondents, of which the petitioners complain, are in violation of either the language or spirit of said sections.

It may be well to premise that the object which Congress had in view when it passed the Interstate Commerce Law was to abolish rebates on, and the pooling of, freights, and to prevent interstate railroad companies charging more for short than for long hauls upon the same routes and under substantially similar circumstances. All these matters were supposed to be great evils, and had given rise to much public clamor and an urgent demand for their suppression.

Such being the object which Congress had in view, let us see how it sought to accomplish it by the language used in the sections of the law above referred to.

By the last clause of § 1 it is enacted that "all charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in con-

nection therewith, or in the receiving, delivering, storage, or handling of such property, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

I have heretofore shown that owing to the peculiar character of the milk and cream traffic, and the unusual nature and expense of transporting, receiving, and delivering the same, there is nothing unreasonable, unjust, or unlawful in the charges of respondents, against which the petitioners complain.

One mode adopted by the counsel for the petitioners to show the unreasonableness of said charges is entitled to the merit of peculiar novelty. He assumes that, because the profits which this respondent derives from its milk traffic are very large, *ergo* the charges for transporting the same must be unreasonable and unjust.

Stripped of all verbiage, that proposition amounts to this: that whenever the freightage business of a railroad is large and profitable, it follows, necessarily, that its charges for transportation must be unjust and unreasonable, and that it is only when the freight traffic of a railroad is small and unprofitable that its charges can be just and reasonable.

I do not think this Commission can be induced to sanction any theory so baseless and extraordinary.

And when we come to examine §§ 2 and 3 of the Act, we search the proceeding in vain to find any violation of either of them by any of the respondents. No person or persons are charged any greater or less compensation for the services rendered in the transportation of milk and cream over the railroads of the respondents from the places where the same are received to the points of delivery; nor do any of the acts done or omitted to be done by the respondents, or any of them, in such transportation, come within the prohibitions of § 3 of the Interstate Commerce Law, which forbids the giving of any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

It is manifest, from all the evidence in this proceeding, that all shippers of milk and cream over the roads of the respondents are treated exactly alike in all respects in regard to the reception, transportation, and delivery of their milk and cream, and the charges for these services so rendered. And it is not averred in the petition, or attempted to be shown by the evidence, that the respondents so conduct their milk and cream traffic as to interfere in any way with the transportation of any other kind of freight.

But the counsel for the petitioners seems to think that if all else fails he can rely upon § 4 of the Interstate Commerce Law to show that the manner in which the respondents have conducted their milk and cream traffic is contrary to law.

Let us see if this contention can be sustained. Bearing in mind (what has already been

said) that one of the main objects Congress had in view in passing the Interstate Commerce Law was to prohibit interstate railroad companies from charging more for a short than a long haul, let us examine the language used in said § 4, to see how Congress sought to accomplish its object: "That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance."

From the language thus used, I respectfully submit that it was not the intention of Congress to prohibit absolutely as great a charge for a short as a long haul, when the circumstances justified it. All that Congress was careful to guard against was that the language of the section should not be so construed as to warrant as great a charge for a short as a long haul when there was no reason for doing so. And surely the Commission must see, from an examination of all the evidence in the proceeding, that similar charges for short and long hauls of milk and cream were not only necessary to enable the respondents to carry on the business, but were most conducive to the public interests by extending the area of the milk-producing territory, instead of establishing a practical monopoly in the milk business, by confining it to the comparatively limited section in which the petitioners, and those whom they profess to represent, reside.

I am not aware that the Commission has ever announced any decision in a case where the question of the legality of charging as much for a short as a long haul was involved. But I respectfully submit that the construction of § 4 of the Interstate Commerce Law for which I contend is warranted by the views expressed in the report of the Commission (before cited) of December 1, 1887; by reference to which it will appear that in determining whether transportation charges are reasonable or unreasonable, and whether it is legal to charge as much for a long as a short haul, all the costs and charges attending the transportation of the traffic are to be taken into consideration, including even the greater cost of constructing one railroad than another.

I respectfully submit that the complaint should be dismissed.

Mr. John B. Kerr, for New York, Ontario, & Western Railway Company:

I. The Unreasonableness of the Charge.

The rate on milk from points in Orange County to Weehawken, including the return of the empty can, is 35 cents per can. A full can weighs 100 pounds, and the empty, 20 pounds. The rate for transportation is therefore at the rate of 29 cents per hundred pounds.

The petitioners produce no proof whatever

as to the fairness of this charge in itself, but, on the argument, claim that the fact that a less rate per hundred pounds is charged upon certain other kinds of inanimate freight proves that the charge upon milk is unreasonable.

While it is distinctly denied that a comparison of rates affords any proof as to the reasonableness of any one rate named, the comparison of the milk rate with any other rate quoted by the petitioners not only fails to show any unfairness in the former, but amply justifies the charge.

The schedule referred to is headed, "Table of comparative tariff of rates in effect 1887, per ton of 2,000 pounds." The articles enumerated are fresh meat, butter, berries, eggs, cream, and passengers. The rates stated in the schedule as charged on passengers are those charged upon a single passenger between the points named, irrespective of weight; and although this Company may be guilty of discrimination in omitting to name a rate per ton on passengers, it confesses that it has neglected to make rates on any such basis.

Cream and fresh meat take a higher rate than milk. The rate on butter is lower (the rate for carriage, including the return of empty packages, being at the rate of 22 cents per hundred pounds), for the reasons, among others, that there is much less liability of loss on butter than milk; that while milkcans occupy the floor space, butter can be piled on top of the cans, and the capacity of the car, which cannot be utilized for milk, thus employed; and that the empty packages are returned on any train the company chooses.

The other rates quoted are for carriage on ordinary trains. Comparison might as well be made between the old-time market wagon and the ordinary way-freight-train service, as between the latter and the milk-train service.

The proofs show that the conditions applying to milk traffic are not common to any other class of business. The market for milk produced in the counties traversed by the roads of the respondents is found in New York, Brooklyn (through New York), and Jersey City. The demand has increased steadily in proportion to the growth of population in those cities; and as the country in the immediate vicinity has been unable to produce the amount of milk required, the area of supply has been constantly extended, until it now reaches points 200 miles distant from New York.

The milk is supplied to the consumers by the dealers in small quantities, early in the morning. To enable this delivery to be made, trains must reach their terminus about midnight. If a train fails to reach the market in time to enable the dealers to make the morning delivery, the cargo is an almost entire loss, because, even if it is not spoiled during the detention, the amount brought in each day is sufficient for that day's use; and the consumer having got along without his usual supply for the day, a new train load of fresher milk supplies the market for the next morning, and thus the delayed cargo is entirely worthless, and, as it is time freight, the loss falls on the carrier.

The milk being sent in, of course, by farmers, extra stations or platforms have to be supplied at convenient intervals, at which they may deliver milk, as many are unable to make

a long haul to regular stations. As the train has a long run, and is obliged to make these extra stops, it must make a high rate of speed, and cars must be provided with the most approved appliances in the way of brakes and trucks; the cost of such car being four or five times greater than an ordinary box car. In addition to this, ice is placed in the cars in summer, and heat supplied in winter, in order to preserve the milk.

The shipments are in small lots, no one station even supplying a full carload (200 cans); and, it being necessary to load or unload quickly, extra help has to be employed both on the train and at the delivery point. The cans cannot be piled one upon another, but only enough can be put in a car to occupy the floor space, thus limiting the capacity of the car, which could carry 25 tons to 10 tons. As the cars have to be kept in the milk service alone, they can be used for no other purpose on the return trip except to carry empty cans; and the load back is thus restricted to two tons.

No other business can be permitted to interfere with the milk traffic; and although fresh meat and butter are carried in small quantities on the train, because they can be loaded in on top of the cans, no business of this kind of any moment can be carried, because if it assumed any proportions it would delay the train, and would have to be abandoned, as was found necessary in the case of the Erie.

The passenger coach is run on the train, for the convenience of passengers between local stations on the line of road; but the earnings from this source, as shown in the proofs, are very slight.

At the terminal station the train is met by large numbers of milkmen, who gather there with their wagons to take the milk to New York or Brooklyn. As they want immediate delivery, all about the same time, special platforms have to be prepared for their convenience, using for that purpose land of very great value immediately adjoining the ferries.

The ferries have to be run during the night, solely for the accommodation of this business, and, as shown, are run at a loss.

The items of expense, which are assumed by the petitioners to be the total expense, are only a portion of the extra expense incident to the milk traffic, not borne by the ordinary freight traffic of the roads.

II. *Undue and Unreasonable Preference or Advantage.*

The rate in itself being reasonable for the service rendered petitioners, how are they prejudiced by giving the same rate to shippers some miles further distant from the market?

No prejudice to petitioners, or advantage to the more distant shippers, was shown upon the trial; nor is any claimed in the brief submitted. There is only enough milk shipped from the entire territory reached to supply the market, and the price each shipper receives is the same. The more distant producers are not enabled to undersell the petitioners, nor to supply a market which the latter could fill if they had lower rates even; for, as far as appears,—and it is the fact,—the present pro-

duction is the capacity of Orange County. If any more could be produced, the carriers certainly would not have used any effort to stimulate production from more distant points.

There is no injustice done; and the fact that the men who appeared before the Commission ship but four cans of milk a day, out of a daily average of about 5,000 cans, proves it.

If there was any disadvantage or prejudice to the farmers in Orange County, the men who ship large quantities of milk, who have large capital invested in the business, and understand it, would have been present, and speedily shown just how they were injured.

It is proper to state, for the information of the Commission, that since the hearing in this matter, this company has made a uniform rate of 35 cents per can from all points reached by the milk-train, and that this action was taken at the instance of large shippers, both from Orange County and points as to which the higher rate of 38 cents had been made.

The complaint should be dismissed.

Mr. John W. Taylor, for New York, Susquehanna, & Western Railroad Company:

The following questions are raised by the pleadings, viz.:

1. Whether the rates charged by the New York, Susquehanna, & Western Railroad Company for transporting milk from points in Orange County, New York, to Jersey City, New Jersey, are "reasonable and just."

2. Whether this company "charges for transporting milk to the city of Jersey City from Summit, in the State of New York (a distance of 184 miles from Jersey City), the same rate for a like service in Orange County, a mean distance of 50 miles."

This is purely a question of fact.

3. Whether, "by such rates and charges and discriminations," the company making them violates § 2 of the Act to Regulate Commerce.

4. Whether, by so doing, the company also violates § 3 of the same Act.

As the last two questions are questions of law arising out of the question of fact involved in question 2, and as that question is a simple one, and can readily be disposed of, it will be first considered.

1. It is not true that the New York, Susquehanna, & Western Railroad Company charge for transporting milk to the city of Jersey City from Summit, in the State of New York (a distance of 184 miles from Jersey City), the same rate for a like service in Orange County, a mean distance of 50 miles.

1. The allegation on this head is found in paragraph seven of the petition (1 Inters. Com. Rep. 467), where it relates to the New York & Lake Erie Railroad Company; but in paragraph nine of the petition it is averred to be "equally applicable" to the New York, Susquehanna, & Western Railroad Company.

2. The answer of this company (1 Inters. Com. Rep. 472) "denies that the allegations of the seventh paragraph of said petition are true in respect to [it], or that they are at all applicable to it."

3. While the petitioners were thus put to the proof of those allegations, as against the New York, Susquehanna, & Western Railroad Company, they did not attempt to prove them; and

the evidence on the part of that company showed them to be totally untrue. It proved beyond controversy: (1) that its line extended from Jersey City only "to Middletown, in the county of Orange, in the State of New York;" (2) that the only portion of its line in the State of New York is that extending from Unionville to Middletown, a distance of only 13 $\frac{1}{2}$ miles; (3) that it does not transport milk from Summit, in New York, to Jersey City, but only "from points in Orange County" to Jersey City; that consequently it does not charge for transportation from Summit to Jersey City; much less does it charge "the same rate" from Summit to Jersey City as "from points in Orange County."

4. It is perfectly manifest, from the language of the petition itself, that the alleged grievance of the petitioners relates to the supposed conduct of the railroad companies with respect to "persons" and "localities" to the west of, and more distant from, Jersey City than "points in Orange County;" and that it consists in charging no greater compensation or rate for transporting milk from those more distant "localities" to Jersey City, than is charged from the nearer "points in Orange County" to Jersey City; and thereby (as alleged) giving "an undue and unjust preference and advantage to particular persons and localities" west of "points in Orange County," and subjecting the petitioners and their constituents, and the localities in which they reside, "to an unjust and unreasonable prejudice as against other persons and localities," more distant from Jersey City.

5. That this is the only grievance referred to in the seventh paragraph of the petition is further manifest from the following language quoted from the brief of the learned counsel of the petitioners: "In this instance the discrimination complained of is that the railroad, irrespective of the length of haul or the amount of cost to it, charges residents of a locality—as in the case of the New York, Lake Erie, & Western Railroad Company—183 miles from Jersey City, the same price as to another person or locality 21 miles from the common terminals."

6. It remains only to make a few observations in answer to the brief of the learned counsel, on this head, suggested by the concluding language of the above quotation: 1. No "person or locality 21 miles from the common terminals" has made any complaint to the Commission. 2. No such "person or locality" could complain except, perhaps, for "undue and unjust preference and advantage to particular persons and localities" in "Orange County," and represented by the petitioners and their counsel. 3. The petitioners are not aggrieved by being charged no more for the transportation of their milk to Jersey City from "points in Orange County,—a mean distance of 50 miles,"—than is charged to "another person or locality 21 miles from the common terminals." 4. As was said in the case of *Boston & A. R. Co. v. Boston & L. R. Co.* 1 Inters. Com. Rep. 576, 1 Inters. Com. Rep. 74, the petitioners do not complain in the public interest, but in their own; and the grievance of which they complain "is not a

public grievance." They cannot complain of the imagined private grievances of other persons and localities.

II. The charge for transportation of milk over the New York, Susquehanna, & Western Railroad Company, "from points in Orange County" to Jersey City, is not unjust and unreasonable.

1. As was stated by the Commission in their first annual report, p. 36 (1 Inters. Com. Rep. 671): "The question of the reasonableness of rates involves so many considerations, and is affected by so many circumstances and conditions, which may at first blush seem foreign, that it is quite impossible to deal with it on purely mathematical principles, or on any principles whatever, without a consciousness that no conclusion which may be reached can by demonstration be shown to be absolutely correct."

See also *Canada Southern R. Co. v. International Bridge Co.* 8 Fed. Rep. 190; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Louisville & N. R. Co. v. Tennessee R. Comrs.* 19 Fed. Rep. 679.

2. A variety of considerations of a very practical nature must always enter into the making of freight rates by a railroad company, and these also go very far in every instance to determine the question of whether such rates are reasonable or unreasonable. It would be very dangerous to the successful existence of such companies for them to make, or be required to make, freight rates upon mere theories or conjectures.

Evans v. Oregon R. & Nav. Co. 1 Inters. Com. Rep. 646, 1 Inters. Com. Rep. 336.

3. The elements entering into a reasonable charge for the transportation of persons or property are: (1) the cost of performing the service; (2) a fair return upon the capital invested; (3) in considering the question—the reasonableness of charges—the principle is not what profit it may be reasonable for a railway company to make, but what is reasonable to charge to the person who is charged (*Canada Southern R. Co. v. International Bridge Co.* L. R. 8 App. Cas. 723); (4) a premium covering the liability which a common carrier assumes as an insurer.

4. The petitioners insist that the charge for the transportation of milk is unjust and unreasonable.

This proposition is attempted to be supported: (1) by comparison of the charge with that for the transportation of "other inanimate freight,"—namely, cream, butter, and fresh meats,—by the same companies; (2) by showing what are supposed to be the net profits of milk transportation.

First. As to the argument from comparison with charges for other inanimate freight, viz., cream, butter, and fresh meats:

1. As held by the commission in *Raymond v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 628, 1 Inters. Com. Rep. 230, without other testimony than that afforded by a comparison between these rates, the charge complained of will not be declared unreasonable and unlawful.

2. If the charge was deemed excessive and unreasonable, as compared with the charges in respect to these other articles, why have INTER S.

the petitioners abandoned the charge of the violation of § 2 of the Act, by receiving "a less compensation for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions?" Doubtless because the learned counsel was convinced that the transportation of milk is not "a like kind of traffic, under substantially similar circumstances and conditions." In this conviction he was right; but not being a "like kind of traffic," transported under "substantially similar circumstances and conditions," it cannot be inferred that the charge in respect to milk is unreasonable and unjust because greater than in respect to the other dissimilar articles mentioned.

3. But the allegations of the answer, fully sustained by the evidence in the cause, show abundant grounds in support of the reasonableness and justness of the charge, such as the following, among others, viz.: (1) milk is perishable and time freight; (2) trains, extra expensive, specially made and specially equipped, are required for the service; (3) these trains require to be run at extra speed, with an extra force of train hands, and unusually frequent stoppages, with extra, exclusive, and expensive terminal accommodations and facilities; (4) the charge covers not only the transportation of the filled cans to Jersey City, but the return of the empty cans to the shippers.

See *Harper*, Inters. Com. L. 48; *Chicago & A. R. Co. v. People*, 67 Ill. 24; *Girardot v. Midland R. Co.* 4 R. & Can. Traf. Cas. 291.

A further enumeration of elements or items of the exceptional expense attending the transportation of milk, and justifying the charge, is unnecessary. The evidence on this point is ample and conclusive, and is before the Commission.

4. The counsel for the petitioners, in the face of all this evidence, contends, notwithstanding, that it still rests with the respondents to show that all this extra cost justifies the alleged exceptional charge; that "the burden of proof is upon them to show that that which is apparently, and upon its face, unjust and unreasonable, is by reason of the facts which they prove just and reasonable within the meaning of this Act."

In answer I insist that, as the petitioners allege that the charge is "unreasonable and unjust," and unlawful, they must prove the charge, and that the burden of proof is on them throughout; and that, with the evidence of extraordinary cost of milk transportation, the complainant must show that, under all this evidence, the extra cost does not justify the alleged extra charge. Besides, the question is begged when it is assumed that the charge, in the face of this evidence, is "apparently and upon its face unjust and unreasonable."

See, on the question of *onus probandi*, *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 115, per Lord Selborne; *Harper*, Inters. Com. L. 50.

5. By an inspection of the table showing the rates of the New York & Susquehanna Railroad Company, it will be perceived that the rates charged for meat, butter, and other articles (cream not stated), "from points in Orange County," is scarcely less, and in some

instances greater, than the charge for milk,—considering that the charge in respect to milk includes the return transportation of cans, and is really but 17½ cents per can each way.

Secondly, as to the supposed net profits of milk transportation, I think the Commission will have no difficulty on this head, inasmuch as they will not assume to determine what profits a railroad company may make annually, either on all its business or on any particular article transported, especially until the learned counsel for the petitioners shall have laid before them the law and evidence to justify such a determination. This he has not done.

I submit that the petition should be dismissed.

Mr. Nathaniel J. Beattie for Lehigh & Hudson River Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Walker, Commissioner:

The petition in the case presents two questions:

1. Is the rate which is charged for the transportation of milk from points in Orange County, in the State of New York, to Jersey City, in the State of New Jersey, a just and reasonable rate?

2. Is the practice of making a uniform milk rate from all stations upon the defendant lines, without regard to distance from Jersey City, in contravention of the provisions of the Act to Regulate Commerce?

The answers justify both the reasonableness of the rate and the principle by which the whole milk route of each road is grouped under an identical tariff rate.

The facts which are found to be established by the proofs, so far as they are considered pertinent to the issues, are as follows:

A meeting, which was attended by two hundred or more farmers and milk-producers residing in Orange County, New York, appointed the complainants a committee to present a petition to this Commission for the purpose of endeavoring to obtain a "less tariff rate," and a "different method of charging freight," in respect to the transportation to the New York market of milk produced in said locality.

The New York, Lake Erie, & Western Railroad Company extends from Buffalo to New York city, passing through Orange County, and carries the greater part of the milk there produced. It also transports from Greycourt, in said county, to Jersey City, milk which is collected along the line of the Lehigh & Hudson River Railroad, which runs in a northeasterly direction 62 miles from Belvidere, New Jersey, to said Greycourt. Said Erie company also carries milk to Jersey City from points on its line more distant than its Orange County stations, and from other points less distant than said stations. The nearest point is Ridgewood, in New Jersey, 21 miles from Jersey City; the most distant is Summit, in New York, 183 miles from Jersey City. The milk stations in Orange County, on the Erie road, extend a distance of from 31 miles to 87 miles from Jersey City, and include stations upon branches as well as upon the main line. Greycourt is 53 miles from Jersey City; the route of the Lehigh & Hudson River Railroad lies in

Orange County for about 13 miles, the rest of it being in New Jersey.

The New York, Ontario, & Western Railroad collects milk at various points along its line in the counties of Orange, Sullivan and Delaware; from Sidney, distant 202 miles from Jersey City, to Orr's Mills, distant 56 miles therefrom. The Orange County points extend a distance of 28 miles westerly from Orr's Mills, or 84 miles in all from Jersey City. The route of this line to New York is over the West Shore road from Cornwall-on-the-Hudson.

The main line of the New York, Susquehanna, & Western Railroad does not pass through the State of New York, but a branch or spur thereof extends north from Two Bridges, New Jersey, to Middletown, in said Orange County, New York, upon which milk is collected at a few stations in said county, distant 74 to 87 miles from Jersey City. Said road also collects milk in the State of New Jersey at various points from 29 to 84 miles from Jersey City.

Upon all said roads milk and cream are carried in cans holding 40 quarts each, which weigh when filled 100 pounds, and when empty 20 pounds. The rate to Jersey City is uniform,—being for milk 35 cents per can, and for cream 45 cents per can, from all of said points, including the return of the empty cans.

Upon reaching Jersey City the milk is delivered by the carriers to the various dealers to whom it is consigned, who receive it in wagons and transport it across the ferry to the city of New York, where they distribute it to the consumers. These dealers, through an organization called the "Milk Exchange, Limited," establish, from time to time, a price upon all milk coming to New York city, which is paid to the producers, less the freight. For example, at the time of the hearing the price paid was in accordance with a resolution of said Milk Exchange, as follows:

New York, Sept. 23, 1887.

At a meeting of the Milk Exchange, Limited, held this day, it was resolved that on and after October 1, 1887, and until otherwise ordered, the market price of milk be four cents per quart, less the railroad charges from each respective producer's shipping point, together with an allowance of five cents per can of forty quarts when the milk is delivered on the west side of the Hudson River.

Under this arrangement Orange County milk is subject all the year round to a deduction from the standard price amounting to 35 cents per can freight, and 5 cents per can ferrriage,—being 40 cents per can in all, or 1 cent per quart; so that when the established dealers' price is 4 cents per quart, the producers who ship by the defendant roads receive 3 cents per quart for their milk. The actual ferry charge paid by the dealers is a certain sum per one or two horse wagon, as the case may be, which averages about 1 cent per can to the railroad companies owning the ferryboats. The remaining 4 cents per can appears to be retained by the dealers in consideration of the service of transporting the milk across the Hudson River in said wagons and return-

ing the empty cans to the depot in Jersey City.

The only rate here in question is the railroad tariff of 35 cents per can, or $8\frac{1}{2}$ mills per quart, from the various shipping points in Orange County to Jersey City, including the return of the empties. The price which the dealers receive for said milk delivered to the consumers varies from 4 to 8 cents per quart, and sometimes 10 cents—the largest sum being considered as the regular price, but reductions being made by each dealer to individual customers, as is found to be required to secure their business.

The milk delivered by said four roads in September, 1887, was as follows, respectively, viz.:

| | |
|---------------------------------------|--------------|
| New York, Lake Erie & Western..... | 120,805 cans |
| New York, Ontario, & Western..... | 42,407 cans |
| New York, Susquehanna, & Western..... | 40,907 cans |

In all..... 204,119 cans

—out of a total of 457,855 cans delivered by all routes supplying the New York markets. The Lehigh & Hudson River delivers about 27,000 cans per month to the Erie at Greycourt, which is included in the above statement of receipts from the latter road.

The milk traffic of the New York, Lake Erie, & Western, commonly called the Erie Railroad, is handled as follows: Two milk trains are run, which double the road daily. One starts from Port Jervis at 5.30 P. M., reaching Jersey City at 11.08 P. M., returning the following forenoon. The distance covered is 87 miles in each direction. This train is usually composed of two refrigerator cars which are brought to Port Jervis from the Delaware Division upon a mixed train, from Summit and Deposit, respectively; and of other refrigerator and ordinary milk cars which are put into the train at Port Jervis, Otisville, Middletown, and Goshen, and from short branches connecting with the main line at Middletown and at Goshen. The other milk train starts from Pine Island, the terminus of the Pine Island branch, at 5.45 P. M., coming upon the main line at Goshen, and arriving at Jersey City at 11.56 P. M. This train also returns in the morning of the following day, the distance being 71 miles in each direction. It hauls refrigerator and milk cars taken up at Pine Island, Florida, Monroe, Turner's, Oxford, Washingtonville, and Newburg, together with seven refrigerator cars delivered by the Lehigh & Hudson Road at Greycourt. The first train usually hauls 13 and the second 15 milk and refrigerator cars. Passenger cars are attached to both trains, and passengers are carried to and from all local stations. The service is daily, including Sundays. The trains stop at all points where milk is received, including several platforms between the regular stations. No freight is carried except milk, cream, and potcheese. If ice is required it is furnished by the shippers. In winter the cars are warmed by the carrier. Two hundred cans constitute a carload, covering the entire floor space of the car, as well when empty as when filled with milk. Upon the return trip the cans are distributed, and the cars left along the line in the same manner as they are taken up in the other direction. The equipment of the Erie

Road employed in this service, in addition to the 7 refrigerator cars of the Lehigh & Hudson, comprises 9 refrigerator cars and 18 milk cars; costing respectively about \$1,500 and \$1,200 each. All said cars are equipped similarly to passenger trains, with passenger trucks, patent couplers, and air-brakes. A large number of stops are made, and the running time between stations is much faster than that of freight trains. The trains are scheduled with the passenger trains, and are required to make their time without fail, for the reason that if the milk reaches Jersey City after midnight it occasions complaint, and if delayed much beyond that hour the milk is sacrificed. It is "time freight," and must be in the hands of the dealers for early morning distribution throughout the Cities of New York and Brooklyn.

The business of receipting for the cans to individual shippers, delivering them to the various dealers to whom they are consigned, receiving and counting the cans, and distributing them at the proper stations, involves much care and attention in order to insure accuracy, while it must necessarily be done rapidly; it requires the services of a large number of extra men, not only on the trains, but at the Jersey City station. A man accompanies nearly every car for this purpose; the crew of the train usually consists of a conductor and twelve men, besides the engineer and fireman; the ordinary freight-train crew is a conductor and three brakemen. Two crews are required for each milk train, in alternate service. The labor upon each milk train, back of the engine, costs \$49.20 per day for the two crews. The force of clerks and helpers employed at Jersey City upon this special business costs \$25.93 per night. The ferryboats of the line are kept running all night, principally to accommodate this traffic. At Jersey City a large part of the terminal tracks, grounds, and buildings have been devoted to this business exclusively. The several roads unite in employing a man to trace and return missing cans, at a salary of \$50 per month.

The methods employed by the other defendants in conducting their milk business are substantially the same as those in use upon the Erie road. The New York, Ontario, & Western uses refrigerator cars exclusively and supplies ice in summer. The milk train runs from Sidney and return, 202 miles each way daily, and milk is brought from New Berlin, 22 miles beyond Sidney. The average distance that the milk is carried on this road is 135 miles, about 75 per cent of it coming from points beyond Orange County. Besides milk, cream, and potcheese, the train also carries fresh butter and fresh meat in baskets.

The New York, Susquehanna, & Western has no refrigerator cars. The expense of its milk train for wages only is \$45.70 per day. The total expense of the train, including coal, oil, wear, and tear, etc., is computed at \$141.65 for the round trip. The cost of an ordinary freight train for the same trip is computed on the same basis at \$106.25. The milk train on this road also carries fresh meat, butter, and eggs, together with berries and fruit in their season. The longest haul on the main line in New Jersey is 84 miles.

The milk train on the Lehigh & Hudson River railroad also carries fresh meat and fruit, the total distance from Belvidere via Greycourt to Jersey City being 116 miles.

The rate of freight to Jersey City, and the average net price paid to the producers for milk for several years last past, are shown in the following table:

| Year. | Ave'ge price per quart. | Freight per can of 40 quarts. |
|-----------|-------------------------|-------------------------------|
| 1877..... | .0315 | .55 |
| 1878..... | .0251 | .55 |
| 1879..... | .0233 | .40 from May 1. |
| 1880..... | .0235 | .40 |
| 1881..... | .0298 | .40 |
| 1882..... | .0325 | .40 |
| 1883..... | .0315 | .40 |
| 1884..... | .0304 | .275 |
| 1885..... | .0279 | .32 from Feb'y 1. |
| 1886..... | .0294 | .35 from Feb'y 1. |
| 1887..... | .03 nearly | .35 |

The yearly consumption of milk in the New York market has meanwhile steadily increased, and the various roads which were able to do so have, from time to time, extended their milk routes further into the interior.

The gross yearly earnings of the milk trains on the defendant roads are approximately shown in the following table. The data from which it was prepared include the earnings upon the first day of each month during the period from July, 1886, to June, 1887, upon milk and cream shipped from every station upon said roads; also upon other freight carried upon said trains. The Erie Road, in May, 1887, discontinued the carriage of other freight on its milk trains in order to avoid delays. The passenger earnings given upon the New York, Ontario, & Western and the Lehigh & Hudson River Roads are actual receipts for one year; upon the other roads, estimated.

| N. Y. L. E. & W. | N. Y. Ont. & W. | N. Y. Sus. & W. | L. & H. R. | Milk and cream. | Other freight. | Passengers. | Total. |
|------------------|-----------------|-----------------|------------|-----------------|----------------|-------------|--------------|
| \$474,690 50 | \$7,362 60 | \$187,057 97 | 40,659 63 | 50 | 80 | 85 | \$539,308 55 |
| 178,094 50 | 1,973 80 | 178,094 50 | 3,860 27 | 50 | 80 | 24 | 201,978 01 |
| | | | | | | 62 | 196,197 89 |
| | | | | | | 75 | 47,644 38 |

The receipts of the latter road from cream and from other freight were not furnished. Probably about \$5,000 should be added, which would make the gross yearly earnings of its milk train \$52,644.38.

The cost of handling the milk business of the defendant roads was not shown. The ex-

pense of the train service upon the New York, Susquehanna & Western was estimated at \$141.65 per day, as above stated, or \$51,502.25 per year; but no statement was made in respect to the station and terminal expenses. The extra cost of labor upon the Erie road in running the trains, above the cost of ordinary trains, was carefully proved, together with the cost of extra labor at Jersey City; but the ordinary cost of train, station, or terminal service was not given. No proof whatever was made in respect to the cost of the traffic upon the two other roads.

The net profit of the carriage cannot therefore be stated, nor even approximated, with any satisfactory accuracy. The business, however, is evidently exceedingly valuable to the carriers,—the gross earnings per car upon the Erie Road amounting to about \$42 per day, for the entire number of milk cars owned by that company, on every day in the year. The receipts per car in each trip, carrying 200 cans at 35 cents per can, are \$70. Cars engaged in this business carry about ten tons each in one direction, and about two tons each in the other direction. Taking into account the return of the empty cans, the rate per hundred pounds charged upon milk shipments is about 29 $\frac{1}{2}$ cents.

The tariff rates upon certain other commodities upon each of the defendant roads were put in evidence. The articles selected were fresh meats, berries, butter, and eggs, which are carried to a certain extent upon milk trains. The rates made upon said articles are very diverse, their transportation in carloads and in less than carloads, as well as at carriers' or owners' risk, being distinguished by important differences in the charges made. When said articles are shipped upon the milk trains in less than carload lots and at the carriers' risk, their transportation bears some analogy to that of milk, although the danger of loss from delay is less, there is no special urgency in the return of empty packages, and the articles named can be economically carried by loading them upon the tops of the cans of milk, after the entire floor space of the cars is filled with the latter product, for which the train is primarily intended.

Upon the Erie Road the rate per hundred pounds from the several milk-route stations to Jersey City are as follows, varying according to distance:

| | |
|-----------------------------|----------------|
| Fresh meat and berries..... | 13 to 33 cents |
| Butter and eggs..... | 10 to 28 cents |
| Egg cases, returning..... | 7 to 17 cents |

—empty berry crates returned free. Other packages returning are charged freight, but the rate was not stated.

Upon the New York, Ontario, & Western the rates are as follows: Fresh meat, 30 to 60 cents; fresh butter, 20 to 45 cents (both on milk train, released); on other trains, meat and berries, 16 to 32 cents; butter and eggs, 14 to 27 cents; returning packages, berry crates, butter pails, and egg crates, 9 to 22 cents.

Upon the New York, Susquehanna, & Western on Monday and Thursday, called produce nights, the rates are as follows: Fresh meat and berries, 14 to 22 cents; butter and eggs, 11 to 19 cents; meat baskets, butter packages

and egg crates returned free on produce nights, wholly at owner's risk and not manifested.

Upon the Lehigh & Hudson the rates are as follows: Fresh meat and berries, 26 to 36 cents; butter and eggs, 22 to 30 cents; packages returned free in milk cars; otherwise, at rate of 14 to 18 cents per hundred pounds; minimum charge, 50 cents.

The Orange County rates are as follows:

| | Fresh meat and ber- ries. | Butter and eggs. | Returning packages. |
|----------------------|---------------------------------|---------------------|-----------------------------|
| N. Y. L. E. & W. . . | .13 to .25 | .10 to .22 | .07 to .14 (egg cases). |
| N. Y. Ont. & W. . . | .16 to .20 | .13 to .17 | .09 to .10 |
| N. Y. Sus. & W. . . | .20 | .17 | Free on pro- duce nights |
| L. & H. R. | .26 to .30 | .22 to .25 | Free in milk cars. |

Conclusions.

1. It is obvious that the data furnished upon the question of whether the rate complained of is just and reasonable are exceedingly meagre. The question of the reasonableness of rates is always a perplexing one. A great variety of considerations are necessarily involved in each instance. Theory and conjecture merely are not enough. A comparison of one isolated rate with another is not sufficient. The whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation.

In the present case the proofs show the volume of the business in question and the way in which it is transacted; the distances traversed, and the various extraordinary expenses involved; the rates charged upon milk and cream, together with the rates charged upon four other articles of traffic. The passenger fares in force upon the defendant roads were also put in evidence, but no important relation between them and the milk rates is perceived.

In order to arrive at a just understanding and determination of the question presented, many other lines of evidence and of comparison would be admissible, in respect to which the case is wholly barren. Some of them are of great importance. For example, the volume of the traffic affords little light upon the question, without some knowledge of the total volume of traffic of the defendant roads respectively, and of the expense of working the traffic as a whole; the relation which the milk business has to the other business of the roads in extent, cost, and profit; the amount of net earnings of the properties, with the operating expenses, fixed charges, and capitalization. The daily earnings per car of the milk trains upon some of the defendant roads may be deduced from the proofs, but nothing whatever is shown of the earnings of other cars in other branches of service. It is claimed that the profits of the business to the carriers are large as compared with the net results of other kinds of traffic, but what the latter may be are altogether unknown, nor is there any attempt to show what is a just measure of profit in railroad transportation. Even the cost of the running of the milk trains, and of the

delivery, collection, and returning of the cans, is left wholly undetermined; the expenses of maintenance of way, structures, and equipment, and the fixed charges of the roads, to which this business should contribute its fair proportion, are not even alluded to. Some light might be thrown upon the question by evidence of what is charged by other carriers in other localities for like services rendered, but nothing of the sort is adduced. The course of the business in respect to rates of freight and prices of milk for a term of years is in evidence, but the result is such that no relation between them can be seen. When the freight charges have been reduced the producers have not apparently profited comparatively, although the method of settlement now in vogue would seemingly give them the benefit of any reduction in the cost of transportation. The experience of the past tends to show that the market price of the product is to a great extent controlled by other considerations. There was no evidence to show the cost of milk to the producer, or how much profit above the cost of production the business yields, or how the producer's profit corresponds with the carrier's profit. No evidence was given which points to any injurious effect upon the agricultural interests of the territory west of the Hudson River, resulting from an exorbitant milk tariff. It does not appear that the farmers of that locality suffer any burdens as compared with those who reside upon other lines of road supplying the same market, or that the net price which they realize for their milk is not fair, and one which affords them a reasonable profit. The rates charged upon the New York & Harlem, Long Island, New York & Northern, and other New York Roads are not produced; and as most of the other roads which supply the New York markets are not interstate roads, their milk tariffs are not accessible to the Commission. The same is true in respect to milk rates quite generally at other large cities, and no proof thereof has been presented.

It might be possible for the Commission, of its own motion, to institute an inquiry into some of the foregoing questions, all of which, and others that might be named, are among the considerations—the average result of which in their totality, produces conviction upon the question of whether a given rate is or is not just and reasonable. It would hardly be proper, however, in disposing of an important question like this, for triers of fact to cast about for evidence upon which to base a decision, without affording opportunity for the carriers to make all proper explanation, and to call attention to any proper distinguishing characteristics of their traffic and its conditions. Especially in this instance, where the complainants' case was presented with great deliberation, it would be out of place for the Commission to assume that the facts submitted failed to present the entire ground upon which the petitioners' claim for relief was based.

The brief filed on their behalf rests this branch of their case upon the following line of reasoning:

"That the rate charged being beyond what is charged by the same companies for the transportation of any other inanimate freight,

it is impossible to escape the conclusion that, as the rates under their tariffs for other articles must be assumed to be just and reasonable, because otherwise they would be unlawful, it is entirely obvious from the comparison furnished by the petitioners themselves that these rates are unjust and unreasonable."

It is not apparent how an assumption that any other given rate must be reasonable is not equally applicable to the milk rate; and it is not difficult to perceive that a rate may fail to afford a fair basis of comparison because it is in fact less than what would be a reasonable rate, if considerations of expense alone governed, wholly disconnected from competitive circumstances and other conditions of the traffic. Passing by these suggestions, however, the comparison proposed is between the rate charged upon milk and that charged for the transportation of "any other inanimate freight." Such a comparison might be of use, although not necessarily controlling, because there must be some one article upon which the highest rate charged upon any article may properly be made; and it cannot be assumed that milk may not be that very one. Only four articles, however, have been presented, out of the vast number of subjects of transportation over the defendant roads. The articles named are those which in some respects are similar to milk in the circumstances of their transportation; in other respects they are quite different; and the disparity of rates between them is by no means so remarkable as to lead to any necessary conclusion of injustice. In fact the figures above given show that on some of these very selected articles, at several of the points where milk is collected, the milk rate is in fact the lowest; and the variations in the figures, as well as in the circumstances of the traffic, are so great that no such conclusion as is claimed can be legitimately drawn.

It is further said that the charges upon milk and cream, of 35 and 45 cents, respectively, for the same sized can, cannot both be reasonable; but the element of value in the commodity transported forms a proper consideration to be taken into the account in the establishment of a rate. The liability of a carrier as an insurer of freight against all loss except such as is occasioned by the act of God or of the public enemy is elementary, and the greater the value the greater the risk.

It is further suggested that the business of transporting milk is extremely profitable; it seems to be thought that this reason without more would justify the Commission in ordering a reduction of the rate. But it is not shown how profitable this traffic in fact is; nor is there any guide as to what, in the apprehension of the petitioners, would be a reasonable profit for the carriers. It is evident that at present rates the farmers of Orange County are very largely engaged in an industry which would be impossible without the co-operation of the roads; for the service of transportation they pay about 25 per cent of the value of the milk when laid down in New York City. As the matter now stands, no necessary deduction follows that the profit of the carriers is exorbitant, or what would be a reasonable sum

for the carriers to charge in case the present rate was found excessive.

It is apparently assumed by complainants that a *prima facie* case is made out by showing that the rates in question are higher in certain cases than certain other rates, and that they produce a large profit to the carriers. Such is not the understanding of the Commission. When a question of reasonable rates is presented, the whole subject should be laid open with all the attending circumstances and relations. While upon the facts as they now appear there seems to be considerable foundation for the claim that the rate in question is too high, at least upon some of the defendant roads, nevertheless it would be unreasonable and unjust for the Commission to pass upon a question involving such important rights without full information upon the entire subject involved. See Annual Report of the Interstate Commerce Commission, 1 Inters. Com. Rep. 313, 1 Inters. Com. Rep. 671; *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 316, 1 Inters. Com. Rep. 646.

2. The other question, in respect to the practice of making a uniform milk rate from all stations upon all the defendant roads is very thoroughly presented in the proofs and the arguments. The petitioners evidently feel that it constitutes a substantial grievance. In fact this proceeding, as the case has been presented, is principally an attempt by them to secure what they denominate "a different method of charging freight," meaning a system of rates which shall be either framed upon a progressive mileage basis, or much less widely grouped. Their claim is based upon § 3 of the Act to Regulate Commerce, which forbids the giving of any undue or unreasonable preference or advantage to any particular person, locality, etc., and the subjection of any particular person, locality, etc., to any undue or unreasonable prejudice or disadvantage in any respect whatever. Their argument is tersely stated as follows: "Undue advantage to the one and undue prejudice to the other is just as great when the difference is made in the increased amount of the service rendered for the same price as it is when the difference is made in the increased price charged for the same amount of service." And the particular discrimination complained of is summarized in the statement that the Erie Road, irrespective of the length of the haul, charges residents of a locality 183 miles from Jersey City the same price for the transportation of milk that it charges those of another locality only 21 miles from the common terminal.

This method of arranging freight rates, technically known as the grouping of rates, has been long practiced by carriers. Various grounds of justification have been assigned, according to the different conditions which in each case have called it into operation.

Under ordinary circumstances it is apparently against the carrier's interest so to group its charges. Upon a wholly independent line of road, disconnected from any competitive surroundings, and able to fix its tariff upon rigid principles, it is probable that a mileage basis would be quite strictly adhered to, for the purpose of obtaining a fair remuneration

upon short-distance traffic and an increasingly larger sum at more distant points, thus producing the greatest possible revenue in each instance. Yet, upon lines like this most simple example, occasions have arisen when the competition of business interests, as urgent in its stress and as imperative in its demands as competition between carriers, has been relied upon by shippers as sufficient to constrain the grouping of rates from different points. A considerable extent of territory containing a large number of mines, quarries, or manufacturing establishments, has frequently been given identical freight rates upon the ground that otherwise the more distant points would be driven from the market and thus important industries might be ruined, resulting indirectly in serious loss of revenue to the road. This argument has even been pressed to the extent that manufactures, for example, 150 miles from a common terminus, have claimed that they should receive the same rate given to others only 50 miles from the same point. They have insisted that their expenses in other respects were substantially the same, and they have demanded the same rates of transportation as an alleged business necessity. This theory, in certain localities and upon certain commodities, has at times been followed to some extent; and it is not unusual to hear it said that it may eventually be found to be both expedient and just to place all freight rates for like commodities at the same sum per hundred pounds, regardless of distance; upon the principle which now controls the transportation of mail matter by the Postoffice Department,—the "postage-stamp system," so called. This is undoubtedly an extravagant way of looking at the subject; for while it is true that the fixed expenses of a railroad or steamboat line are constant, and its maintenance is a steady and uniform outlay, and that the cost of receiving and delivering any given article of freight, including the use of the terminals and other facilities, bears no relation to the distance traversed, but is substantially alike in all cases, so that the service in many respects could be measured as fairly by the quantity transported as by the length of the haul, nevertheless the fact remains that upon many, and perhaps most, articles of traffic the haul is the leading element of expense, and the distance fairly controls the rate of compensation. This is particularly true in respect to passenger traffic; in respect to freight the rate customarily varies per hundred pounds at each distance point established in the rate sheet,—the ratio of the increase of the rate diminishing with the increase of the distance, thus combining the two elements in an approximately just result. No opinion is now expressed or intimated in respect to how far the grouping of rates can be properly carried upon considerations founded solely upon the competition of business, or as to whether such considerations are, to any extent, admissible.

Another occasion of a somewhat wide grouping of rates has arisen under the operation of § 4 of the Act to Regulate Commerce. Prior to April 5, 1887, examples were very common in which a larger sum was charged for a shorter than for a longer distance over the same line in the same direction. The long

and short haul provision of the Law involved new methods; and upon many roads and systems the rate established to the more distant point was taken as the basis to which the tariff at intermediate points was reduced. This it was alleged was the only alternative; for to raise the rates at more distant points, where the competition of other carriers controlled the traffic, involved retiring from such business altogether. The tariffs on file with the Commission show that at a vast number of interior points the rates are now grouped so as to be the same as at some more distant terminal; and the explanation given is that heretofore they were higher than at the point beyond, but were reduced to bring them into conformity with the law.

This, of course, cannot be regarded as directly authorized by the Law; for § 4 of the Act provides that "this shall not be construed as authorizing any common carrier, within the terms of this Act, to charge and receive as great compensation for a shorter as for a longer distance." And it is a fact to which the Commission has already called attention, that one effect of this system of rate-making is to interfere with the business of jobbing centres located between the original shipping point and the various points of destination. When rates are made, for example, from Chicago to La Crosse, at a given sum, and at the same rate from Chicago to all points between La Crosse and Mankato or St. Paul, it is obvious that the Chicago jobbers have a great advantage over the La Crosse jobbers, who cannot buy, reship, and sell without an addition to the given rates equal to the local charges from La Crosse to the points of consumption. To what extent this practice may be legitimately pursued has not as yet been considered by the Commission. *La Crosse Manufacturers, etc. Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Com. Rep. 629. 2 Inters. Com. Rep. 9. But the legislative purpose, as manifested in § 4 of the Act to Regulate Commerce, is distinctly in the direction of relieving the smaller points—in other words, the ultimate consumers—from the burden of rates higher than those paid by more distant or competitive points; and when the application of the rule in reducing intermediate or local rates to a common level, or increasing rates on long-distance traffic, has surprised the merchants at distributing towns, an investigation has usually shown that their former prosperity was based upon two elements, both working in their favor and both denounced by the Act to Regulate Commerce; to wit, the granting of rebates and special rates in their behalf, and the making of higher rates to local points than to more distant terminals or competitive centres. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Com. Rep. 401, 1 Inters. Com. Rep. 703; *Martin v. Chicago, B. & Q. R. Co.* 2 Inters. Com. Com. Rep. 25, 2 Inters. Com. Rep. 32.

This explanation is given in view of the claim which is made in complainants' brief, that milk and cream are the only articles the tariff upon which "takes no account of the length of the haul, but charges as much for a long haul as for a short one." This belief is wholly incorrect. There are few lines which do not show a considerable grouping of rates

upon one consideration or another. The principle of grouping is not novel. The propriety of its application is properly open to challenge in every case, and every case must be justified upon its own facts and peculiar circumstances. The above examples of its use have been given for the purpose of distinguishing them from the question here presented.

The transportation of milk is in some respects a very peculiar description of traffic. The expenses are wholly out of proportion to the expenses involved in respect to any other article of freight. It must be handled upon passenger trains or by a special train service. Time is of the first importance. The period which can be permitted to elapse between its production and its delivery to the consumer is necessarily very short. This fact involves the organization of methods adapted solely to this traffic. Cars must be specially equipped. The route covered by the train must be rapidly passed over, and the empty cars returned with like promptitude. Accuracy is required in every detail. Protection against frost must be afforded. A large addition to the number of train hands is required. A long section of the terminal station is appropriated to this use, where a special staff of clerks and laborers are on duty throughout the night. It is an exceptional traffic in the system of handling, made necessary by the unusual risk and expense.

It is also easy to perceive that these additional arrangements and expenditures apply to the whole quantity of milk handled on the line, without any reference whatever to the length of the haul. The special equipment and trains, the extra labor and care, the terminal service and supervision, are all employed upon the milk business as a unit. This fact is recognized by the complainants; for their brief well says: "It will be observed that the character of the service rendered is the same, and every element which goes to make up the expense account to the railroad performing this service is identically the same, whether the milk is taken to its cars 183 miles from New York, or 21 miles from New York, except in the length of the haul." And it may well be doubted whether the length of haul establishes in this case any very material difference between the expense at different localities. The milk train, when equipped and organized, should be expected to make a daily run. The train hands are under daily wages, and their trip may as well be a full run as a short one. It is true that if the trip was very short one crew might be able to do the daily work in both directions, but this could not be done from the Orange County points. In fact the Erie milk trains both start from stations in Orange County. So far as the evidence shows, only two cars per day are brought by this road from points beyond. It is the giving of the 35 cent rate to these two cars, against which complaint is directed, so far as the Erie Road is concerned. On the New York, Ontario, & Western the case is different; for that road collects milk quite extensively in two counties beyond Orange, and the route of its milk train is over 200 miles; its first milk station being 56 miles from Jersey City. Yet it does not appear that the extra man in the milk car is paid other than by the day, or that the expenses of the

trip, upon this road even, are materially increased by its length. The items of fuel and of wear and tear are apparently the chief matters in respect to which the milk-train service for the more distant points is more expensive than that for the nearer points, and those items when distributed would appear so small that relatively there is in fact very little difference in expense.

Upon the New York, Susquehanna & Western the milk train on its main line, wholly in New Jersey, is met at Two Bridges by cars from its branch to Middletown, New York; 14 miles of this branch are in Orange County, and Middletown is further from Jersey City than any other milk station on its entire route. The milk train on the Lehigh & Hudson River Railroad simply covers its road daily with a single crew, and its expenses would be reduced but very little upon any shortening of the daily run. Moreover, the road is peculiarly situated, in this, that its direction is northeasterly; Pequest, the first milk station, is little if any further from Jersey City, in a direct line than Greycourt, the point of connection with the Erie; and the average distance from Jersey City, of the whole route, "as the crow flies," is about the same as that of Greycourt.

Of course, if the expense was absolutely identical, no argument from that consideration could be derived in opposition to the grouping of the rates. The difference in expense upon the routes covered by the regular milk trains of the various defendant roads, taking all its elements into the account, is so trifling that the argument against grouping from this source is not at all controlling, and in fact is of very slight weight.

Complainants do not fail to perceive that the application of the rule for which they ask would relatively reduce the milk rates at points between Orange County and Jersey City. Yet no evidence is given to show that the milk producers at the latter points are injuriously affected by, or even that they object to, the present system. The petitioners are not prejudiced by the fact that they are charged no more than is charged to others situated nearer the terminus; and, so far as Orange County is concerned, its position, being intermediate, is such that the advantages and disadvantages of its geographical location are substantially equalized by the present identical rates; in other words, upon a strictly mileage basis the complainants would be charged more than milk producers at the nearer points, and less than at the more distant points, the net result upon the four lines in question being not very different from the present rate, so far as the Orange County producers as a body are concerned.

The question comes, therefore, to this: Whether the Act to Regulate Commerce requires the exaction of a relatively greater impost upon milk shipped from the Counties of Sullivan and Delaware than upon milk produced in the County of Orange. In that view the application has the aspect of being an effort to restrict the production of those counties, or at least to incumber it by relatively larger burdens. The farmers who would be most directly affected by the proposed revolution in the tariff are not before us and have

not been heard. This, however, is not material, for the conclusion to which we have arrived in their absence is not against their interest.

The case in this respect is put by the petitioners upon the ground that shippers by rail are entitled, under the law, to the benefit of any advantage apparently afforded by nearness to a common market. It is urged that carriers have no right to remove inequalities arising from location by arrangement of tariffs upon identical rates for long distances; and that the Act to Regulate Commerce was passed, in part at least, to correct what they conceive to be the inherent injustice of grouped rates.

The section of the Act upon which they rely is framed with the care and precision which are manifested in the selection of the phraseology of the entire statute; it declares unlawful the giving of any "undue or unreasonable" preference or advantage to one locality as against another, and the subjection of any locality to any "undue or unreasonable" prejudice or disadvantage.

Upon the point thus indicated the facts do not satisfactorily support complainants' claim. The language of the law implies that there may be advantages which, upon the whole, are not unreasonable or undue.

The argument of complainants upon this question is in part founded upon what is called a "fact which is known as a matter of common experience," namely, "that the nearer the land lies to the great city terminals of the great roads the higher is the market price for such land, by reason of the supposed advantage resulting from its proximity to the market." This is called a "natural law." But as applied to the present case, the statement fails to present such a general principle that the Commission would be justified in taking notice of such a fact as is alleged, without proof to support it. Orange County itself is a considerable distance from the common market. It is not sufficiently near to be materially influenced by opportunities for market gardening or for sale of building lots. The average distance of its various milk stations upon the defendant roads is at least 60 miles from Jersey City. No evidence is furnished in respect to the market price of its farming lands, nor in respect to the value of the farming lands in the Counties of Sullivan and Delaware. There is no proof as to the comparative cost of producing milk or of labor in the three counties named. If any such distinction as is alleged exists in fact there may be reasons which cause it other than the bare fact of distance from New York. The whole subject is left as matter of conjecture merely. We do not know that any such difference in market price in fact exists. If it does exist we do not know the cause.

The Commission, in considering the question of whether or not advantage to localities was or was not undue and unreasonable, has had occasion, several times, to say that regard must be had to the results which flow from the fact that rates are relatively lower at some points than at others; and that the mere existence of the fact of advantage is not sufficient to show a violation of the law. For example, upon this very subject of the grouping of rates,

in the case of *La Crosse Manufacturers, etc. Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Com. Rep. 631, 2 Inters. Com. Rep. 10, it was said that "the system itself is therefore not necessarily illegal; it only becomes illegal when it can be shown that illegal results flow from it." See also *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Com. Rep. 52, 2 Inters. Com. Rep. 41.

In the present case the petitioners have utterly failed to show any way in which they are in fact injured by the grouping of the rates, or by the fact that more distant points have the same rates. So far as appears, the Orange County farmers do not receive any less for their milk because an opportunity is given to farmers in Sullivan and Delaware Counties to participate in the industry upon the same terms. Nor does it appear that there is any glut in the market created by the extension of the identical milk rates, or that there is any difficulty in disposing of the entire Orange County product. Some apprehension seems to be felt that the market price in New York City may be reduced by the bringing in of too much new territory, and that the opening of like facilities at more distant points may eventually crowd the nearer points out of the market. But there is no proof whatever that any such state of affairs now exists. On the contrary, the evidence shows a constant and rapidly increasing consumption of milk, arising from the natural growth of the cities which constitutes the market, and from the enlarged use of milk and its products which is stimulated by a steady and satisfactory supply. In order to meet this constantly growing demand the sources from which the product is drawn are necessarily continually extended. It seems that at first the immediate neighborhood of the cities sufficed to furnish all milk required; presently the lines of supply were gradually prolonged in various directions, until they ramified throughout the distant County of Orange, and now are extended beyond that county to more distant localities still; but it does not appear that the price is affected by any excess of delivery, or that any milk of Orange County producers remains unsold. Prudence would influence railroad managers to confine the collection of milk within the territory in which it can be most cheaply handled, and to extend the milk system no further than the increasing growth of the demand should require. It does not appear but that this has been in fact the course which the business has taken; it is not shown that the addition of new territory at any time has operated to the prejudice of the old.

It is said by way of argument that there is an inherent injustice in carrying the product of one locality at a less rate than that of another which lies nearer to the common market, because in that case the nearer shipper pays a part of the expense of transporting the freight of his rival a longer distance upon the same train. This result does not necessarily follow, however. In cases where the rate is sufficiently high to afford a reasonable profit upon each portion of the traffic by itself, there are no losses upon the longer portion of the route to be made up by overcharges upon the remainder. Although the product of the most

distant locality may yield a substantially less measure of profit than that of the nearer, nevertheless the traffic which pays the least profit to the carrier may pay its own entire transportation expense, and perhaps a good deal more. In that event there is nothing in its transportation which is saddled upon other communities, and the smaller profit which is made from the longest haul helps to support the facilities which the carrier is enabled to maintain for the common benefit of the entire route covered. In the present case it will not be contended by complainants that the milk business from even the most distant stations is done at any loss to the roads.

In considering a question of this kind the interests of the public as a whole should be kept in view. It will not do to look solely to the pecuniary advantage of the producers. The great body of consumers are equally entitled to be considered, although their pecuniary interests are individually less because their number is so much the greater. Milk is one of the prime necessities of life, and its constant distribution and general use have become a marked feature of the modern civilization of our great cities. This has been made feasible by the intelligent employment of the unexampled facilities which railroads now afford. The public are entitled to have the most full and free access possible, to all reasonable extent of producing territory; and anything that might tend to embarrass the production of a sufficient quantity of milk to supply all demands, or to hinder the regular shipment to the dealers of an adequate daily quantity, would be an evil of great public consequence. The system of making a uniform freight rate upon all milk transported upon the same road to a common market is one of long standing. No one was heard to say that he remembered its origination. It has served the public well. It tends to promote consumption and to stimulate production. The method is peculiar, it is true, but the traffic is peculiar. It does not appear that the petitioners are pecuniarily damaged by the gradual extension of its opportunities to more distant points. The benefits to the farmers of those localities, as well as to the great army of consumers, are obvious. It is not apparent how any other method could be devised which would present results equally useful to the public or more just to the complainants. To subdivide the freight rates according to distance, or even to introduce a system of shorter grouping of rates, would necessarily compel the adoption of a new system of receiving, delivering, and accounting; would cause great inconvenience to the carriers and the dealers; would impede the rapid and reliable management of the traffic; would restrict the extension of territory required for future public demands, and apparently would not benefit the Orange County farmers in the slightest degree. Until some actual injury to them arises, the Commission does not feel justified in holding that the grouping of the milk rate upon the route carried daily by a separate milk train, operated as a unit, works undue or unreasonable prejudice to the complainants; and it is, moreover, impressed with the belief that the present system is upon the whole the best that can be devised

for the general good of all concerned in the traffic.

It is proper to add that the milk business referred to, from its nature, is confined to the neighborhood of large cities, and that milk rates are not usually interstate rates. It would be a misfortune to have different principles adopted in the method of handling the traffic, upon lines which supply the same market; and the Commission is supported in reaching the result above stated by the fact that the grouping of milk rates by charging the same sum upon all milk carried to the same market has been recently considered and approved by two able State Commissions.

In this connection the manner in which the subject of grouped rates has been treated by the English tribunals and by Parliament is of interest. The Railway & Canal Traffic Act of 1854 contains a provision in very similar terms to the section of the Act to Regulate Commerce which is here in question. It reads as follows: "No such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever; nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Under this section various decisions concerning the grouping of rates were made, at first exhibiting an apparent tendency toward the position that undue and unreasonable prejudice is an ordinary consequence of the grouping system. An application in the court of appeals involving a review of a decision of the railway commissioners upon the subject was, however, dismissed, the Lord Chancellor (*Lord Selborne*) using the following language: "It is admitted that if preference is constituted by the railway company carrying for certain colliery proprietors on more favorable terms than for others, *prima facie* that fact was proved, because beyond question they did carry upon the same terms as to charge for the collieries for which they performed more than the same service. They gave a decided, distinct, and great advantage, as it appears to me, to the distant collieries. That may be due or undue, reasonable or unreasonable, but under those circumstances is not the reasonableness a question of fact? Is it not a question of fact, and not of law, whether such a preference is due or undue? Unless you could point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law but of fact." *Denaby Main Colliery Co. v. Manchester Sheffield & Lincolnshire Ry. Co.* 3 Ry. & Can. Traffic Cas. 426, 441; 4 Ry. & Can. Traffic Cas. 23, 28, 437.

The effect, therefore, of the final decision in the *Denaby Case* was to adjudge that the court of appeals, having jurisdiction of questions of law alone, could not revise the decision of the commissioners, who had found, upon the facts shown them, that the preference in question was undue and unreasonable.

In a more recent case before the commissioners, the basis of the earlier decisions was clearly stated by the following language used

in distinguishing them from a pending case: "But they have not shown (a fact which was found in the *Denaby Case*) that their output is at all in excess of the demand for their coal, or that a single ton of coal is left on their hands because they cannot at existing rates find a market for it." *Broughton & Plas Power Coal Co. v. Great Western Ry. Co.* 4 Ry. & Can. Traffic Cas. 203 (1883).

A still later decision reaffirms the proposition that applicants claiming undue preference "must show that they are damaged by the undue preference complained of." *Skinning-grove Iron Co. v. Northeastern Ry. Co.* 5 Ry. & Can. Traffic Cas. 244 (1887).

The result reached in the present case is believed to be in entire harmony with the construction given to the same statutory provision by the English tribunals.

There appears, however, to be a substantial difference in the expense when milk is brought from points beyond the end of the route of the regular milk trains upon the New York, Lake Erie, & Western, and the New York, Ontario, & Western roads. Two refrigerator cars are hauled every day from Summit and Deposit to Port Jervis upon an ordinary mixed train, the expense of which is separable from and additional to the expense of the milk train proper. The daily run of the milk train is 87 miles, while these cars are taken nearly 100 miles further. It requires four cars to perform this service; for a round trip to Jersey City and back cannot be made within twenty-four hours, as the trains are run. The manner in which milk is collected upon the New York, Ontario, & Western at points beyond Sidney was not explained in the proofs,

but similar conditions probably exist. A charge for such service somewhat higher than the charge made upon the route of the daily regular milk train proper would seem to be just, and perhaps to be necessary, in order to fairly equalize the proportionate privileges afforded, in view of the material increase of cost required to send cars out to points beyond the terminus of the daily trip, and to bring them back loaded, at an hour convenient for making up the train.

Nevertheless it does not appear but that the present rates to those more distant points are already sufficiently high. No increase in those rates can be recommended or would be proper, in view of the facts above stated, upon the point of the reasonableness of the present tariff. It is presumed that the rates to all points can be adjusted by the carriers themselves in conformity with the views herein intimated, and without any further consideration of details by the Commission. In case that the subject of a reduction of the rates in general shall be brought again before the Commission, the question of grouping, to the extent last above indicated, will be regarded as still open.

The petition is therefore held to be not sustained upon the question of charging the same rate to all points reached by the regular daily milk trains upon the several defendant roads. Upon the question of the reasonableness of the rate so charged, the petition will be retained by the Commission to enable the complainants to produce evidence of additional facts if they so desire.

Commissioner Morrison does not join, but dissents from the report and opinion of the other Commissioners.

UNITED STATES CIRCUIT COURT

FOR THE EASTERN DIVISION OF THE EASTERN DISTRICT OF MISSOURI.

Patrick P. CONNOR, *et al.*, Firm of Connor Bros.,

v.

VICKSBURG & MERIDIAN R. R. CO.

1. The jurisdiction of the Federal Courts over actions for violations of the Interstate Commerce Act is not dependent on the fact of diverse citizenship, and hence, under Act of Congress of March 3, 1887, a civil action for such violations can be brought only in the district whereof the defendant is an "inhabitant."

2. A corporation is an inhabitant of the State that created it, or of the State where it keeps its records and principal office, and where its chief officers reside or may most usually be found.

3. The fact that a railroad corporation keeps an office and an agent for the purpose of making freight contracts in a federal judicial district outside of the State which chartered it and in which are its road and chief office, will not make it an inhabitant of such district so as to give the Federal Courts of that district jurisdiction of actions against it

in which jurisdiction is not founded only on the fact of diverse citizenship.

(Decided October 5, 1888.)

ACTION against a railroad company to recover damages for violation of the Interstate Commerce Act.

On motion to set aside the marshal's return of process and to dismiss the suit. *Motion sustained.*

The petition states that the plaintiffs are citizens of Missouri, engaged in the shipment of grain to Mississippi, Alabama, and other southern States; that defendant is a railroad corporation created under the laws of Mississippi and having its principal office in that State; that defendant also has an office and agent in St. Louis, Missouri for the transaction of its business as a common carrier; that defendant is a common carrier engaged in the transportation of property, under a common control, management, or arrangement for a continuous carriage or shipment from one State of the United States to other States of the United States, etc., within the meaning and purview of the Act of Congress of April 5, 1887, known as the Interstate Commerce Act, and that defendant is subject to the provisions of that Act; and that being such common carrier, so engaged in the transportation of property, defendant, by an unlawful system of rebates,

drawbacks, false bills of lading and other false and fraudulent devices and discriminations against plaintiffs, instituted and put in force and practiced by defendant, in violation of said Act of Congress, has damaged plaintiffs \$50,000; wherefore they sue.

Process in the suit was returned as served upon the agent of the defendant at St. Louis.

The grounds of the motion to dismiss are stated in the opinion.

Messrs. Pollard & Werner, for defendant, for the motion:

1. The record shows, on its face, that the suit is founded on the Interstate Commerce Law; that the plaintiffs are citizens of the State of Missouri; and that defendant is a corporation organized under the laws of the State of Mississippi, having its general offices in and being a citizen of that State. The jurisdiction of this court therefore is not founded on the citizenship of the parties alone. In such case the suit can only be maintained in the district of which the defendant is an inhabitant.

Act May 3, 1887, § 1; *Reinstadler v. Reeves*, 33 Fed. Rep. 308; *Gormully v. Pope Mfg. Co.* 34 Fed. Rep. 818; *Halstead v. Manning*, 34 Fed. Rep. 565.

2. Defendant did not become an inhabitant of this district, within the meaning of the Act, by having an office and doing business within it, so as to make it subject to service of summons under the state statute.

County of Yuba v. Pioneer Gold M. Co. 32 Fed. Rep. 183; *Fales v. Chicago, M. & St. P. R. Co.* Id. 673; *Gormully v. Pope Mfg. Co.* *supra*.

Messrs. Minor Meriwether and Henry W. Bond, for plaintiffs, *contra*:

Is it true, as claimed by defendant, that the jurisdiction is not founded only on the fact of diverse citizenship? The parties are certainly citizens of different States. The cause of action, the tort of the defendant, does not go to the question of jurisdiction. Defendant has wronged the plaintiffs, and for such wrong plaintiffs are entitled to redress under the common law, and could recover it in any court of competent jurisdiction, regardless of the Interstate Law. The Interstate Law has only declared unlawful that which was always unlawful—the discrimination by a common carrier in favor of one shipper against another; and has opened the courts of the United States to the sufferer, for redress of the wrong. Section 9 of the Act provides that “Any person claiming to be damaged by such discrimination may sue for recovery of the damage in any District or Circuit Court of the United States of competent jurisdiction.”

Would it be denied, if this were an action upon account or upon a promissory note, that the diverse citizenship would sustain the jurisdiction under the Judiciary Act of March 3, 1887? Does the fact that the action is for a tort forbidden at common law, and for the redress of which Congress has opened the courts, make the jurisdictional question as to parties less one of diverse citizenship? The question of jurisdiction here is not one of subject-matter but of parties.

A foreign corporation doing business in a State consents to be sued there. If it do busi-

ness there it will be presumed to have assented, and will be bound accordingly.

La Fayette Ins. Co. v. French, 59 U. S. 18 How. 408 (15 L. ed. 453); *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 81 (20 L. ed. 358). See also *St. Clair v. Cox*, 106 U. S. 356 (27 L. ed. 225), in which it is said that the condition of doing business in another State may be implied as well as expressed, and that a corporation doing business in another State will be deemed to have fully assented to be sued therein.

The law of Missouri provides that foreign corporations doing business in this State may be sued by service upon the agent of the corporation in this State (Rev. Stat. § 3489), and that a general judgment may be entered against it as if created by the laws of this State (Act 1881, p. 173).

Under a similar statute in Pennsylvania, a citizen of Pennsylvania sued a foreign corporation in the United States Circuit Court of Pennsylvania. The United States Supreme Court held that the circuit court was a court of the Commonwealth of Pennsylvania within the intent of the statute, and had jurisdiction of the suit, and should proceed to hear and determine it.

Ex parte Schollenberger, 96 U. S. 369 (24 L. ed. 853). The Judiciary Act of 1875 limited suits to the district of which the defendant is an inhabitant, or in which he shall be found at time of service. The Act of 1887 modifies this by limiting suits to the district of which the defendant is an inhabitant, except in cases where the jurisdiction is founded on the fact of diverse citizenship only, and then the suit may be brought in the district of the residence of either the plaintiff or defendant.

But we submit that neither the Act of 1875 nor that of 1887 affects the principle upon which the cases cited above were decided; namely, that where a foreign corporation avails itself of the comity of a State to do business therein, it thereby consents, for the purposes of suit, to be an inhabitant of the State and places itself exactly in the attitude and position of any other inhabitant of the State, for the determination of all controversies, and not place the inhabitant of a State at the disadvantage of having to seek redress in the courts of a distant State, for wrongs done by the corporation in his own State, after abusing its comity. “Foreign corporations doing business in a State are to be regarded and treated, for the purposes of suit, as corporations of the State.”

New York L. Ins. Co. v. Best, 23 Ohio St. 105; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249; *McNichol v. United States Merc. Rep. Agency*, 74 Mo. 457.

Whether, then, the suit at bar relies for its jurisdiction upon the fact of diverse citizenship only, or upon the Interstate Commerce Act, the defendant, under the authority of the cases above cited, is, for the purposes of the suit, an inhabitant and a corporation of Missouri, and subject to the jurisdiction of this court, under the Act of March, 1887.

Thayer, District Judge, delivered the opinion of the court:

In this case plaintiffs are citizens of Missouri,

and the defendant is a corporation created by the laws of the State of Mississippi, and has its chief office and place of business in that State. The petition avers that defendant also has an office in the City of St. Louis, and has an agent in this city for the transaction of its business. Process has been served on the alleged agent, in accordance with the laws of Missouri regulating service upon foreign corporations.

Defendant appears specially and moves to set aside the marshal's return of service, and to dismiss the suit on two grounds: (1) because the petition shows that the cause of action is of such character that defendant can only be sued thereon in a federal court, in the district where it was incorporated and has its chief office,—that is, in Mississippi; (2) because (as it is claimed) the person on whom process was served was not its agent at the time of service.

An objection is raised to any consideration of the first point of the motion, for the reason that it is not raised by demurrer. With reference to that objection it is only necessary to say that where it is claimed that a petition shows on its face that the court is without jurisdiction of the cause, I can conceive of no substantial reason why the defendant should not be permitted to move a dismissal of the same on that ground. In such case it is, in my opinion, wholly immaterial whether the jurisdictional question is raised by demurrer or by motion to dismiss.

I accordingly proceed to consider whether the first point of the motion is well taken.

Section 1 of the Act of March 3, 1887, regulating the jurisdiction of federal courts, provides that "No civil suit shall be brought before either of said courts (district or circuit) against any person . . . in any other district than that whereof he is an inhabitant; but, where jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

In the present case it is obvious that the jurisdiction of this court (if it has jurisdiction) does not depend "only on the fact" that plaintiff and defendant are citizens of different States.

The action is brought to recover damages sustained by reason of violations of an Act of Congress approved February 4, 1887 (U. S. Stat. at L. Vol. 21, p. 379), commonly called the "Interstate Commerce Law."

The petition is drawn with especial reference to the provisions of that Law, and states a cause of action over which the federal courts are expressly given jurisdiction by § 9 of the Act, without reference to the citizenship of the parties.

It has been suggested that the petition states a cause of action at common law as well as under the statute; but it is unnecessary to determine that question on this motion, for even if the acts complained of do give a right of action at common law, it is also true that they amount to a violation of the Interstate Commerce Act; and the federal courts have been given jurisdiction of suits brought to recover damages growing out of violations of that Act, without

reference to the citizenship of the parties litigant. See § 9, *supra*.

In any view of the case made by the petition, it is clear that the jurisdiction of this court is not dependent "only on the fact" of diverse citizenship; therefore if jurisdiction of the cause is retained, it must be on the ground that the defendant is an inhabitant of this district, within the meaning of the Act of March 3, 1887.

For the purpose of determining whether defendant is an inhabitant of the district, I shall assume that the averments of the petition are true; that is that it keeps an office and an agent in this district for the purpose of making freight contracts, but that its chief office as well as its railroad is located in the State of Mississippi.

Does the fact then that it has an office and an agent here constitute it an inhabitant of the district?

This precise question, for reasons that appear to me to be sound, has been decided in the negative by the Circuit Court of the United States for the Southern District of New York and Northern District of Illinois. *Halstead v. Manning*, 34 Fed. Rep. 565; *Gormully v. Pope Mfg. Co.* 34 Fed. Rep. 818. See also *Reinstadler v. Reeves*, 33 Fed. Rep. 303.

It has long been the settled rule that a corporation created by a certain State, by virtue of that fact is to be deemed a citizen of that State for the purpose of determining questions of federal jurisdiction dependent on citizenship.

For the same reason that entitles it to be regarded as a citizen of the State that creates it, it may also be said to be an inhabitant of such State—especially if (as in this case) its chief office and place of business is there located.

In one case at least a corporation has been termed an inhabitant as well as a citizen of the State under whose laws it was incorporated. Thus in the case of *Louisville, C. & C. R. Co. v. Letson*, 43 U.S. 2 How. 556 (11 L. ed. 377), the court says: "A corporation created by a State . . . seems to us to be a person, though an artificial one, inhabiting and belonging to that State, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that State."

If an artificial person, like a corporation, may be an inhabitant of a State or district, it can, with most propriety, be said to be an inhabitant of the State that created it, or of the State where it keeps its records and principal office, and where its chief officers reside or may most usually be found.

These, in my judgment, are the tests which should determine the domicile of a corporation; and, tried by such tests, the defendant is clearly an inhabitant of the district of Mississippi.

No other rule, indeed, seems to be applicable to the determination of the question of domicile, unless it be held that a corporation is an inhabitant of any and every State where it has an office and transacts business.

But if the latter position be assumed, no reason is perceived why it might not, with as good reason, be held that a corporation is likewise a citizen of each State where it maintains an office and transacts business. That, however, is a doctrine at variance with all of the decis-

ions respecting the citizenship of corporations.

On the assumption that the defendant has an office and agent in this State, it goes without saying that it might have been sued in this district under the Act of March 3, 1875, to determine the jurisdiction of United States Courts, as that Act permitted suits to be brought against a defendant, not only in the district of his residence, but wherever he might "be found at the time of serving . . . process." These latter words, permitting service where defendant may be found, have been dropped in the Amendatory Act of March 3, 1887, for the

manifest purpose of requiring all suits to be brought in the district of defendant's residence, excepting those suits only in which jurisdiction is dependent solely on the fact of diverse citizenship.

The authorities cited by plaintiffs' counsel in opposition to the motion (being all decisions under the Act of March 3, 1875) are therefore not in point.

The motion to dismiss the suit for want of jurisdiction over the person of the defendant (it being an inhabitant of the district of Mississippi) is therefore sustained, and the suit is dismissed.

INTERSTATE COMMERCE COMMISSION.

LOUISVILLE SOUTHERN R. CO.

v.

LOUISVILLE & NASHVILLE R. R. CO. and Louisville Railway Transfer Co.

(No. 147.)

ANSWER filed September 18, 1888, to complaint given *ante*, 131, alleging refusal to furnish equal facilities for interchange of traffic.

The answer of the Louisville & Nashville Railroad Company and the Louisville Railway Transfer Company to the petition filed against these respondents by the Louisville Southern Railway Company of the 30th day of August, 1888.

For answer unto so much of said petition as these respondents are advised it is material for them to answer, they state as follows:

1. Some time prior to 1850, what was afterwards known as the Louisville, Cincinnati, & Lexington Railroad was constructed from Le Grange to Louisville, Kentucky, and established its depot in Louisville at or near the intersection of Brook and Jefferson streets, in said city.

The southern termini of the Jefferson, Madisonville, & Indianapolis Railroad, and the Ohio & Mississippi Railroad were on the north side of the Ohio River, opposite the city of Louisville.

The Louisville & Nashville Railroad was completed from Nashville to Louisville about 1859, and established its depot at or near the intersection of Ninth and Broadway streets, in the city of Louisville. This point was distant about one and a half miles from the depot of the Louisville, Cincinnati, & Lexington Railroad, a distance of about $1\frac{1}{2}$ or 2 miles from the depot of the Jefferson, Madisonville, & Indianapolis Railroad. All traffic interchanged between said several railroads had to be hauled in wagons or drays, and in the case of traffic interchanged between the Louisville & Nashville Railroad and the Jefferson, Madisonville, & Indianapolis Railroad and the Ohio & Mississippi Railroad, had to be ferried across the Ohio River.

Afterwards a branch of the Louisville, Cincinnati, & Lexington Railroad was extended from Le Grange to Newport, Kentucky, and, by means of a bridge across the Ohio River at that point, connection was made with the Pennsylvania railroad system at Cincinnati. It was expected that this extension to Cincinnati would add greatly to the business of the Louis-

ville, Cincinnati, & Lexington Railroad. And about 1871, what is known as the Louisville Railway Transfer was built from a point on the Louisville, Cincinnati, & Lexington Railroad, at East Louisville, to a point on the Louisville & Nashville Railroad, at South Louisville, a distance of about 4.13 miles.

This transfer railway was built by a corporation chartered by the State of Kentucky, under the name of the Louisville Railway Transfer Company; but the entire capital stock of said company was subscribed for by the Louisville, Cincinnati, & Lexington Railroad Company and the Louisville & Nashville Railroad Company; and said transfer railway was built exclusively by the funds and credit of those two companies.

The object of building said transfer railway was to avoid the necessity of hauling in wagons, through the city of Louisville, passengers and freight interchanges between the Louisville, Cincinnati, & Lexington Railroad and the Louisville & Nashville Railroad and to afford to manufactories and other business enterprises at Louisville suitable locations along the line of said transfer railway track to which sidings could be made, and freight going to or coming from either of said railroads could be promptly received and delivered. A copy of the contract entered into at the time the construction of said transfer railway was determined upon, made between the city of Louisville, the Louisville & Nashville Railroad Company, and the Louisville, Cincinnati, & Lexington Railroad Company, is here filed, marked "Schedule No. 1."

Afterwards said Louisville Railway Transfer Company's railroad was leased to the Louisville, Cincinnati, & Lexington Railroad Company, and it was operated by that company until November, 1881, when the Louisville & Nashville Railroad Company purchased the Louisville, Cincinnati, & Lexington Railroad, with all property rights and privileges, and, by virtue of said purchase, the Louisville & Nashville Railroad Company became entitled to the stock which the Louisville, Cincinnati, & Lexington Railroad Company owned in the Louisville Railway Transfer Company, and also became entitled to the possession, control, and operation of said Louisville Railway Transfer; and since that time the said Louisville & Nashville Railroad Company has continued to use said railway transfer as one of its terminal facilities at Louisville, for transferring freight and passengers between its main stem and its Cincinnati division, and also as a means of

switching cars to and from the numerous sidings which have been from time to time constructed along the line of said railway transfer.

Numerous other sidings have also been constructed from time to time, connecting with the main stem of the Louisville & Nashville Railroad, at different points between what is known as South Louisville and the depot at the intersection of Ninth and Broadway.

About 1881 the depot of the Louisville, Cincinnati, & Lexington Railroad, at the intersection of Brook and Jefferson streets, was abandoned, and the new depot for that road was established at the intersection of First and Water streets, and a line of track was extended from what is known as East Louisville to said last-mentioned depot; numerous sidings have also been constructed, connecting with said last-mentioned line of track.

The Louisville & Nashville Railroad has now a depot and freight yard at South Louisville; another, at Ninth and Broadway; another, at East Louisville, and another, at First and Water streets. By means of said several depots and freight yards, and by means of said several lines of railway, and the various sidings connected therewith, said Louisville & Nashville Railroad has established a system of terminal facilities in and near the city of Louisville, which has cost said company a large sum of money. It would now cost to duplicate such a system not less than \$1,500,000; and, by means of said system, the said Louisville & Nashville Railroad is enabled to receive and deliver promptly freight destined to or from the city of Louisville.

2. A bridge having been constructed by the Louisville Bridge Company across the Ohio River, at Louisville, on June 5, 1872, a contract was entered into between said bridge company, the Jefferson, Madisonville, & Indianapolis Railroad Company, the Ohio & Mississippi Railroad Company, and the Louisville & Nashville Railroad Company for the use and maintenance of said bridge upon certain terms; and a copy of said contract is here filed, marked "Schedule No. 2."

The Jefferson, Madisonville, & Indianapolis Railroad Company constructed a track from the southern end of said bridge out Fourteenth Street, to a point at or near the depot of the Louisville & Nashville Railroad Company, at the intersection of Ninth and Broadway, and a connection was made between those two railroads, so that freight could be interchanged at that point; and the interchange between the Louisville & Nashville Railroad and the Jefferson, Madisonville, & Indianapolis Railroad has been made at that point ever since; and the interchange of freights between the Louisville & Nashville Railroad and the Ohio & Mississippi Railroad recently abandoned the use of the Louisville bridge. Said interchange of business is now conducted under an agreement made on the 16th of May, 1888, between the Louisville & Nashville Railroad Company and the Louisville Bridge Company, a copy of which is here filed, marked "Schedule No. 3."

3. What is known as the Chesapeake, Ohio & Southwestern Railroad was constructed some time prior to 1875, from Paducah to Louisville, and at first established its depot

near the intersection of Kentucky and Fourteenth streets, in Louisville.

Afterwards the Jefferson, Madisonville, & Indianapolis Railroad extended its Fourteenth Street track to a connection with said Chesapeake, Ohio, & Southwestern Railroad, and by means of said connection said Chesapeake, Ohio & Southwestern Railroad was enabled to interchange traffic with the Louisville & Nashville Railroad at the depot of said last-mentioned railroad, at Ninth and Broadway, and traffic was interchanged between the Louisville & Nashville Railroad and the Chesapeake, Ohio, & Southwestern Railroad at that depot for a number of years.

Afterwards said Chesapeake, Ohio, & Southwestern Railroad moved its depot to a point near the intersection of Rowan and Thirteenth streets, near the river, and constructed what is known as the Short Route Railroad from that depot to the depot of the Louisville & Nashville Railroad at the intersection of First and Water streets, so that now freight can be and is interchanged between the Louisville & Nashville Railroad and the Chesapeake, Ohio, & Southwestern Railroad either at Ninth and Broadway or at First and Water streets.

Afterwards a written agreement was entered into between the Louisville & Nashville Railroad and the Chesapeake, Ohio, & Southwestern Railroad Company and the Elizabethtown, Lexington, & Big Sandy Railroad Company by which the Louisville & Nashville Railroad Company in consideration that the Chesapeake, Ohio, & Southwestern Railroad Company would lease from the Louisville & Nashville Railroad Company what was known as the Cicillian Branch of the Louisville & Nashville Railroad at an annual rental of \$60,000, and in consideration that the Chesapeake, Ohio, & Southwestern Railroad Company would construct a track or tracks from the said Cicillian Branch to connect with the main line of the Louisville & Nashville Railroad and of the track of the Louisville Railway Transfer, and, upon certain other considerations mentioned in said contract, it was agreed that in the city of Louisville, and also in the city of Lexington, free access should be accorded the cars of each of said parties to all side tracks, yards, wharves, and factories reached or controlled by the other and now existing or as may be hereafter required; and the Louisville & Nashville Railroad Company agreed to admit the cars of the other two roads, or either of them, to the connecting tracks of the Louisville & Nashville Railroad including the tracks of the Louisville Railway Transfer Company, in Louisville, and to the passenger and freight depots and side tracks of the Louisville, Cincinnati, & Lexington Railroad in said city.

Said contract was conditioned, however, upon the agreement of the other two companies not to compete with the Louisville & Nashville Railroad Company for certain business, and not to build certain parallel or competing lines. A copy of said contract is here filed as "Schedule No. 4."

The Louisville & Nashville Railroad Company claims that as the Chesapeake, Ohio, & Southwestern Railroad Company has failed to build the track connecting the Cicillian Branch with the main line of the Louisville & Nash-

ville Railroad and of the Louisville Railway Transfer, it has failed in other respects to comply with said contract; and that the Chesapeake, Ohio, & Southwestern Railroad and the Elizabethtown, Lexington & Big Sandy Railroad are not entitled to have access to the local sidings at Louisville as provided by said contract. But this question has never been authoritatively settled as between the three companies, parties to said contract.

4. The Kentucky & Indiana Bridge Company having constructed a railroad bridge across the Ohio River, near Louisville, and having constructed certain terminal railway tracks in New Albany and Louisville, claims the right, under a certain provision in the charter of the Louisville & Nashville Railroad Company to connect the railway track of said bridge company with the main stem of the Louisville & Nashville Railroad, and a physical connection of said tracks was made at the intersection of Seventh Street & Magnolia Avenue, in the city of Louisville, in November, 1887.

The petitioner, the Louisville Southern Railway Company, claiming a similar right under said provision of the charter of the Louisville & Nashville Railroad Company, made a contract with the Louisville & Nashville Railroad Company for permission to cross the main stem of the Louisville & Nashville Railroad at a point where Fourth Street, if extended, would intersect said main stem. The said crossing of the Louisville Southern Railway is about one mile north of the freight yard of the Louisville & Nashville Railroad, at South Louisville, and it is about one mile south of the intersection of the track of the Kentucky & Indiana Bridge Company, and the intersection of said last-named track is about one mile south of the freight yard of the Louisville & Nashville Railroad at Ninth and Broadway.

The said Louisville Southern Railway has established its freight depot near the intersection of Rowan and Thirteenth streets, near the river, and it has established its passenger depot near the intersection of Seventh Street with the river front.

A map showing the various railroad tracks, sidings, depots, and yards, referred to above, is here filed, marked "Schedule No. 5."

The Kentucky & Indiana Bridge Company, has already obtained an order from this honorable Commission, requiring the Louisville & Nashville Railroad Company to interchange business with it at the intersection of said Bridge Company's track, above referred to; and, if the petition of the Louisville Southern Railway Company in this case is granted, the Louisville & Nashville Railroad Company will be compelled to make an interchange of business with that company at this crossing; thus establishing two new points for the interchange of business within a distance of one mile of each other and both of them located upon the main stem of the Louisville & Nashville Railroad and between the depot at South Louisville and the depot at Ninth and Broadway.

The Louisville Southern Railway connects with the track of the Chesapeake, Ohio, & Southwestern Railroad on Fourteenth Street, and by means of said track it connects with the track of the Jefferson, Madisonville, &

Indianapolis Railroad, on said street, and by means of said last-mentioned track its cars can be switched to and from the yard of the Louisville & Nashville Railroad, at Ninth and Broadway, or the Louisville Southern Railway can make connection with the yard of the Louisville & Nashville Railroad at South Louisville; and by either of those means the additional trouble and expense of an interchange of business at the crossing at Fourth Street can be avoided.

A written contract was entered into between said Kentucky & Indiana Bridge Company and the Louisville Southern Railway Company, dated June 21, 1887, a copy of which is herewith filed, marked "Schedule No. 6;" and, by reference to articles 7 and 8 of said contract, it will be seen that said companies have agreed that the Louisville Southern Railway shall switch all freight cars that are to be moved between said bridge company's tracks and the track of the Louisville Southern Railway Company, so that the Louisville Southern Railway Company, by virtue of said contract, can, if the order made by this Commission in the case of said bridge company is enforced, make an interchange of traffic with the Louisville & Nashville Railroad Company, at the intersection of the track of said bridge company with the main stem of the Louisville & Nashville Railroad, above referred to, and thus avoid the necessity of opening another point of interchange at the place where the track of the Louisville Southern Railway crosses said main stem.

5. Having thus explained the position and relation of the various railroads centering at Louisville,—an explanation which respondents feel it was necessary to make, in order that the Commission may clearly understand the questions in controversy in this case,—respondents will now proceed to answer the several allegations of the petition.

They admit that the petitioner, the Louisville Southern Railway Company, is a corporation created, organized, and existing under and by virtue of the laws of the State of Kentucky; that the Louisville & Nashville Railroad Company is a corporation created, organized, and existing under and by virtue of the laws of the State of Tennessee; that the Louisville Railway Transfer Company is a corporation created, organized, and existing under and by virtue of the laws of the State of Kentucky; that petitioner owns and operates a railroad commencing at the City of Louisville, in the State of Kentucky, and extending through Jefferson, Shelby, Anderson, and Mercer counties, and via the towns of Shelbyville, Lawrenceburg, and Harrodsburg, to a junction with the Cincinnati Southern Railroad, at Bergen, in the said county of Mercer.

The Louisville & Nashville Railroad Company owns and operates a railroad extending from Louisville southwardly, through the State of Kentucky to the city of Nashville, in the State of Tennessee; also a line of railroad extending from Louisville, Kentucky, to Cincinnati, Ohio; and it owns, controls, and operates various branch lines from the said railroads; and it controls, in the sense of owning a majority of stock, other railroads connect-

ing with said main railroad and branches, and extending through some of the States south of Kentucky.

It is true that by means of petitioner's connection with the Kentucky & Indiana Bridge Company's tracks, petitioner's road is indirectly connected with the Ohio & Mississippi Railroad, the Louisville, New Albany, & Chicago Railroad, and by means thereof petitioner has indirect connection with a number of railroads in the State of Indiana and other States north of the Ohio River, and thereby may be said to indirectly reach all principal points of commerce in the United States north of said river.

It is also true that by means of said connection with the tracks of the Kentucky & Indiana Bridge Company, petitioner's road is connected with the Chesapeake, Ohio, & Southwestern Railroad, by means of which it is enabled to indirectly reach the city of Memphis and many other points in the State of Tennessee, and also to indirectly connect with other railroads extending to the various States in the south and southwest.

At Bergen, in Mercer County, Kentucky, petitioner's road is connected with the Cincinnati Southern Railroad, and by means thereof it is enabled to reach indirectly the city of Cincinnati, Ohio, and the railroad system centering in that city, and is also able to reach indirectly the city of Chattanooga and other points in the State of Tennessee, and to indirectly connect with the railroad system of the south and southwest.

6. Respondents admit that the crossing between the track of petitioner and the main stem of the Louisville & Nashville Railroad, at the intersection of Fourth Street, in Louisville, is practically complete, and that it affords a possible and perhaps practicable means of interchange of cars, between petitioner's road and the Louisville & Nashville Railroad. But respondents deny that such interchange would be either easy or convenient, reasonable or proper, or that such interchange could be made without the use, by petitioner, of the tracks and terminal facilities of the Louisville & Nashville Railroad, at Louisville; on the contrary, the main object of petitioner's application in this case is to compel the Louisville & Nashville Railroad to virtually open its terminal facilities at Louisville to petitioner, so far as petitioner may desire to avail itself of them.

It is true that there is no other direct connection between the railway of petitioner and the Louisville & Nashville Railroad, except at said crossing; but respondents have already shown that a connection could have been made at the yard of the Louisville & Nashville Railroad, at South Louisville, or that connections could have been made with the freight yard at Ninth and Broadway by means of the connection with the Chesapeake, Ohio, & Southwestern Railroad, and that a connection could also be made at the intersection of the track of the Kentucky & Indiana Bridge Company, if the order of the Commission, made in the *Kentucky & Indiana Bridge Company Case*, should be enforced against the Louisville & Nashville Railroad.

The provision quoted in the petition from § 2 INTER S.

18 of the charter of the Louisville & Nashville Railroad is correctly quoted.

7. Respondents admit that petitioner is a common carrier over its railroad, and that it is engaged in the transportation of passengers and property by railroad, under agreement and arrangement with the Cincinnati Southern Railroad and other railroads connected therewith, and under agreement and arrangement with the Kentucky & Indiana Bridge Company, whereby passengers and property are received for continuous carriage or shipment wholly by railroad from other States into and through the State of Kentucky, and beyond Kentucky into other States; and that they are received in Kentucky for such continuous carriage or shipment into other States.

It is also true that the Louisville & Nashville Railroad Company is a carrier of passengers and property by railroad over its railroad aforesaid, and is engaged in the transportation of passengers and property, wholly by railroad, for continuous carriage or shipment between the States of Tennessee, Georgia, Alabama, Florida, Mississippi, and Louisiana.

Respondents have no knowledge as to what amounts of freight of any description petitioner has received, or is receiving, from the several railroad companies mentioned in the petition, coming from States other than the State of Kentucky for continuous shipment or carriage to points beyond the line of petitioner, and upon the line of the Louisville & Nashville Railroad Company, or lines operated by the Louisville & Nashville Railroad Company, at the aforesaid point of crossing between their said railroads.

Respondents file herewith as "Schedule No. 7" a statement showing all the cars that were ever tendered by petitioner to the Louisville & Nashville Railroad at said crossing between June 7 and September 10, 1888.

Cars Nos. 6,994 and 3,824, purporting to have been received on June 11, 1888, were not received from the Louisville Southern Railway, but were received from the Kentucky Refining Company upon bills of lading issued by the Louisville & Nashville Railroad Company to said refining company.

Car No. 726 was received by mistake, and returned to the Louisville Southern Railway the next day.

Cars Nos. 9,352, 2,158, 7,519, 12,028, 9,692, 9,741, 574, 13,841, mentioned upon said statement as having been received between July 22 and August 28, 1888, inclusive, were all received by a subordinate of the Louisville & Nashville Railroad Company, contrary to orders which had been issued to him by his superior officer.

Cars Nos. 20,081 and 20,116 are claimed to have been delivered to the Louisville & Nashville Railroad Company by the Louisville Southern Railway agent; but the books of the Louisville & Nashville Railroad contain no account of either of them.

All of the cars mentioned upon said statement as having been received subsequent to August 24 were received in obedience to a cer-

tain injunction, which will be referred to hereafter.

Said statement contains all of the cars ever tendered to the Louisville & Nashville Railroad Company by the Louisville Southern Railway, except a carload of tan bark consigned to a private siding on the Louisville & Nashville Railroad, and an empty car which was to be loaded at a private siding in Louisville, destined to some point on the Louisville Southern Railway. The last two mentioned cars were refused.

Respondents deny that the Louisville & Nashville Railroad Company has from time to time received, or is now receiving, freight from States other than Kentucky, for transportation by it to Louisville, and thence over petitioner's line of railway to points thereon, or on the line of railway connecting with petitioner's railroad in Kentucky and beyond Kentucky.

Respondents file herewith a statement marked "Schedule No. 8," showing all of the cars ever received by the Louisville & Nashville Railroad for the Louisville Southern Railway; and said cars were delivered to said Louisville Southern Railway, as shown by said statement.

It will be seen by reference to said statement that three of said cars consisted of an engine, a baggage car, and a passenger car, which were consigned to the Louisville Southern Railway as a part of its equipment, and delivered to it at the crossing aforesaid, and constituted no part of the traffic of said road.

Several of the cars mentioned upon said list were loaded with telegraph supplies for the Western Union Telegraph Company, and cannot properly be considered as traffic. Several other cars mentioned in said statement were loaded as lumber consigned to the Louisville Southern Railway, at Louisville, for use in the construction of the road, and therefore no part of the traffic of that road. In fact the only car in said statement which can be considered as interstate traffic is car No. 17,852 loaded with live stock from Mason, Tennessee.

8. Respondents admit that the Louisville & Nashville Railroad Company has refused and is now refusing to interchange with the Louisville Southern Railway, at said point of crossing, any and all interstate traffic between competitive points which are reached with equal facilities and equal rates by the Louisville & Nashville Railroad and its connections. To illustrate: the Louisville & Nashville Railroad Company refuses to receive at said crossing from the Louisville Southern Railway freight originating at Chattanooga or points south and east thereof, because the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway, in which the Louisville & Nashville Railroad Company owns a majority of the capital stock, have a line from Louisville to Chattanooga, which competes with the Louisville Southern Railway, and which carries freight from Chattanooga to Louisville as promptly and at as low rates as is carried by the Louisville Southern Railway and its connections. But the Louisville & Nashville Railroad Company will not refuse to interchange with the Louisville Southern Railway, at said point of crossing, freights passing between local stations on the

Louisville Southern Railway and stations on or reached by the Louisville & Nashville Railroad and connecting lines, upon such reasonable terms, conditions, and restrictions as are usually agreed upon between connecting lines for the interchange of such traffic; though the Louisville & Nashville Railroad Company will refuse to deliver at its terminal tracks and warehouses in Louisville freights coming from local stations on the Louisville Southern Railroad, destined to Louisville, because the Louisville & Nashville Railroad Company is not willing to give the Louisville Southern Railway Company access to its terminal facilities in and adjacent to the City of Louisville—the Louisville Railway Transfer being included as an important part of its system of terminal facilities.

It is not true that the Louisville & Nashville Railroad Company has refused or is refusing to deliver to the Louisville Southern Railway Company freight arriving on the Louisville & Nashville Railroad at Louisville, or on any railroad connecting therewith. No such freight has been offered to the Louisville & Nashville Railroad Company and naturally no such freight would be offered except such as originates at local stations on the Louisville & Nashville Railroad, and to the interchange of which, as above stated, no objection will be made.

With reference to the charge that the Louisville & Nashville Railroad Company discriminates in favor of other railroads terminating at Louisville against the Kentucky & Indiana Bridge Company and the Louisville Southern Railway, respondents deny. The Louisville & Nashville Railroad Company does not interchange traffic with any railroad at Louisville except when, and only when, the terms, conditions, and restrictions upon which such interchange is to be made is fully agreed upon between the parties with which such interchange is to be made; and such terms, conditions, and restrictions are subject to change, modifications, and abrogation on notice, and are usually changed or modified from time to time as the interest of the parties may require.

As to freights passing between noncompetitive points, the Louisville & Nashville Railroad Company does interchange, as it now proposes to do, with the Louisville Southern Railway Company.

The Louisville & Nashville Railroad does refuse to give the Louisville Southern Railway access to the tracks, sidings, and other terminal facilities of the Louisville & Nashville Railroad at or near Louisville, and refuses to switch cars for the Louisville Southern Railway to or from said sidings, tracks, and facilities upon the same terms that other railroads terminating at Louisville are allowed. But this is done because the roads coming to Louisville from the North, and using the Louisville bridge, are not competitors, but allies of the Louisville & Nashville Railroad; and the Chesapeake, Ohio, & Southwestern Railroad and the Elizabethtown, Lexington, & Big Sandy Railroad claim the right to have access to said terminal facilities under the contract above referred to, though the right, as explained above, is not conceded by the Louisville & Nashville Railroad Company, nor has

it been established against the Louisville & Nashville Railroad Company; and all of the railroads to which the Louisville & Nashville Railroad Company has allowed the use of said terminal facilities at Louisville have—by contracts, referred to in the opening part of this answer—agreed to render some valuable consideration to the Louisville & Nashville Railroad Company as an equivalent for such facilities. The Louisville Southern Railway has offered no such equivalent upon its part. It has made nothing but a mere physical crossing with the Louisville & Nashville Railroad, and upon that alone bases its right to have access to all the terminal facilities of the Louisville & Nashville Railway, at Louisville, at as low switch charges as are made against other railroads centering there, all of which have made valuable concessions upon their part to the Louisville & Nashville Railroad in return.

9. On the 24th day of August, 1888, the Louisville Southern Railroad Company filed a petition against the Louisville & Nashville Railroad Company in the Louisville Law and Equity Court, setting forth substantially the same facts as are set forth in the petition filed in this case, and charging that the Louisville & Nashville Railroad Company had refused to receive from the Louisville Southern Railway, at the crossing aforesaid, certain carloads of lumber which originated in the State of Georgia, and were brought to Chattanooga and there reshipped for continuous carriage over the Cincinnati Southern and Louisville Southern railroads, to a point on the line of the Louisville & Nashville Railroad, in Louisville, which cars the Louisville & Nashville Railroad Company had refused to receive at said point of crossing, or to deliver at its sidings in Louisville; and the petition prayed that said law and equity court would enjoin the Louisville & Nashville Railroad Company from refusing to receive from the Louisville Southern Railway such cars of lumber, and from refusing to deliver said cars to the consignee thereof, and from "further refusing to receive freights from the plaintiffs, and from refusing to deliver freight to the plaintiffs, and in general from refusing to interchange freight with the plaintiffs at the aforesaid point of junction near the intersection of defendants' railroad with Fourth Street." And on the 24th day of August, 1888, an injunction was granted in accordance with the prayer of said petition, by Charles S. Grubbs, assuming to act as the judge of said court. It has since been decided by the regular judge of said court, that the election of said Charles S. Grubbs, as special judge, was null and void; and it is assumed that said injunction is therefore void; but said petition is still pending, and it has been answered by the Louisville & Nashville Railroad Company.

Respondents plead said suit as a bar to this proceeding; and if not a technical bar, they insist that the Louisville Southern Railway Company shall be compelled to elect whether it will proceed in said law and equity court, or before this Commission.

All business which has been interchanged between the Louisville & Nashville Railroad Company and the Louisville Southern Railway Company since said injunction was granted

ed was interchanged in obedience thereto, and the cars of lumber referred to in the petition filed in this case were received under said injunction; and the charge of three cents per 100 pounds for switching said cars is the published local rate on lumber, charged by the Louisville & Nashville Railroad Company on all distances less than 10 miles.

Respondents deny that the Louisville & Nashville Railroad Company performs for other persons or corporations like services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, at any charge less than that charged for the switching of said cars of lumber.

It is true that the Louisville & Nashville Railroad Company does not charge exceeding \$2 per loaded car for switching cars for certain other persons and corporations at Louisville; but such charges are made either in the case of individuals who have constructed local sidings connecting with the tracks of the Louisville & Nashville Railroad, in Louisville, under contracts with the Louisville & Nashville Railroad, justifying such a low rate of charge, or they are made against other railroad companies who have entered into contracts with the Louisville & Nashville Railroad Company, as heretofore explained, in which such other companies agree to make corresponding concessions to the Louisville & Nashville Railroad Company.

Respondents are advised and insist that when the Louisville Southern Railroad Company accepts freight consigned to Louisville, its rights and obligations as a common carrier cease when such freight is unloaded in its own depot at Louisville, whether such freight comes from Kentucky or States other than Kentucky; and that the arrangement for its transfer from said depot to the place of business of the consignee in Louisville is not a matter of interstate commerce, but of strictly state commerce, and not subject to the operations of the Act of Congress to Regulate Commerce. And so, if any shipper at Louisville desires to ship by the Louisville Southern Railway the transfer of his freight from his warehouse to the Louisville Southern Railway is not a matter of interstate commerce at all.

And, having fully answered, respondents pray to be hence dismissed

[Signed, etc.]

MARY O. STONE and Thomas Carten, Composing the Firm of STONE & CARTEN,

v.

DETROIT, GRAND HAVEN & MILWAUKEE R. CO.

(No. 149.)

ANSWER filed October 8, 1888, to complaint given *ante* 152, alleging discrimination against Ionia, Michigan, in relation to the delivery of freight.

To the Honorable the Interstate Commerce Commission:

The Detroit, Grand Haven, & Milwaukee Railway Company, respondent in the above-entitled cause, answering the petition says:

1. It admits that the petitioners are engaged

in the retail sale of goods, as in paragraph numbered 1 of said petition stated; and that goods are purchased by them in Philadelphia, New York, and other points east of Detroit,

2. It admits that respondent is a corporation existing under and pursuant to the laws of the State of Michigan, and is a common carrier of passengers and property for hire between said city of Detroit and the city of Grand Haven, both of said places and its entire line of railroad being in the State of Michigan. It denies that it is a common carrier, or engaged in the transportation, of passengers or property between said city of Detroit and the city of Milwaukee, in the State of Wisconsin, or that it owns or controls a line of steamboats operating across Lake Michigan, between said two last-named cities. But there is a line of steamboats engaged in transportation of persons and property across Lake Michigan, between said cities of Grand Haven and Milwaukee, from which respondent receives traffic consigned over its road from Milwaukee, and to which it delivers traffic from its road, destined to Milwaukee. All of said boats are owned, operated, and controlled by an independent corporation organized under the laws of the State of Michigan, by the name of the Grand Haven & Milwaukee Transportation Company, although the management of its business is under control of the same officers as the said road and business of this respondent. In no other way or sense are said water transportation and respondent's road under one management or control.

3. Respondent admits the averments of said petition contained in paragraph thereof numbered 3.

4. It further admits that shipments of freight from Philadelphia, New York, and points east of Detroit, which are delivered to respondent's road at said city of Detroit and transported by it over its line of railway, pass through the city of Ionia, before reaching the city of Grand Rapids; and that the former place is nearer the city of Detroit than the latter, over respondent's railroad.

5. Further answering, respondent admits that it provides at its own expense carts or trucks at the city of Grand Rapids, for the service of transporting merchandise and freight generally between its station and the places of business of merchants, traders, and other patrons of its road at that place, which service it performs without any additional charge to the owner or shipper of the property on account thereof; and that this service is not afforded to petitioners or other merchants at said city of Ionia. This service at Grand Rapids, however, is not secretly rendered, but openly and notoriously rendered, by respondent, and, as respondent is informed and believes, has been for a long period of time past; to wit, for twenty-five years and upwards. In justification of this, respondent says that its station at said city of Grand Rapids is, on the average, one and a quarter miles from the business sections of said city, where the traffic of the place tributary to respondent's road originates or terminates; while respondent's station for receiving and discharging freight and property at said city of Ionia is not to exceed one eighth of a mile distant from the business

center of said city. At said city of Grand Rapids there are two other railroads,—namely, the Michigan Central Railroad, and the Detroit, Lansing & Northern Railroad,—both of which are immediately and directly competitive with respondent's road for the business of said place; and the stations of these two roads for receiving and discharging freight and property at that place are in the business center of said city, requiring only a short haul to and from their stations, of a distance not to exceed on the average more than one quarter of a mile. Respondent did the carting of freight to and from its station at said city of Grand Rapids substantially in the same manner as at present, long prior to the time when either said Michigan Central or Detroit, Lansing & Northern Railroad was constructed at that place. Respondent further answering, says, upon information and belief, that said Michigan Central Railroad Company and said Detroit, Lansing & Northern Railroad Company, both, notwithstanding the more favorable situation of their stations for securing traffic of said city of Grand Rapids, either haul, free of charge to the owner or shipper, all freight and property to and from their stations, or make to such owner or shipper a pecuniary allowance or deduction from the rate of freight charged, equivalent to the cost of such service; while neither of said companies extends the same advantages to the shippers at other points on the lines of their respective roads between the city of Grand Rapids and the city of Detroit, with perhaps the single exception of the City of Jackson, a station on the line of said Michigan Central Railroad, between said city of Grand Rapids and said city of Detroit. Respondent is informed and believes, and so states the fact to be, that, owing to the short distance between the station and the several places in said city of Ionia to and from which traffic has to be hauled, the actual cost of hauling is trivial, and constitutes an insignificant pecuniary expenditure of the petitioners, or any other shipper, interested in shipments of goods or property over respondent's railroad in said city. No complaint has ever been made to respondent of the exceptional service performed by it at Grand Rapids, in carting to and from its station there, either by petitioners or any other shipper, merchant, trader, or other person of said city of Ionia. And respondent further states, on information and belief, that neither the petitioners nor any other person, firm, or corporation at said city of Ionia interested in shipping over respondent's road encounters competition in business, to any appreciable degree, with business at said city of Grand Rapids. Respondent therefore submits, the facts being made to appear, that said petition should be dismissed, and that the relief therein prayed for should not be granted.

E. M. Meddaugh, The Detroit, Grand Haven,
Solicitor for & Milwaukee R. Co.,
Respondent. By W. J. Spicer,
General Manager.

DELAWARE STATE GRANGE of the Patrons of Husbandry

NEW YORK, PHILADELPHIA & NORFOLK R. R. CO.; Delaware R. R. Co.; Philadelphia, Wilmington & Baltimore R. R. Co.; and Pennsylvania R. R. Co.

(No. 102.)

1. The Commission is liberal in allowing **amendments to complaints**, but will not allow one that would be in effect making a new case.
2. **Amendment is not necessary** to bring in matters that would have been the subject of proof under the complaint as originally filed.
3. A **case involving local rates** ordered to be heard before the Commission at a central point in the territory immediately affected by the rates.

(September 13, 1888.)

PROCEEDING on complaint alleging the imposition of unreasonable and discriminative rates, etc. See abstract of complaint 1 Inters. Com. Rep. 649.

Motions by defendant to strike out amendment to complaint and to change place of hearing from Dover to Wilmington. *Denied.*

MEMORANDUM BY THE COMMISSION.

The complainant is an association of farmers and business men organized and located within the State of Delaware. On December 2, 1887, it filed its complaint on behalf of itself and of the farming and trucking interests of the State and the eastern shore of Maryland, charging the defendant companies as follows:

First, they have made unjust and unreasonable charges for services rendered, especially in carrying perishable freights over their roads.

Second, they have granted favors by rebates or false schedules of weights to individuals and companies in preference to others.

Third, they have given undue advantage to particular localities by giving lower rates of freight and extra and more rapid train service to more distant points, so that freight from those points would be delivered in New York and other northern cities so long in advance of similar freight from nearer points as to destroy the market for the latter.

Fourth, they have violated the 4th section of the Act to Regulate Commerce by charging shippers at Norfolk, Va., lower rates for carrying produce to New York and other northern and eastern markets than they charge shippers along the lines of their roads on the Peninsula for carrying similar products to the same markets over a much shorter distance.

The complaint further alleges that the charges made by defendants for the transportation of freight from points on their lines to New York and other northern and eastern cities are exorbitant and unreasonable.

The defendants answered the complaint at length, denying its allegations; but in their answer they claim that it is not sufficient in law, nor sufficiently specific in its allegations of fact, and they ask that for that reason it be dismissed.

On January 12, 1888, after the answer had been filed, the Commission made an order re-

citing that "It appearing to the Commission that the complaint is not sufficiently specific for the purpose of fully apprising the defendants what violations of law the complainant expects to prove and rely upon at the hearing, *It is ordered* That within ten days the complainant file with the Commission a specification of the particular instances of violation of law of which it intends to offer evidence at the hearing under the several paragraphs of its complaint, and that it also within the same time mail to each of the defendants, addressed to the general counsel thereof, at the place where its general offices are located, a copy of such specifications of particulars."

In compliance with this order complainant filed specifications under the first and fourth paragraphs of the petition, and gave notice that with respect to these second and third paragraphs of the petition the petitioner upon further investigation made no specifications, and will offer no proofs thereunder.

On August 16, 1888, the complainants, on obtaining leave of the Chairman of the Commission, filed an amendment to the petition as follows, at the end of the first paragraph thereof: "And further, with respect to perishable freight, defendants do not furnish the efficient train service and speed, and proper and careful handling of the goods, and prompt delivery of freight at Jersey City and Philadelphia which the nature of the business requires, and the necessity for all which has been from time to time alleged and set up by the railroad companies as justifying the extremely high and unjust rates of freight charges by them as aforesaid. And complainant particularly alleges that during the peach and berry season of 1887 the arrangements of said Pennsylvania Company for the delivery of berries and peaches at Jersey City were so inadequate that such delivery was rarely effected until many hours after the time at which the cars should have been ready for such delivery. And further, that similar delays occurred at Philadelphia, so that the main market which should have been available to shippers and consignees in each of said cities was wholly lost."

The defendants made answer to the amendment, as follows:

"That the said amendment was filed without these respondents being afforded an opportunity to be heard against the same; and they respectfully protest that the said amendment should not be allowed, nor should these respondents be held to answer thereto, because the allegations therein contained are not legally germane to the grievances complained of in the paragraph to the petition of which it assumes to be amendatory;

"The several matters therein set out relate solely to contractual obligations of the carrier, which attach at common law; and such allegations, even if sustained or proved, only show a breach of contract or duty for which the carrier would be answerable only in damages to the party affected thereby; and such damages could only be ascertained by the intervention of a jury;

"Said amendment does not set forth any matter or thing within the jurisdiction of the honorable Commission to relieve;

"The allegations contained in the said amend-

ment are not sufficiently direct and specific to advise the respondents with reasonable certainty in what particulars its train service is inefficient;

"Subject to the foregoing protest against liability to answer, and which this honorable Commission is respectfully asked to duly consider and pass upon, these respondents make answer to the matters alleged in said amendment, denying each, every, and all of the allegations therein contained;

"Wherefore, your respondents pray that the proposed amendment be disallowed and the said original petition, with the specifications thereto, be dismissed."

The case being thus at issue an order was made fixing as a date of hearing the 20th of September; and as a place Dover, in the State of Delaware, this being a central point in the region affected by the rates which are under consideration. After notice had been given of this assignment, counsel for the defendants filed a motion to strike out the amendment to the complaint, and also to change the place of hearing from Dover to Wilmington. This motion, by consent of counsel, was brought to a hearing at Washington on September 13, 1888, before Commissioners Morrison and Bragg, other commissioners being elsewhere engaged. In support of the motion to strike out it was contended: *first*, that the several matters alleged by the amendment would, if established by satisfactory evidence, show only a violation of a common-law duty or a breach of contract obligation, or both, and are not therefore within the purview of the Act to Regulate Commerce, nor within the jurisdiction of the Commission. To this point the case of *Schofield v. Lake Shore & Michigan Southern R. Co.*, heretofore decided by the Commission was cited [see *ante*, 76]; *second*, the amendment was not germane to the original complaint; *third*, the matters specified, even if established, could only be redressed by an award of damages to parties aggrieved—an award which the Commission could not make; and *fourth*, the amendment does not disclose with reasonable certainty the particulars in which the train service of the respondent is inefficient.

On behalf of the motion to change the place of hearing it was contended that Wilmington would be much the more convenient place for the attendance of parties, and for procuring the attendance of witnesses, and that it would be economy of time and of expense to have the hearing held at that place instead of at Dover.

After a full hearing of Messrs. James A. Logan and George B. Massey in support of the motions, Messrs. George H. Bates and Lewis C. Bird in opposition, the motions were denied.

Commissioner Morrison:

We have fully considered the matters submitted to us. The practice of the Commission is very liberal in allowing amendments. It will not allow an amendment that makes a new case, but this we do not understand to be a new case. The question involved is one of the reasonableness of rates and of efficiency of service; and the kind of service, the number of trains, and whether the efficiency is equal to the requirements of the business is a question necessarily involved in the question of reason-

ableness of rates. The complainants are not asking damages. They want a more efficient and a better service. If, in the investigation of the matter, the commission should find the service is not good, that defendants have not the trains, and do not give the kind of cars which they should give to suit the demands of the traffic, the complainants may reasonably expect that the defendants will amend their service and make it better for the future. We think the amendment is properly made; in fact we do not see that it calls for any evidence that might have been heard without it. The motion to strike it out should, therefore, be denied. As to the place of hearing, it has been deliberately fixed, and we think it should remain as fixed. The full Commission would undoubtedly have a right to change it, but we think it very unlikely that it will be changed. We will, however, submit that question to our associates and apprise counsel of their determination.

Commissioner Bragg:

In the conclusions stated by the senior Commissioner I fully concur. Some few additional observations occur to me, that perhaps might be made in the line of what has been stated, and in connection with what has been said.

The service afforded by the railroad companies for transporting fruit and milk to the City of New York has been before us in other cases; and we have heard evidence, offered by the carrier, that where there is a great deal of extra expense in furnishing extra service and running extra trains these things might be considered as reasons for charging higher rates. The service rendered bore upon the cost of transportation and the reasonableness and fairness of the rates.

This amendment seems to anticipate to some extent the defense, and it claims that this extra service rendered was not such as justified the extra rates charged. Without any averment on this subject, the Commission proceeding as heretofore in other cases of the same kind would have allowed the carrier to introduce evidence to show the service; and we would have allowed the petitioners on the other side to meet that, if they could, by evidence showing that the service was not as expensive as it was claimed to be, and not as good as was claimed by the carrier. We follow the rules laid down in the Statutes of the United States, and feel ourselves constrained to be liberal in the allowance of amendments to complaints in matters before us. But we have not allowed a petitioner to make a new case, because that is beyond the limits of an amendment. That is what we substantially held in the case of *Riddle, Dean & Co. v. Baltimore & Ohio R. R. Co.* 1 Inters. Com. Com. Rep. 372; 1 Inters. Com. Rep. 701. We adhere to that decision, but we do not think this is making a new case at all. We would have allowed the evidence upon the subject embraced in this amendment just as well without the amendment as with it.

It seems that the Chairman of the Commission allowed this amendment. No one is more familiar than he is with our practice in such cases heretofore, and in allowing it he was strictly in the line of that settled practice.

The hearing will be before the Commissioners and we will confine the evidence within

proper bounds. The complaint contains nothing involving the operation of the road, any further that it bears upon the question of rates, what service is performed and how performed.

(The action of the two Commissioners was afterwards submitted to their associates, and was fully approved).

SUPREME COURT OF ARIZONA.

ATLANTIC & PACIFIC R. CO., *Appl.*,
v.
LESUEUR.

- *1. The **exemption** of a right of way from **taxation** does not exempt the superstructure, *i. e.*, a railway, thereon.
2. **Taxation of the franchise of a railway** granted by Act of Congress, by the **Territories**, is not in conflict with the constitutional grant to Congress of the power to regulate **commerce among the several States**.
3. Nor is the taxation by a **Territory** of the franchise of a corporation incorporated by Act of Congress unconstitutional, as the **taxation of a federal agency**, in the absence of such restriction in the grant of the taxing power to the Territory, as Congress may permit the Territory to do so.
4. For the purpose of taxation, the **situs of the rolling stock of a railway company** is where it is habitually used. If the specified property be constantly changing, the amount may be fixed by the average amount so used.
5. **Exemption from taxation** is the exception to the rule of taxation, and can be sustained only from the strictest construction.
6. The words "**right of way**" in a grant describe the tenure, not the land, granted.

(Decided September 18, 1888.)

APPEAL by plaintiff from a judgment of the District Court of Apache County in favor of the defendant, in a suit to enjoin the collection of taxes. *Affirmed*.

The facts and questions presented are stated in the opinion.

Messrs. William C. Hazledine, Sumner Howard and E. M. Sanford, for appellant.

Messrs. Baldwin & Baldwin, for appellee.

Barnes, J., delivered the opinion of the court:

This was a suit to enjoin the collection of taxes levied upon the property of the plaintiff by the proper revenue officers of Apache County. The ground upon which the injunction is sought is that the assessment was illegal. The levy was made upon the improvements on a certain strip of land in said county, 200 feet wide and 112 miles long, upon the center line of which the railroad of plaintiff is situate; the improvements consisting of culverts, wooden bridges, grading, trestles, rock, earth cuts, and fills; also 265,000 wooden cross ties, steel and iron rails, fish plates, bolts and spikes thereon;

also steam pumps and water tanks, section houses, depot buildings, roundhouse, hotel, coal chutes, side tracks, blacksmith shops thereon; also twelve cottages, used by employees, 500 feet from the track; the franchise of plaintiff to do business and collect freights and fares, except business with the United States; also a telegraph plant along the said line; also safes and office furniture; also railway supplies; also fifteen locomotives, four coaches, two mail and express cars, one hundred box cars, seventy-five flat cars, seven caboose cars, sixteen living cars, fifteen hand cars, coal on hand, and cross ties.

Against the legality of this assessment it is urged: first, that the superstructure and improvements, buildings, etc., on what is called the "right of way" of the plaintiff are exempted from taxation by its charter. By its charter (14 U. S. Stat. at L. 292) "The right of way through the public lands is granted to the plaintiff for the construction of a railroad and telegraph, to the extent of 100 feet on each side of said road, including necessary grounds for station buildings, shops, switches, turntables, and water stations; and the right of way shall be exempt from taxation within the Territories of the United States." It is said that this is a grant of an interest in the real estate, taken for a right of way, and that whatever is attached to it becomes a part of the realty, and, as the right of way is exempt, that the exemption carries with it whatever has become a part of the realty.

No one can question that a right of way is an interest in the realty; nor that culverts, bridges, railway switches, depot buildings, etc., thereon, become part of the realty. He who has title to the right of way has title to the superstructure. They would pass by grant, and would be subject to the laws regulating the conveyance of real estate, including the Statute of Frauds. All this will be conceded. But does it follow that the exemption of the right of way exempts all appurtenances afterwards attached thereto? This is the question. The Supreme Court of Montana seems to hold that it does, though a careful consideration of the decision will show that this conclusion is *dictum*. *Northern Pac. R. Co. v. Carland*, 5 Mont. 146.

The charter of the Northern Pacific Railroad Company is in the same words as the Atlantic & Pacific Railroad Company's charter. In that case the tax was levied upon an assessment of "twenty miles of railroad and rolling stock." The assessment of twenty miles of railroad did include the right of way, as the argument of that case and the cases cited demonstrate conclusively. And the court rightly held that the assessment was illegal, in that the exempted right of way was included in it. This was all that was before the court, and is all that was really decided. The cases cited do not lead beyond this conclusion.

Appeal of North Beach & M. R. Co. 32 Cal. 506. This case holds that a right of way is an ease-

*Head note by BARNES, J.

ment in the land, and that the estate is real property, and may be taxed as such. The opinion is quoted at large in the *Montana Case*. We have never seen the principle here stated doubted.

Washburn on Easements, 5, says: "An easement always implies an interest in the land. It may be a freehold or a chattel one, according to its duration. It is real property, and it is created by grant." In this it differs from a license. *Rowbotham v. Wilson*, 8 El. & Bl. 157; *Ex parte Coburn*, 1 Cow. 570; *Heaton v. Ferris*, 1 Johns. 146; *Wolfe v. Frost*, 4 Sandf. Ch. 86; *Poster v. Browning*, 4 R. I. 51; *Buckeridge v. Ingram*, 2 Ves. Jr. 654; *Binney's Case*, 2 Bland, 145; *Bowman v. Wathen*, 2 McLean, 385; *Providence Gas Co. v. Thurber*, 2 R. I. 21; *Albany & S. R. Co. v. Osborn*, 12 Barb. 225; *Albany & W. S. R. Co. v. Canaan*, 16 Barb. 247; *Sangamon & M. R. Co. v. Morgan Co.* 14 Ill. 166; *Williams v. N. Y. C. R. Co.* 16 N. Y. 100; *Mahon v. N. Y. C. R. Co.* 24 N. Y. 658; *Wager v. Troy Union R. Co.* 25 N. Y. 526; *Presbyterian Society v. Auburn & R. R. Co.* 3 Hill, 569; *People v. Cassity*, 46 N. Y. 46; *New Haven v. Fair Haven & W. R. Co.* 38 Conn. 422; *Chicago v. Baer*, 41 Ill. 306; *Farmers Loan & Trust Co. v. Hendrickson*, 25 Barb. 494; 1 Washb. Real Prop. 3.

These and many other authorities that may be cited clearly point out the law as stated. An assessment of twenty miles of railroad was an assessment of the real estate, and included the right of way and the superstructure thereon. How we are to conclude from these premises, however, that the exemption of a right of way *ex vi termini* exempts from taxation the superstructure, we cannot see. It is *non sequitur*. Exemption from taxation is an exception from the general rule that all property shall be taxed equally. He who asserts that his property is exempt must show it by the clear letter of the law. No intendments are in his favor. No construction will aid him. Every doubt will be resolved against him. He does not stand favored, as does a grantee or a mortgagee. The meaning of words is not broadened to include him. Though you will construe liberally when you tax, you must construe strictly to exempt. You must point it out in the words, "*Ita lex scripta est*," free from doubt or ambiguity. *Cooley*, Taxn. 204; *Phila. & W. R. Co. v. Md.* 51 U. S. 10 How. 376 (13 L. ed. 461); *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514 (7 L. ed. 939); *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 (29 L. ed. 770); *Cottle v. Spitzer*, 65 Cal. 459; *Walter v. Hughes*, 11 Pac. Rep. 122.

Shields, J., for this court says: "No property within the Territory is exempt from the operation of these revenue laws, unless put beyond them, designedly and unequivocally, by the legislative or other sovereign power. A mere inference that certain property is exempt from taxation will never do; nor will it be assumed unless the language used is too clear to admit of doubt," *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569 (30 L. ed. 732).

"It is the settled doctrine of this court that an immunity from taxation by the State will not be recognized unless granted in terms too plain to be mistaken." By this rule then we come to a construction of section 2 of the plaintiff's charter. The lands of plaintiff are not

assessed, nor is the right of way as such. Improvements, culverts, bridges, ties, iron, buildings, etc., located on the right of way are. But were these exempted by the exemption of the right of way? Had Congress so intended it would have been easy to say so; the addition of a word or two would have made it certain. Congress granted a right of way over the public lands, and in the same section it exempts from taxation what is granted. It did not grant improvements, culverts, bridges, buildings, iron, ties, etc. This was property to be placed there afterwards by the grantees. Shall we infer that it exempted what it did not grant, when it does not say so or use words looking in that direction? We think not. We should stand by the letter of the law in favor of equality of taxation. We will not infer that Congress has done so unjust a thing as to expose an immense property thereafter to be created where it would demand the constant protection of all the machinery of organized society at a great expense, and then relieve it of its just burden of taxation in order to defray these expenses. It was projected into almost a wilderness where inhabitants were few; where the title of the lands was in the United States free from taxation; where the burdens of sustaining social order would at best be heavy. Such a property as this would greatly increase these burdens. It cannot be thought for a moment that Congress intended by the use of the innocent words, "and the right of way shall be exempt from taxation," to do such a monstrous wrong as to exempt the millions the grantees should put upon the right of way, from taxation for all time.

It is further urged, with great force, skill and ability, that the grant of right of way to a railway is *sui generis*, and is in fact a grant of the fee; and if so, to exempt the fee so granted exempts the superstructure. It is said that the term "right of way" is used to describe the land granted—that is, that these are words of description rather than of tenure. We cannot concur with this view, and no authority can be found which so holds. We must conclude that the words are used in their common, well known, and universally accepted, legal meaning, and that it was a grant of an easement as defined by law. It was not a grant of the fee. Should the Company see fit to change its line and abandon its present alignment at any point, the right of way so abandoned would revert to the grantor.

Again; it is urged that the assessment of the franchise of this Company is the taxing of the federal agency, and hence it may not be taxed; and the case of *Phila. & S. Steamship Company v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200), is cited. That case and the authorities cited therein hold that the State may not tax a federal agency created by Act of Congress, and also that a State may not, by taxation, interfere with interstate commerce. This is a power specially delegated by the Constitution. "Congress alone can deal with such transportation, its nonaction being equivalent to a declaration that it shall remain free from burdens imposed by state legislation." *Bradley, J.*, in case *supra*; *California v. Pacific R. Co.* 127 U. S. 41 (32 L. ed. 158).

In the case at bar Congress has acted. The

Act says this right of way shall be exempt from taxation. *Inclusio unius, exclusio alterius*. Congress excludes or exempts only the right of way; hence, the inference is that all else is not excluded or exempted. The Constitution declares that "Congress shall have power to regulate commerce with the foreign Nations and among the several States," etc.; art. 1, § 8. This takes the power from the States and delegates it to Congress. Congress might therefore tax or authorize the taxation of the franchises of interstate carriers. But the Act of the Territory is the Act of Congress. Rev. Stat. U. S. § 1851. "The legislative power of this Territory extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. No tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or property of residents." This is the only limitation placed upon the taxing power of the Territory, and should be held to be a delegation by Congress of its admitted power to the Territories to tax all else. A franchise is property, has value, and it is not prohibited to tax it. To do so is not inconsistent with the Constitution or laws of the United States.

Section 1850, Revised Statutes of the United States, enacts that "All laws passed by the Legislative Assembly shall be submitted to Congress, and if disapproved shall be null and void." And may we not add, "otherwise shall have full force and effect?" February 12, 1885, the Territory enacted (Comp. Laws, § 2005) that "All property of every kind and nature whatsoever within this Territory shall be subject to taxation, except,"—and a franchise of a corporation is not in any of the exceptions. We must conclude, therefore, that Congress has granted to the Territory the right to tax franchises, whether they be federal agencies or the means of interstate commerce. Congress may withdraw this power whenever it sees fit, and may disapprove of this legislation. Until it does it must be enforced as the law of the Territory. Congress will carefully guard all of its agencies, and see to it that the Territories do not impair their efficiency, and also will look well after the commerce among the States, that it be not obstructed, and will act when occasion requires. Until it does it must be regarded as having approved of this legislation. Again, it is contended that all of this rolling stock has its *situs* and domicile in Albuquerque, N. M., and was not subject to taxation within said county. It appears that the headquarters of the western division of plaintiff's railroad was at Albuquerque, N. M., and that

it had over 1,000 cars and engines in constant use between Albuquerque, N. M., and Mojave, Cal., a distance of over 800 miles, moving passengers and freight. Plaintiff returned fifteen locomotives, sixteen office cars, and seven caboose cars as constantly in Apache County; 181 cars were added by the assessor. This question is set at rest by the Supreme Court of the United States in *Marye v. Balt. & O. Railroad Company*, 127 U. S. 117 (32 L. ed. 94) (April 23, 1888): "It is quite true, as the *situs* of the Baltimore & Ohio Company is in the State of Maryland, that also upon general principles is the *situs* of all its personal property; but for the purposes of taxation, as well as for other purposes, that *situs* may be fixed in whatever locality the same may be brought and used by its owner, by the law of the place where it is found." "And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used."

In the above case the *situs* was conceded to be in Maryland. That State granted its charter. In this case it is by no means conceded that the place of the "headquarters of the western division" is the *situs* of the Company. The charter designates no place of general business. For the purposes of taxation its *situs* must be wherever business is done, and its personal property engaged in that business shall be subject to the taxing laws of the place where it is so used. The above decision makes it unnecessary to review the long list of cases cited, as this, the last case, settles all conflict and resolves all doubt.

It is insisted also that the telegraph lines erected on the right of way are exempt for the same reason as depots, etc. We think not, for the reasons given heretofore. It is clear that section 3, chapter 53, Compiled Laws of Arizona, refers to telegraph lines constructed under the provisions of that Act. The lines of this plaintiff are constructed by authority of the Act of Congress granting this charter. Under what circumstances a court of equity will entertain jurisdiction to enjoin the collection of a tax, see the case of *Campbell v. Bashford*, 16 Pac. Rep. 269, where the question is discussed by this court.

We see no error in this record, and the judgment of the District Court is affirmed.

Wright, Ch. J., and Porter, J., concur.

INTERSTATE COMMERCE COMMISSION.

LITTLE ROCK & MEMPHIS R. R. CO.
v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO. and St. Louis, Iron Mountain & Southern R. Co.

(No. 146.)

ANSWERS to complaint given ante, 130, charging the refusal of equal facilities for interchange of traffic, etc.

2 INTER S.

ANSWER OF EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(Filed September 19, 1888.)

For answer to the complaint filed herein by the Little Rock & Memphis Railroad Company, on the 29th day of August, 1888, the East Tennessee, Virginia & Georgia Railway Company says:

That, prior to the date when it ceased sell-

ing through tickets, reading via Little Rock & Memphis Railroad, and St. Louis, Iron Mountain & Southern Railroad, the St. Louis, Iron Mountain & Southern Railroad was reached from respondent's territory via Little Rock & Memphis Railroad. Recently said St. Louis, Iron Mountain & Southern Railway finished a road from Bald Knob to Memphis, and thereupon became a direct and immediate connection of respondent's properties.

In accordance with a custom of twenty years' standing, any railroad company so changing its relation towards another as the St. Louis, Iron Mountain & Southern Railway Company has changed its relation to respondent, has been conceded the right to require immediate connections to take off through tickets to points on its line reading over intermediate lines, and put on tickets reading entirely over its own line for all points reached by its line. In accordance with this custom of long standing and conceded right, respondent admits that it did take off that form of through tickets formerly reading over the Little Rock & Memphis Railroad to points upon the St. Louis, Iron Mountain & Southern Railroad and points reached thereby.

Respondent neither admits nor denies all other allegations of the complaint, but calls for proof of each and every of them that may be deemed material.

Respondent is advised that there is no warrant or authority in the Act to Regulate Commerce which requires any common carrier to sell through tickets over the lines of other carriers; and this question is respectfully submitted to the judgment of the Commission.

And now having fully answered, etc.

Wm. M. Baxter,

Solicitor for Respondent.

ANSWER OF ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

(Filed September 29, 1888.)

The St. Louis, Iron Mountain & Southern Railway company, for answer to the complaint of the Little Rock & Memphis Railroad Company, says:

It is admitted that the complainant is engaged in operating the railroad between Memphis, Tennessee, and Little Rock, Arkansas; but of what its traffic principally consists your respondent is not informed other than by the complaint. Your respondent is operating a railroad between St. Louis, Missouri, and Texarkana, Arkansas, connecting with the Texas Pacific and running through Little Rock, Arkansas. The East Tennessee, Virginia & Georgia Railroad Company is engaged in operating a number of railroads having for their western terminus the City of Memphis.

Respondent is not informed as to the number of passengers received by complainant from the East Tennessee, Virginia & Georgia Railroad Company between January 1 and June 30, 1888; but it does state the fact to be that during said period the St. Louis, Iron Mountain & Southern Railroad Company received at Little Rock from the Little Rock & Memphis Railroad 1,244 passengers, who had purchased their tickets from the East Tennessee, Virginia & Georgia Railroad Company.

Respondent is not informed as to whether it is by far the most important connection of complainant, and if the allegation to that effect is material to the issue it calls for strict proof; it calls for strict proof also as to the number of passengers exchanged between respondent and complainant during the first half of the year 1888.

The respondent, about the 13th day of May, 1888, opened a branch road called the Bald Knob Branch and extending from Memphis, Tennessee, to Bald Knob, a point on respondent's line between Little Rock and St. Louis. By this route the distance from Memphis to Little Rock is fifteen miles greater than by complainant's line. The depot of said branch at Memphis is about two miles from the depot of the East Tennessee, Virginia & Georgia Railroad, and through passengers are transferred from one to the other by conveyances belonging to the S. M. Patterson Transfer Company, which handles business of this character for all railroads in that city. There is also track connection between the two depots, but no arrangement has been made for running cars from one to the other.

So far as the respondent is informed the connection between the depot of the East Tennessee, Virginia & Georgia Railroad and that of the Little Rock & Memphis Railroad is a track connection merely, and passengers are not transferred to the complainant's depot in the trains on which they arrive. On the contrary, the respondent alleges that through passengers arriving in Memphis on the East Tennessee, Virginia & Georgia Railroad are transferred at the depot of the latter into a passenger coach which carries them to the depot of the Little Rock & Memphis Railroad, where they again change cars.

Respondent admits that passengers arriving in Memphis in the evening by the East Tennessee, Virginia & Georgia Railroad are detained in the neighborhood of five hours and forty-five minutes if their journey is to be pursued by the Bald Knob Branch of respondent, but it denies that they are detained twelve hours if they arrive in the morning. On the contrary, the morning train of the East Tennessee, Virginia & Georgia Railroad is scheduled to arrive in Memphis at 6.10, A. M., and the connecting train on the Bald Knob Branch leaves Memphis at 6.45, A. M., permitting passengers a reasonable time for transfer from one depot to the other.

Respondent alleges that the fastest and most popular train on its road bound for the Southwest leaves Little Rock at 9.20, A. M., reaching Texarkana at 2.25, P. M. With this train the Bald Knob Branch makes direct connection from Memphis; the trains of the Little Rock & Memphis Railroad fail to make with it close connection at Little Rock.

Respondent denies the allegation of complainant that "Notwithstanding the opening of the Bald Knob Branch, the traffic of complainant has remained substantially unchanged, the traveling public preferring its road."

Respondent is not informed other than by the complaint in this case that the East Tennessee, Virginia & Georgia Railroad Company is selling through tickets over the Kansas City, Springfield & Memphis Railroad by way of

respondent's road to points in Texas and the West; and if it is material to the present issue, respondent calls for strict proof of complainant's allegations in that respect.

The line of railway directly between Little Rock & Memphis was at one time a component part of the St. Louis, Iron Mountain & Southern Railway. During this period a system of ticket exchange was established with other roads; and tickets calling for transportation over the main line of respondent and its branch line between Memphis and Little Rock were distributed to eastern roads. In the year 1887, by judicial proceedings, the line between Memphis and Little Rock ceased to be a part of respondent's road; and since the opening of the Bald Knob Branch respondent has notified the East Tennessee, Virginia & Georgia Railroad to discontinue sales of such tickets. It admits that it continues to permit sales of tickets over the Bald Knob Branch in connection with its main line.

Respondent denies that in doing so it is actuated by the alleged purpose of breaking down the legitimate business of complainant and of crushing a rival. Respondent denies that in refusing to permit the East Tennessee, Virginia & Georgia Railroad Company to sell tickets via its own road to Memphis, thence by complainant's road to Little Rock and thence by respondent's road to Texarkana and the Southwest, while permitting said East Tennessee, Virginia & Georgia Railroad Company to sell tickets by its own road to Memphis, thence by respondent's road to Texarkana and the Southwest, it is violating section 3 of the Act of Congress approved February 4, 1887; and it alleges that while doing so it is affording equal privileges to all lines connecting with it at Little Rock, Arkansas, and to all lines connecting with it at Memphis, Tennessee; and alleges that it has failed to discriminate between lines connecting with it at either place.

John S. Blair

Solicitor for Respondent.

SPARTANBURG BOARD OF TRADE

v.

RICHMOND & DANVILLE R. R. Co. *et. al.*

(No. 135.)

1. The Commission is not willing to determine the relative **reasonableness of rates** at many stations, and in a large extent of territory, upon the mere face of tariffs, and without further proof.
2. Where it is obvious that there are many **parties interested** as directly as is the complainant in the question before the Commission, **opportunity** will be given them to **appear** on the taking of evidence.
3. Where on a question of rates it appears that **higher rates** are made **upon the shorter hauls** on the same line and in the same direction, the **carrier** making them must take the **burden of proof** to show their reasonableness.
4. A case finally submitted without evi-
- 2 INTER S.

dence ordered adjourned to a future day for the purpose of **taking evidence** on the principle above stated.

(Heard July 20, 1888—Decided October 8, 1888.)

PROCEEDING on complaint alleging unjust discrimination against Spartanburg, South Carolina. (See complaint, *ante*, 15.)

On demurrer and motion to dismiss complaint. *Overruled.*

No counsel appeared for the petitioner.

Mr. J. T. Worthington, for the Richmond & Danville Railroad Company, the Western North Carolina Railroad Company, and the Asheville & Spartanburg Railroad Company.

Mr. John S. Blair, for the St. Louis, Iron Mountain & Southern Railway Company.

Mr. J. T. Brooks, for the Chicago, St. Louis & Pittsburgh Railway Company.

Messrs. Ramsey, Maxwell & Ramsey, for the Cincinnati, Hamilton & Dayton Railroad Company.

Mr. W. M. Baxter, for the East Tennessee, Virginia & Georgia Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The complaint in this proceeding involves the reasonableness and justness of freight rates at Spartanburg, S. C., on eastern as well as western freights, made, as is alleged, by the railroad companies defendants. So much of the complaint as related to the Central Railroad & Banking Company of Georgia, the Augusta & Knoxville Railroad Company, the Port Royal & Augusta Railroad Company, and the Port Royal & Western Carolina Railroad Company was withdrawn by the petitioner before the hearing.

The answer of each of the defendants, except the Richmond and Danville system, denies that it makes the rates to Spartanburg or that it has lines which terminate at that point, and avers that from its terminal points to Spartanburg it simply adds the rates of the connecting lines which reach Spartanburg.

The remaining defendant railroad companies whose lines alone reach Spartanburg, namely: the Richmond & Danville Railroad Company and the lines composing its system, deny all unjust discrimination involved in the complaint. The Georgia Railroad Company, in addition to its answer, also demurs to the complaint, and the Richmond & Danville Railroad Company and the Asheville & Spartanburg Railroad Company, in addition to their answers, move to dismiss the complaint.

We have carefully considered the demurrer and these motions to dismiss, and they are each adjudged to be insufficient to justify us in dismissing this complaint.

No oral evidence was offered on the hearing. The petitioner did not appear at the hearing, relying upon the printed tariffs of the defendants as justifying its complaint. Upon the petition and answers and tariffs it appears that the Richmond & Danville Railroad Company and its system are the parties defendant who seem to be responsible for the rates complained of at Spartanburg.

The burden of the complaint upon its merits

seems to be the difference made in rates on freights from New York to Spartanburg and other points along the line of the Richmond & Danville Railroad Company, such as at Charlotte and stations between Charlotte and Spartanburg, and at stations between Spartanburg, Atlanta, and including Atlanta and the difference in western freights, such as meat, flour, grain, etc., at Spartanburg, Union, Gaffney's, Black's, Chester, and Columbia, in South Carolina, and Rutherfordton and Charlotte, in North Carolina, and Atlanta, in Georgia.

Questions such as are here presented, involving the relative reasonableness of rates at many stations and in a large extent of territory, we are unwilling to determine upon the mere face of tariffs. Shippers at every such station, whether represented before us in this proceeding or not, are interested in these questions, and we deem it necessary, as a matter of justice to all concerned, that evidence shall be fully presented showing the circumstances and conditions, if any such exist, that are relied upon by the Richmond & Danville Railroad Company and its system for the differences in rates as they appear upon these tariffs by which the higher rates to Spartanburg than to other points on its line further distant from the place of origin of the freight can be justified. In the presentation of such evidence the burden of proof will be upon the Richmond & Danville Railroad Company to justify, if it can, the higher rates it charges at Spartanburg than at other points on its line further distant from the point of origin of the freight.

A period of forty days from this date will be allowed for the taking of this evidence. The parties, namely: the petitioner and the Richmond & Danville Railroad Company, may, if they prefer, take their evidence before the Commission, at its office, in the City of Washington, at such time as they may indicate to the Commission they desire to do so. Or these parties may respectively take their evidence before a notary public at such point as may be most convenient to either of them, in such case giving the other parties notice of the time and place of taking such testimony and furnishing a list of the witnesses who will be examined; and the testimony so taken must be properly certified, sealed and forwarded to the Secretary of the Interstate Commerce Commission at Washington, D. C.

This case is adjourned, for further proceedings upon the evidence so taken, until November 20, 1888, at the office of the Commission, in the City of Washington, when it will again be called.

The other defendant railroad companies are not required to make further appearance to this controversy or to furnish any evidence respecting it, unless they shall hereafter be notified by the Commission, namely: the Ohio & Mississippi Railroad Company, the Nashville, Chattanooga & St. Louis Railroad Company, the Louisville & Nashville Railroad Company, the St. Louis, Iron Mountain & Southern Railroad Company, the Chicago, St. Louis & Pittsburgh Railroad Company, the Jefferson, Madisonville & Indianapolis Railroad Company, the Cincinnati, Hamilton & Dayton Railroad Company, the Cincinnati Southern Railroad Company, the East Tennessee, Virginia &

Georgia Railroad Company, the Western & Atlantic Railroad Company, the Illinois Central Railroad Company, and the Cincinnati, St. Louis & Chicago Railroad Company.

C. H. GRIFFEE

v.

BURLINGTON & MISSOURI RIVER R. CO. IN NEBRASKA, and also as Lessee of the Atchison & Nebraska Railway.

(No. 137.)

On the 10th of April, 1887, on the request of one C. H. Waite, **trip passes** were issued to him by an officer of the defendant from Lincoln, Nebraska, to Atchison, Kansas, and return, to be good for twenty days. Waite had been an employee of the defendant for several years in the capacity of an engineer, and, having been recently discharged, professed when he applied for the passes that he desired to go to Atchison to seek employment on another road. They were **issued** to him as an **ex-employee**. They were **not used**, and no one was ever transported upon them. They were delivered to the Commission on the hearing. *Held:*

(a) That the **offense** charged is **under the second section of the Act** and consists in charging, demanding, collecting or receiving by a common carrier to which the Act applies, from any person or persons, a greater or less compensation for service rendered or to be rendered, in the transportation of persons or property subject to the Act, than it charges, demands, collects or receives from any other person or persons, for doing him or them a like and contemporaneous service;

(b) That the unlawfulness under this section is the **doing of a service** by a carrier in the manner **forbidden by the statute**, and if no such service has been done a contravention of the Act has not occurred;

(c) That the **passes** in question **not having been used**, but having long ago become defunct by their terms, and no transportation of anyone upon them having ever taken place, the **charge of unjust discrimination is not sustained**.

(Submitted on Depositions at Dubuque, Iowa, July 27, 1888.—Decision Filed October 8, 1888.)

PROCEEDING on complaint charging the illegal issuance of free passes. *Complaint dismissed.*

Mr. G. M. Lambertson, for complainant.
Messrs. T. M. Marquette, and J. W. Deweese, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

The complaint was filed May 10, 1888, and charges that the defendant, the Burlington & Missouri River Railroad Company in Nebraska, on its own and its leased road, the Atchison

& Nebraska Railway, has been guilty of unjust discrimination in charges made for carrying passengers between the City of Lincoln, Nebraska, and the City of Atchison, Kansas, in that certain passengers and persons traveling between said points on said line of railway are charged three cents a mile for every mile traveled, while others are given free transportation, and specifies that on the 10th of April, 1887, the defendant "issued free transportation and carriage to one C. H. Waite, a resident of Lincoln, Nebraska, to and from Atchison, Kansas, and Lincoln, Nebraska," he not being at the time included in any of the enumerated classes to whom free transportation might be given under the statute.

The case of Waite is the only one particularized in the testimony to show a breach of law, and there is no proof of the issuance of a pass in any other instance.

The facts shown by the evidence are that Waite had been in the employment of the defendant several years as an engineer, and was discharged for cause shortly before April 10, 1887. Being then out of a situation he applied to the superintendent of the defendant for a pass to go to Atchison, Kansas, to procure employment on the Southern Kansas Railroad. He stated that he had no more money than he needed for the support of his family, and that in view of his service for the Company, he thought he ought to have a pass. Trip passes were accordingly issued to him on the 10th of April, 1887, from Lincoln to Atchison and return. They expressed on their face that they were issued to him as an ex-employee, and were by their terms good only until April 30, 1887, a period of twenty days.

The fact was undisputed that the passes were never used. No one was ever transported upon them. They were produced in evidence upon the trial, and it appeared upon their face that they had long since expired by limitation of time.

On these facts a contravention of the statute has not been shown. The offense charged is under the second section of the Act, and consists in charging, demanding, collecting or receiving from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service.

In this case confessedly there was no transportation under the pass; nothing whatever was done under it. It was held by the recipient and became defunct in his hands. Assuming therefore that Waite could not be regarded as an employee in the sense of the statute, to whom free transportation might be given, and also that the issue of the pass to him constituted *prima facie* a violation of law, the *prima facie* case is disproved by the showing that no transportation whatever took place under it, and that none can now or could when this proceeding was commenced take place under it, for the reason that the privilege it undertook to give expired long ago by the terms of the pass itself.

The complaint therefore is not sustained, and the order of the Commission is that the proceeding be dismissed.

2 INTER S.

COXE BROTHERS & CO.

v.

LEHIGH VALLEY R. R. CO.

(No. 150.)

COMPLAINT filed October 19, 1888, charging the imposition of unjust and discriminating rates for the transportation of coal.

To the Honorable the Interstate Commerce Commission.

The petition and complaint of Eckley B. Coxe, Alexander B. Coxe, Henry B. Coxe, and the said Eckley B. Coxe and Alexander B. Coxe, executors of Charles B. Coxe, deceased, trading as copartners under the firm name of Coxe Brothers & Co., of Drifton, Luzerne County, Pennsylvania, respectfully represents:

First, that the petitioners and complainants are now, and have been for many years extensive miners and shippers of anthracite coal, and that large quantities of said coal are now being shipped, and have been for some time shipped by the complainants as interstate traffic over the lines of railroad owned, leased, controlled, and operated by the Lehigh Valley Railroad Company. That the several mines and collieries of the petitioners are situate in what is known as the Lehigh coal region of Pennsylvania, at Drifton, aforesaid, at Eckley, at Gowen, at Tomhicken, at Deringer, and at Stockton, all in Luzerne County, Pennsylvania, and at Beaver Meadow, in Carbon County, Pennsylvania; and that the present aggregate annual capacity of the said mines and collieries of the complainants is over one and a half million tons of coal;

Second, that the Lehigh Valley Railroad Company is a railroad corporation chartered under the laws of Pennsylvania, and a common carrier engaged in interstate railroad transportation in the States of Pennsylvania, New Jersey, and New York, over its own lines of railroad, as well as over other lines owned, leased, controlled, or operated by it;

Third, that the said Lehigh Valley Railroad Company is engaged, as such common carrier of interstate traffic, in transporting anthracite coal upon the railroad lines aforesaid as well from the Lehigh coal region of Pennsylvania aforesaid as from the Wyoming coal region and the Mahanoy coal region in Pennsylvania, to various points in the States of New Jersey and New York. That the principal shipping port on tidewater to which such coal is transported by the said Lehigh Valley Railroad, for shipment in vessels to the Atlantic ports, is Perth Amboy, in the State of New Jersey, which is reached by the lines of the said Lehigh Valley Railroad Company, and by those operated by it as a common carrier aforesaid; and the chief lake port to which such coal is transported by the said Lehigh Valley Railroad for shipment in vessels to lake ports is Buffalo, in the State of New York, which is reached from the mining regions aforesaid by the aforesaid lines operated by the Lehigh Valley Railroad and those of the New York, Lake Erie and Western Railroad, over which latter the said Lehigh Valley Railroad Company is a transporter and common carrier of interstate traffic to Buffalo aforesaid and to intermediate points;

Fourth, that, in addition to the petitioners, there are many other miners and shippers of anthracite coal, including the Lehigh Valley Coal Company, hereinafter mentioned, engaged in shipping anthracite coal as interstate traffic from the said several Lehigh, Mahanoy and Wyoming coal regions of Pennsylvania to various points in the States of New Jersey and New York, aforesaid, over the lines of the said Lehigh Valley Railroad Company;

Fifth, that the Lehigh Valley Railroad Company is the owner of the capital stock of a corporation known as the Lehigh Valley Coal Company, which is chartered under the laws of the State of Pennsylvania, and which said Lehigh Valley Coal Company is an owner and lessee of anthracite coal land in the said Lehigh, Wyoming and Mahanoy coal regions aforesaid, in the State of Pennsylvania, an owner or lessee of bituminous coal property in the Snow Shoe district of Centre County, Pennsylvania, a miner, shipper, purchaser and seller of anthracite coal in said three anthracite coal regions, and also a miner, shipper and seller of bituminous coal in the said Snow Shoe district, and that large quantities of the anthracite coal mined and purchased, and also of the bituminous coal mined by the said Lehigh Valley Coal Company as aforesaid, are shipped as interstate traffic over the railroads operated by the said Lehigh Valley Railroad Company, from the State of Pennsylvania to various points in the State of New Jersey and in the State of New York;

Sixth, that bituminous coal is like traffic as anthracite within the meaning of the Act of Congress entitled "An Act to Regulate Commerce," and approved the 4th day of February in the year of our Lord 1887, and that the transportation of the said bituminous coal aforesaid by the said Lehigh Valley Railroad as interstate traffic is conducted contemporaneously by the said Lehigh Valley Railroad with the transportation of anthracite coal as interstate traffic aforesaid, and under substantially similar circumstances and conditions as said anthracite coal traffic is conducted;

Seventh, that the distance of the complainant's mines at Drifton to Perth Amboy, over the lines of railroad on which the said Lehigh Valley Railroad Company is a transporter, is one hundred and thirty miles, and that the distance of the other mines of the complainant to Perth Amboy over said lines is from four and a half miles less to eight miles more than that of the Drifton mines. That so far as the complainants can ascertain the average distance from all the anthracite mines in the Lehigh and Mahanoy coal region aforesaid to Perth Amboy is about one hundred and forty-nine miles; that the average distance from all the anthracite mines in the Wyoming region is about one hundred and seventy-one miles; that the distance from the Snow Shoe bituminous mines of the Lehigh Valley Coal Company to Perth Amboy aforesaid is two hundred and ninety-five miles. That the said Lehigh Valley Railroad Company, by its public tariff of charges, charges all miners and shippers in the Mahanoy and Lehigh coal regions aforesaid the same amount per ton for transportation of anthracite coal of the same sizes, as interstate commerce, to any given point in the State of New

Jersey, and charges the miners and shippers of the Wyoming region aforesaid ten cents per ton more than the shippers of the Lehigh and Wyoming coal regions to the same points. And by its public tariff of charges aforesaid the said Lehigh Valley Railroad Company charges all miners and shippers in the Wyoming, Mahanoy and Lehigh regions the same amount per ton for the transportation of anthracite coal as interstate traffic northward and westward to points in New York State aforesaid, and that such charges are severally made and collected irrespective of the distance over which the said coal may be transported from each anthracite colliery or mine to its destination;

Eighth, that the anthracite coal districts aforesaid are much nearer to the Atlantic tidewater markets and to various places on the lines operated by the Lehigh Valley Railroad Company as a common carrier of interstate traffic between said anthracite coal region and tidewater, than is the Snow Shoe bituminous coal district from which the said Lehigh Valley Coal Company ships bituminous coal aforesaid as interstate traffic over the lines of the Lehigh Valley Railroad Company aforesaid; and your petitioners and other shippers of anthracite coal in the said three coal regions aforesaid are entitled to such reduced charges on anthracite coal, as compared with those on bituminous coal, as their proximity in distance compared with that of the Snow Shoe bituminous region justifies.

That the present rate for the transportation of anthracite coal as interstate traffic over the Lehigh Valley Railroad is as follows:

| | |
|--|-------|
| From the Lehigh and Wyoming region to Perth Amboy..... | \$ 80 |
| From the Wyoming region to Perth Amboy..... | 1 90 |
| From all the three regions to Buffalo..... | 2 25 |

That the local rates on anthracite coal carried as interstate traffic by the said Lehigh Valley Railroad Company from the Lehigh coal region aforesaid, to the various points in the State of New Jersey below named, are as follows:

| | | | |
|--------------------------|--------|------------------------|--------|
| Phillipsburg..... | \$1 30 | New Market..... | \$1 80 |
| Kennedy..... | 1 45 | South Plainfield.... | 1 80 |
| Musconetcong..... | 1 45 | Perth Junction..... | 1 80 |
| Musconetcong..... | | Manning Free- | |
| Branch..... | 1 45 | man's Pock- | |
| Bloomsbury..... | 1 50 | ets..... | 1 80 |
| West End..... | 1 60 | Metuchen..... | 1 80 |
| Pattensburg..... | 1 70 | McHose & Hunt's | |
| Jutland..... | 1 70 | Siding..... | 1 80 |
| Clinton..... | 1 70 | Fords..... | 1 85 |
| Landsdown..... | 1 70 | Valentine's Siding.... | 1 85 |
| Sunnyside..... | 1 70 | Dublin Crossing..... | 1 85 |
| Stanton..... | 1 70 | Patrick Convery's | |
| Flax Mills..... | 1 70 | Coal Pocket..... | 1 85 |
| Flemington..... | 1 75 | United Refiners' | |
| Flemington Junction..... | 1 75 | Oil Co.'s..... | 1 85 |
| Three Bridges..... | 1 75 | On Middlesex R. R. | |
| Neshanic..... | 1 75 | A. Hall Terra Cotta | |
| Flagtown..... | 1 75 | Co's..... | 1 85 |
| South Somerville.... | 1 75 | On Middlesex R. R. | |
| Hartman Siding..... | 1 75 | Perth Amboy Terra | |
| Hillsboro..... | 1 75 | Cotta Co.'s..... | 1 85 |
| Bound Brook..... | 1 75 | On Middlesex R. R. | |
| | | Perth Amboy..... | 1 85 |

That from the above rates on anthracite coal to all points above named, except Buffalo, there are deducted on the sizes of coal known as pea and buckwheat coal the sum of forty cents per ton, and on culm the sum of sixty cents per ton, to all stations where such de

duction does not reduce the said rates below \$1.15.

That the rates on bituminous coal carried by the said Lehigh Valley Railroad Company as interstate traffic from the said Snow Shoe district for the Lehigh Valley Coal Company to the following points in the State of New Jersey, are as follows:

| | | | |
|-------------------|--------|------------------|------|
| Phillipsburg..... | \$2 25 | Elizabeth | 2 25 |
| Bound Brook | 2 25 | Perth Amboy..... | 2 25 |

Ninth, that the bituminous coal of the Lehigh Valley Coal Company transported eastward as interstate commerce over the lines of the Lehigh Valley Railroad Company, is carried from the said Snow Shoe mines by the Pennsylvania Railroad Company and delivered by the said Pennsylvania Railroad Company to the Lehigh Valley Railroad Company at Mt Carmel, Pennsylvania, and from there transported by the Lehigh Valley Railroad Company to or towards its destination, the said Lehigh Valley Railroad Company receiving, as the complainants are informed and believe, as its share of the charge for the entire transportation, a mileage *pro rata* of the entire charge.

That the total distances over which the said bituminous coal is transported, and the parts of that distance over which it is transported by the Lehigh Valley Railroad Company, are shown in the following table:

FROM THE SNOW SHOE DISTRICT.

| Destination. | Total rate. | Total Distance. | Lehigh Valley Mileage. |
|-------------------------------|-------------|-----------------|------------------------|
| Phillipsburg, New Jersey..... | \$2 25 | 237 | 101 |
| Bound Brook, " | 2 25 | 280 | 144 |
| Elizabeth, " | 2 25 | 303 | 155 |
| Perth Amboy " | 2 25 | 295 | 159 |

Tenth, that in addition to the discrimination in charges for transportation shown in the above tables the said Lehigh Valley Railroad Company is now and has been for some time carrying bituminous coal as interstate traffic from the Snow Shoe district aforesaid to various points in the States of New Jersey and New York at less than one half the rates per ton per mile charged by it, the said Lehigh Valley Railroad Company, for the transportation of anthracite coal as interstate traffic over the same lines and in the same direction, the said anthracite coal being contemporaneously moved with the said bituminous coal, and being transported under substantially similar circumstances and conditions as the said bituminous coal is transported;

Eleventh, that by reason of the discrimination in charges in favor of bituminous coal, and against anthracite coal, as aforesaid, your complainants and other shippers of anthracite coal as interstate traffic over the lines of the said Lehigh Valley Railroad Company, are excluded from market for certain sizes and qualities of their coal, although they are in some cases less than half the distance from said markets over which the said bituminous coal is transported as interstate traffic by the Lehigh Valley Railroad Company aforesaid, and the

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said markets are taken away from them by the shippers of bituminous coal, and your complainants are now and have been for some time obliged to throw away, or store at the mines as refuse, large quantities of the said sizes and qualities of anthracite coal, to their great loss and damage;

Twelfth, that the rates aforesaid charged by the Lehigh Valley Railroad Company on anthracite coal as interstate traffic are in contravention of the provisions of the said Act of Congress entitled "An Act to Regulate Commerce," approved the 4th day of February, A. D, 1887, in that

(a) The said charges are unreasonable and unjust;

(b) the said Lehigh Valley Railroad Company is thus charging the complainants more upon anthracite coal than it charges others upon bituminous coal which is a like kind of traffic as anthracite coal, and is carried contemporaneously with anthracite coal and substantially under similar circumstances and conditions as anthracite coal is carried;

(c.) The said Lehigh Valley Railroad Company by the charges aforesaid is giving an undue and unreasonable preference and advantage to the bituminous coal traffic, in respect to charges for transportation, over anthracite coal traffic;

(d) That the said Lehigh Valley Railroad Company is subjecting the anthracite coal traffic aforesaid to an undue and unreasonable prejudice and disadvantage, in respect to charges for transportation aforesaid, as compared with the bituminous coal traffic.

Thirteenth, and the said petitioners further aver and complain: that the said Lehigh Valley Railroad Company, either directly in its own name or indirectly in the name of the Lehigh Valley Coal Company aforesaid, is now, and has been for some time past, purchasing anthracite coal in the anthracite regions of Pennsylvania and transporting the same as interstate commerce to tidewater on the coast of New Jersey, over the same lines as those over which the complainants are shipping anthracite coal, and selling the said coal so purchased at tidewater at such prices that, after deducting therefrom the price at which the said coal was purchased, and a reasonable and proper allowance for shipping and selling expenses, there remains as the revenue or receipts for transportation a much less sum than that charged by the Lehigh Valley Railroad Company to the petitioners and public generally for a like and contemporaneous service in the transportation of anthracite coal transported under substantially similar circumstances and conditions;

Fourteenth, that the said Lehigh Valley Coal Company is now, and has been for some years, engaged in mining anthracite coal in the said anthracite regions of Pennsylvania, and shipping the same as interstate traffic over the lines of the Lehigh Valley Railroad Company aforesaid, and selling the same at tidewater, in the Bay of New York and elsewhere, at such prices that, after deducting the public tariff charges of the said Lehigh Valley Railroad Company for the transportation of such coal, there remains to the Lehigh Valley Coal Company, as representing the value of the coal

at the mines, much less than the said coal cost to mine, and also much less than the current market price of similar anthracite coal at the said mines. That the Lehigh Valley Coal Company would be unable to transact its business in the manner above mentioned except for the fact that its capital stock is owned by the said Lehigh Valley Railroad Company, which furnishes and supplies the said Lehigh Valley Coal company with capital and means to make good the losses which necessarily must result to it from the system of doing business as aforesaid, provided the said Lehigh Valley Coal Company paid to the Lehigh Valley Railroad Company the same charges for the transportation of coal so sold as aforesaid as are paid at the same time by other shippers of anthracite coal for similar service under like conditions. And the petitioners aver that the market price of anthracite coal in the Bay of New York is dependent upon and established by the public charges of the Lehigh Valley Railroad Company for the transportation of coal to said Bay of New York, and that by reason of the facts herein stated the said Lehigh Valley Coal Company is enabled to take contracts at much lower than market prices and to undersell all competitors who pay the regular tariff rates and to secure a certain market for its product beyond the reach of competition, which it could not do if it was treated in charges for transportation upon said anthracite coal the same as the petitioners and the public generally are treated by the said Lehigh Valley Railroad Company. The petitioners do not know, and therefore cannot state when, and in what manner, the charges for transportation of anthracite coal sold as aforesaid by the Lehigh Valley Coal Company are paid in the first instance to the Lehigh Valley Railroad Company, nor what such charges actually are; but the petitioners charge and aver that if the said Lehigh Valley Coal Company does in the first instance or at any time pay the fixed and regular charges as aforesaid, for the transportation on the coal so sold as aforesaid, it the said Lehigh Valley Coal Company suffers a loss in the business of selling the coal so sold as aforesaid, and that such loss is made up by and is borne by the Lehigh Valley Railroad Company; and the petitioners aver and charge that, as the result of the transaction, the Lehigh Valley Railroad Company actually does receive from the said Lehigh Valley Coal Company much less for the transportation of the said coal so sold as aforesaid than at the same time is charged by the said Lehigh Valley Railroad Company to the petitioners and the public generally for a like and contemporaneous service in the transportation of anthracite coal transported under substantially similar circumstances and conditions;

Fifteenth, that there are many large and important customers of anthracite coal in the Atlantic Seaboard and other markets in the States of New Jersey and New York reached by the lines of the said Lehigh Valley Railroad Company who prefer to contract for their coal by yearly or season contracts at a fixed price, delivered to the customer for the year or season. That in order to secure such contracts the petitioners and others shipping anthracite coal as interstate traffic over the lines

of the Lehigh Valley Railroad Company must know what the charges for transportation will be for the period over which such contracts extend. That the said charges for transportation on the Lehigh Valley Railroad are not fixed or established for any definite period, but are subject to variation and change from month to month, or at any time, at the will of the said Lehigh Valley Railroad Company, and that, therefore, your petitioners cannot bid for and secure such yearly contracts without taking the risk of an advance of charges for transportation by the Lehigh Valley Railroad Company absorbing their profits or entailing actual loss by reason of such contracts. And your petitioners aver and charge that the said Lehigh Valley Coal Company is now, and has been for some time, engaged in delivering coal as interstate traffic over the lines of the said Lehigh Valley Railroad, which has been sold at a fixed price delivered to the customer for a term embracing the season or the year. And that the said Lehigh Valley Coal Company, if treated in the establishment and maintenance of rates as the petitioners and public generally are treated by the Lehigh Valley Railroad Company, could not obtain or secure the said contracts without taking a risk such as no prudent business man would take. And your petitioners charge and aver that the said Lehigh Valley Railroad Company discriminates in favor of the said Lehigh Valley Coal Company, either by agreeing to transport the said contract coal at a fixed rate during the existence of the contract, which it does not do in the case of the petitioners or other shippers generally, or else by paying over to the said Lehigh Valley Coal Company, either as an advance or as a gift or other allowance, or by bearing itself, the amount lost by the said Lehigh Valley Coal Company in the business of such contracts. And your petitioners aver and charge that all losses incurred by the said Lehigh Valley Coal Company, for the filling of such contracts aforesaid, are borne by the Lehigh Valley Railroad Company, and that as a fact resulting therefrom the said Lehigh Valley Railroad Company receives less money per ton for the transportation of the coal of the Lehigh Valley Coal Company so sold as aforesaid than it receives per ton for the transportation of other anthracite coal of your petitioners and others carried contemporaneously with the coal of the Lehigh Valley Coal Company and transported substantially under similar circumstances and conditions as the said coal of the Lehigh Valley Coal Company is transported;

Sixteenth, and the petitioners aver and charge that the transactions and methods of business stated in the above three paragraphs, viz.: the 13th, 14th, and 15th sections of this petition, and in each of them, are in contravention of the provisions of the aforesaid Act of Congress, approved the 4th day of February, A. D. 1887, entitled "An Act to Regulate Commerce," in this:

1. That the said Lehigh Valley Railroad Company is thus charging the petitioners more for the transportation of anthracite coal as interstate traffic than is charged to the Lehigh Valley Coal Company on anthracite coal transported as interstate traffic and carried contem-

poraneously with that of the petitioners and under substantially similar circumstances and conditions;

2. That the said Lehigh Valley Railroad Company is giving an undue and unreasonable preference and advantage to the Lehigh Valley Coal Company, in the matter and regulation of charges for the transportation of anthracite coal as interstate traffic over the petitioners and other shippers;

3. That the Lehigh Valley Railroad Company is subjecting the petitioners, and other shippers who pay the public and fixed tariff charges, to an undue and unreasonable prejudice and disadvantage in the matter and regulation of charges for the transportation of anthracite coal as interstate traffic aforesaid as compared with the said Lehigh Valley Coal Company.

Coxe Brothers & Co.,
Franklin B. Gowen,
Counsel for Petitioner.

Re ATLANTA & WEST POINT R. R. CO.
et al.

(No. 151.)

ORDER by the Commission, for hearing in relation to apparent violations of the Act to Regulate Commerce, disclosed by tariffs as filed.

At a general session of the Interstate Commerce Commission, held at its office in Washington on the 22d day of October, A. D., 1888:

In the Matter of the Tariffs and Classifications of the Atlanta and West Point Railroad Company and other Companies.

It appearing to the Commission upon an inspection of the tariffs and classifications published and filed by the carriers hereinafter named, which are associated for certain purposes under the name of the Southern Railway & Steamship Association, as well as by information and complaints received from time to time, that such carriers in many cases make a greater charge for the transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction upon interstate traffic; and that the disparity between the charges made at different points over the same line is in some instances apparently very great as related to distance; and that there is reason to believe that the requirements of section 6 of the Act to Regulate Commerce are not complied with in the filing and publishing of many of said tariffs, in this, among other things: that the rates actually charged to shippers are not the rates given upon said schedules, but so called combination rates are made, different from the rates specified in the tariffs as published and filed, upon both local and joint interstate traffic; and that the classifications in use are complicated and involved, containing many exceptions and variations, different classifications being at times used upon the road of the same carrier for the shipment of the same commodities to neighboring points, and at times two or more classifications being employed upon the same shipment in fixing a so called combination rate upon the line of a single carrier, or of two or more connecting carriers; and that the tariffs as filed, and without explanation, are apparently not in form sufficient for the information of the

public in the transaction of business; and that special tariffs are issued upon single shipments, and are limited in time; and that said tariffs and classifications in other respects do not appear to conform to the provisions and requirements of the Act to Regulate Commerce; and that an investigation and inquiry should be had in respect to said matters;

It is thereupon ordered, That the following named carriers, to wit: Atlanta & West Point Railroad Company, Central Railroad & Banking Company of Georgia, Charleston & Savannah Railway Company, Charlotte, Columbia & Augusta Railroad Company, Cincinnati, New Orleans & Texas Pacific Railway Company, Columbia & Greenville Railroad Company, East Tennessee, Virginia & Georgia Railway Company, Georgia Railroad & Banking Company, Louisville & Nashville Railroad Company, Memphis & Charleston Railroad Company, Mobile & Girard Railroad Company, Mobile & Montgomery Railroad Company, Montgomery & Eufaula Railroad Company, Nashville, Chattanooga & St. Louis Railway Company, Norfolk & Western Railroad Company, Port Royal & Augusta Railway Company, Richmond & Danville Railroad Company, Rome Railroad Company, Savannah, Florida & Western Railway Company, Savannah, Griffin & North Alabama Railway Company, Seaboard & Roanoke Railroad Company, South Carolina Railway Company, South & North Alabama Railway Company, Vicksburg & Meridian Railway Company, Western & Atlantic Railroad Company, Western Railway Company, of Alabama, Wilmington & Weldon Railroad Company, Wilmington, Columbia & Augusta Railroad Company, and such other carriers as may hereafter be named, operating in the same territory with those above enumerated, or connecting with them, appear before this Commission at Washington, D. C., on December 18, 1888, at 11 o'clock A. M., for the purpose of a general examination and investigation of their tariffs and classifications as on file in the office of the Commission, and as in use upon their lines, respectively; to the end that an opportunity may be then and there given to said common carriers to be heard concerning the same, and in respect to the method of constructing interstate rates therefrom as practiced upon said lines, respectively, or in connection with other lines; and that any changes may be made which shall be found necessary and proper in order to bring said tariffs and classifications, and the manner of transacting business thereunder, into more complete conformity with the provisions of the Act to Regulate Commerce.

A true copy.

Edward A. Moseley,
Secretary.

DETROIT BOARD OF TRADE and Merchants & Manufacturers Exchange of Detroit

v.

GRAND TRUNK RAILWAY OF CANADA and New York Central & Hudson River R. R. Co.

(No. 106.)

1. When **freight**, for example, grain, is hauled to the seaboard for export,

or to New England points, from the **Northwestern States and Territories** of the American Union; or when freight is hauled from the seaboard, or New England points, to the Northwestern States or Territories, **through the Cities of Detroit and Chicago**, the rule invoked by the petitioners in this case as a basis of relief, namely: that an estimated portion of this through **rate** as between the points of origin of the freight and Detroit must not be lower in proportion to distance than the rate upon the freight from such points of origin destined to Detroit, is one that cannot be sustained.

2. **Rates must be relatively fair and reasonable** as between localities in essential respects similarly situated, not according to any rule of mathematical precision, but in substance and in fact, having regard to the geographical and relative positions of the localities, so that one will not be favored to the unjust prejudice of the other.

3. Where a **system of rates is made by a number of carriers, covering a widely extended territory**, which seem to be reasonable in themselves and relatively fair, so far as the evidence in this case shows, the Commission will not order them to be changed at one important point, thereby rendering other changes unavoidable at a large number of other points, and throwing the rates of the entire system into confusion and unsettling values, unless a case arises in which it is necessary that this should be done in order to enforce compliance with the law and to reach the ends of substantial justice.

(Complaint Filed December 19, 1887.—Joint Answer Filed February 16, 1888.—Postponed by Parties.—Heard July 31 and August 1, 1888.—Decided October 22, 1888.)

PROCEEDING based on allegations of unjust discrimination in rates against Detroit. *Complaint dismissed.* See complaint, 1 Inters. Com. Rep. 698; answer, *Id.*, 701.

Messrs. Alonzo C. Raymond and Alfred Russell, for complainants:

That the discrimination is unjust and unreasonable is a matter of fact and not a matter of law.

Diphwys etc. Co. v. Festiniog R. Co. 2 Nev. & Mac. 73; *Watkinson v. Wrexham etc. R. Co.* 3 Nev. & Mac. 5; *Denaby Colliery Co. v. Manchester etc. R. Co.* 3 Nev. & Mac. 441.

In this case last cited Lord Selborne said: "Unless you could point to some other law which defines what shall be held to be reasonable or unreasonable, it must be and is a mere question, not of law, but of fact."

The authority of the decisions of the English Courts in settling the construction of our statutes, which are a substantial adoption of their own, is well settled in *McDonald v. Hovey*, 110 U. S. 619 (28 L. ed. 269).

A discrimination which, as a matter of fact, results in a practical destruction and prohibition cannot be otherwise than unjust and unreasonable.

The answer of respondents must stand or fall by the sufficiency of the facts alleged therein, and they cannot go beyond its scope for justification. No injustice to other places is alleged to arise from the granting of Detroit's prayer, and the alleged belief of a general relative reduction to Detroit's new basis has no force or relevancy.

Boston Chamber of Commerce v. L. S. & M. S. R. Co. 1 Inters. Com. Rep. 763.

Application of mileage basis in adjusting rates of such great commercial centers does not fix a uniform per ton per mile basis for every cross road. The difference in their business interests, commercial importance, geographical location, competing rail and water routes, etc., "it would be an indefensible wrong to take away or neutralize." *Id.*

Mr. E. W. Meddaugh, for Grand Trunk Railway Company of Canada.

Messrs. Frank Loomis, Henry Russell, and Ashley Pond, for New York Central & Hudson River Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The complaint in this proceeding claims that Detroit is unjustly discriminated against by the defendants in making their rates on shipments originating at or destined to that city 78 per cent of the Chicago rate on east as well as west bound freights, when it is insisted that taking into consideration the distance and the geographical position of Detroit this percentage should be 70 per cent of the Chicago rate. It is further claimed that Detroit is unjustly discriminated against by the defendants, because the percentage of the through rate on freight passing through Detroit on east and west bound shipments originating at Chicago, or points west or northwest of Chicago, and destined to the seaboard at New York, or New England points, or originating at New York, or New England points, and destined to Chicago, or points northwest of Chicago, is not as high according to length of haul for equal distances, as it is on freight originating at Detroit, and destined to points named, or originating at the points named and destined to Detroit.

The freight rates of the railroads in all sections of the country to which this complaint relates, both east and west bound, are based on the rate from New York to Chicago, and for convenience of calculation that rate is represented by the unit of 100. All the stations in these sections of the country take their percentage of the rate approximately and relatively, according to distance from the point of origin of the freight, to its destination. A few illustrations will show in brief how these rates are made. Suppose the rate on first class goods from New York to Chicago to be seventy-five cents, then the rate to Detroit would be 78 per cent of seventy-five cents, or 58.5 cents. Suppose the rate from Chicago to New York on grain to be twenty-five cents, then the rate from Detroit would be 78 per cent of twenty-five cents or 19.5 cents; and so by a simple and easy process the calculation is made upon all the articles of the tariff at each of these stations.

This widely extended system of freight rates is one that has been the result of long experience in the operation of railroads, after numerous rate wars and fierce competitive struggles. They have these evidences of reasonableness; and in addition to these, whatever inferences may naturally arise from the fact that they have been generally acquiesced in as reasonable by the great communities and sections of the country in which they exist, since the Act to Regulate Commerce was enacted, no other complaints of their unreasonableness than this having been made to the Commission. Immediately preceding the time when the Act to Regulate Commerce went into effect, this system of rates was so adjusted by the carriers as to comply, as they supposed, with the provisions of that statute. Under this system the aggregate of the rate of the long haul over the same line, in the same direction, of like freight, under substantially similar circumstances and conditions, is believed in every instance to be greater than the aggregate for the short haul.

The New York Central & Hudson River Railroad extends from New York to Buffalo, and the Grand Trunk Railway of Canada extends from Buffalo to Chicago via Detroit. The distance from New York to Chicago by the defendants' lines by way of Detroit is 967 miles. The distance from New York to Detroit by the same line is 970 miles. The distance from Chicago to New York by the Pennsylvania Railroad's lines is 920 miles. The distance from Chicago to New York by way of the Lake Shore & Michigan Southern and New York Central is 981 miles. The distance from Chicago to New York by the Baltimore & Ohio Railroad is 1,042 miles. These are each and all long competitive lines on east and west bound business from and to the great sections of the country in which these rates exist and from and to the seaboard. But the Pennsylvania being the shortest route, and therefore presumably able to give the quickest and cheapest service, makes the rate according to the rule which is usual upon this subject among the carriers when not engaged in rate wars, and the others accept it.

The percentages of rates on east bound freights at Detroit prior to the enactment of the Act to Regulate Commerce for many years fluctuated considerably. On the 13th of April, 1876, these percentages were made 85 per cent of the Chicago rate, and this continued until June 23, 1879, and they were then made 81.5 per cent of Chicago rate. The percentage of 81.5 per cent continued to be the rate until April 14, 1880, when it was reduced to 75.5 per cent of the Chicago rate; and this continued to be the rate until June 1, 1883, when it was increased to 78 per cent of the Chicago rate. The percentage on west bound freight at Detroit was 70 per cent of the Chicago rate for many years prior to 1883, and on March 10, 1886, this was advanced to 78 per cent of the Chicago rate. Since the 10th of March, 1886, the percentage of the Chicago rates on east as well as west bound freights at Detroit has been 78 per cent.

The City of Detroit is a large and prosperous city of over two hundred thousand inhabitants and very advantageously situated for the purposes of commerce. It has an extensive and

growing trade, and both rail and water facilities and rates. During a period of many years it has been extending its business connections into adjoining States, as well as in the State of Michigan. The opening of the Wabash system of railroads into Missouri and the West increased very largely the commerce and business of Detroit in the grain trade from Northern Indiana, Southern and Middle Illinois, Northern Missouri, Kansas and Iowa; but prior to that time, as well as since, the City of Detroit, owing to its superior location, its systems of elevators, and its railroads, and water lines, has been a large market for cereals of this description, as well as for general traffic. As a grain market, it now seeks to compete still further in a large area of territory with Chicago, which has long been and still is the greatest grain market in America, or in the world, with the most extraordinary and extensive facilities for the handling and marketing of freight of this character, and the center of the greatest systems of grain carrying railroads on earth. Prior to the enactment of the Act to Regulate Commerce, large shippers and dealers at Detroit enjoyed in an extensive way the benefits of "special rates," and "rebates," such as usually existed in large trading centers of the country and which it was the object and purpose of that statute to prohibit.

According to the testimony of some of these large dealers, Detroit, while this condition of things existed, was prosperous, but now is unable to compete with Chicago as it could formerly, and its trade is languishing. This is not the first instance in which the reasonableness of rates which are general, public, open and equal to all classes of shippers, has been sought to be judged by the rates which formerly were secretly reduced by heavy rebates to favored individuals. The impossibility of making a fair test of comparison in that way is manifest. Notwithstanding these strong expressions as to the bad effects of the existing rates at Detroit, the general result of the testimony put it entirely beyond question that this city is highly prosperous, and that its transportation facilities and the industry and the energy of its traders and manufacturers practically exclude the competition of Chicago over a section of the country embracing the larger portion of the State of Michigan, and enable them to extend their competition in general trade, as well as in agricultural products, very largely into other States.

We consider first the question of grain, as that is made the subject of chief complaint in the operation of these rates: the course of grain in the North and Northwest is that it seeks eastern markets and the seaboard. Railroad facilities, as well as the water lines upon the Great Lakes and the Erie Canal, have been adjusted and arranged to enable grain to find these markets at the minimum of cost, with the utmost expedition, and under conditions of the highest competition. The purpose of these transportation facilities has been to supply an immense domestic demand, as well as a large export business. Grain shipped from the West or Northwest by these railroads or water lines in connection with the railroads, as the case may be, goes to eastern markets to supply the domestic demand, and also to the

seaboard in large quantities for export, chiefly through the Ports of New York, Philadelphia, Boston, Baltimore, Portland and Montreal. Every appliance that can cheapen its transportation in these long hauls is resorted to. It is transported for the most part in full trainloads. It goes as far as possible exempt from elevator, switch and track charges at local points, because of the competition that surrounds it and the necessity that exists for getting it to these far distant and foreign markets at the lowest possible rates and upon a margin of some profit to producer or dealer. It goes by great rival lines in Canada, competing directly for the business with those in the United States.

The question is then presented whether upon such freight as this, starting, as the case may be, from Dakota Territory or the States of Nebraska, Minnesota, Iowa, Wisconsin or Michigan from the Northwest, and passing through Chicago and Detroit for the seaboard, or on its way to eastern markets, usually with no change of cars in either instance, at an exceptionally low rate of freight in consequence of the long haul, stripped of elevator, switching, and track charges at local points, as far as this can possibly be done the charges upon it pressed down to the lowest point by competition, carriers can charge no less upon an estimated portion of the through rate between points of origin of the freight and Detroit, or between Chicago and Detroit, than is charged upon the freight originating at either one of these points of origin, and destined to Chicago or Detroit. We have bestowed upon this subject the most careful consideration, and the conclusion that we have reached is that no such scale of comparison is just or can be sustained.

There is nothing in the Act to Regulate Commerce which requires that an estimated portion of such a through rate, under such circumstances and conditions, should be the same as is required on freight between intermediate stations. The circumstances and conditions surrounding the service performed, and which enter into, and control its performance, are substantially dissimilar. The substantial elements that make up each service are different. The service rendered in each instance by the carrier is substantially dissimilar. It is not a "like service." The length of haul, the methods of transportation, the fierce competition for the business, the volume of the traffic, are all controlling factors in making the cost of the service largely less on the long through haul to the seaboard, or to eastern markets, as compared with the short haul to or from a comparatively near and intermediate city. The service in each instance is a unit. That unit in the case of the long haul cannot be split up with any justice or fairness so as to say that less is charged for example upon that portion of it between Chicago and Detroit than is charged upon a shipment over the same line originating at Chicago and terminating at Detroit. Each is a separate, entire, and distinct service, and for the purpose of any just comparison cannot be apportioned in this manner. The rate in each instance is an "aggregate" rate, and it is the "aggregate" rate, as such, with which the statute deals.

Substantially the same considerations and

upon the same grounds apply with equal force to west bound freight on the long through hauls from eastern points or seaboard cities destined to points in the far West and Northwest, and in reaching which the carrier has traveled but a small part of his journey with the freight when he has passed through Detroit. In each instance it is not a service of preference to mere individuals, or localities, but it is in a very large part, the through carrying trade of the Continent; and to hamper it with the delays, charges and expenses incident to greatly shorter hauls between intermediate points, where substantially very different conditions exist, would bring fatal calamity upon the commerce of the country. There could be no greater perversion of the letter and spirit of the Act to Regulate Commerce than to construe and administer that statute as requiring that for such substantially different kinds and grades of service performed under substantially different circumstances and conditions, the compensation of the carrier must be exactly the same in proportion for some designated portion of the through long haul that is proportionally charged over some equal distance on freight originating at one intermediate station and transported to another selected for the purposes of comparison on the same part of the line along that long through haul.

A most important principle in railway transportation, one that can never be justly overlooked, and which we have had occasion several times to enforce, is that of the relative equality of rates as applied to cities, towns and localities. The Act to Regulate Commerce provides for, and requires this, and before the enactment of the statute carriers recognized the principle and professed to act upon it. Mathematical equality of rates according to distance can rarely, if ever, be attained, because the precise distance to these cities, towns, localities, as the case may be, upon different and near competing lines from the points of origin or destination of the freight are never exactly the same, but it often occurs that they are relatively so. This being true, the conditions of justice are fulfilled in giving each of them the same rates. In this way prejudice to one and preference to another is avoided. Wherever cities and towns are relatively so situated with reference to transportation facilities, it is not enough that the rates to them should be reasonable in themselves, but it is necessary that they should be relatively fair and just to all of them. An instance of this is seen in the equal rates given by the competitive carriers to the Cities of Detroit and Toledo.

In the consideration of a question like the one before us it is necessary to bear in mind that a change of rate at one point requires a change at others also. Relative rates cannot be changed at Detroit alone; if they could, its merchants and dealers might obtain much benefit from having the prayer of this petition granted. But change there means change, by the application of the like principle, at Port Huron, Toledo, Fort Wayne, and, in fact, the whole interior. It means change, also, at Chicago, because a similar reduction would have to be made by the application of the same principle there. Chicago is no more the end

of the line in respect to large classes of business than Detroit; and in the end it would probably be found that relatively, as well as actually, the City of Detroit now has every advantage which it would have as against the competition of Chicago, if the changes sought by the petition were made at Detroit. Such a change if made, while it would not benefit Detroit in the manner supposed in the petition, would necessarily, as we have shown, involve a complete change in the rates all over a large territory of the Northwest, and would probably result in a widespread unsettling and confusion of rates and values during a great part of the business season, when it is to the interest of shippers, as well as carriers, that these rates and values should remain stable, except so far as they may require some necessary and unavoidable correction.

If, however, all the insuperable objections which we have mentioned did not exist, and if, in point of fact, the change of rates sought in this petition on east and west bound freight were made at Detroit, then, according to the same rule, Toledo would be allowed lower rates than Detroit on corn and oats from the Southwest, embracing Northern Indiana, Middle and Southern Illinois, Northern Missouri, Kansas, Nebraska and Iowa. It would also be true that Chicago, being 288 miles nearer than Detroit to the great grain growing region of the Northwest, according to the same rule, would receive correspondingly lower grain rates.

We have carefully considered all the evidence in relation to the terminal facilities at Chicago and Detroit and it does not affect or change our conclusions as above stated.

On all the evidence we find this complaint is not sustained; and it is, therefore, dismissed.

Re TARIFFS OF THE TRANSCONTINENTAL LINES.

1. **Rates** that are just and reasonable from selected manufacturing points, through the entire territory east of Missouri River and west of the Atlantic Seaboard, are **prima facie just and reasonable** from all other points in the same territory.
2. A **tariff** naming a rate from one locality lower than that enjoyed by its neighbor, when the circumstances are the same, tenders a **preference or advantage** to the first; and when any shipper is damaged by the exaction of an additional burden the preference becomes undue and unreasonable, unless it can be justified upon some sound and substantial ground.
3. Common carriers are under obligations to take all descriptions of ordinary traffic from all points; and it is right that the **rates** should be known and **announced publicly in advance** of the offering of traffic.
4. Under the Act to Regulate Commerce **shippers** are not to be put in a position of subserviency to common carriers, nor required to ask for rates, but are **en-**

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titled to equal and open rates at all times.

5. **Discriminations** are made and **undue advantages** are given by the special tariffs in question, in giving different rates to places named and those not named; to manufactured articles named and those not named; to jobbers at places named and those not named; to manufacturers and to jobbers and other dealers.

5. The opinion further states that these **conclusions were made known**, on October 16, to **representatives of the Trans-Continental Lines**, at an interview arranged for that purpose, and were at once acceded to; the modified arrangement suggested by the Commission as to west bound business having gone into effect on October 23.

(Filed October 24, 1888.)

I **INVESTIGATION** by the Commission of a matter appearing by tariffs filed with it, assisted by a conference with the representatives of the Trans-Continental Lines.

OPINION OF THE COMMISSION.

Walker, Commissioner:

The case of *Martin v. Southern Pacific Company* (2 Inters. Com. Com. Rep. 1, 2 Inters. Com. Rep. 1), presented the question of whether a tariff of rates from San Francisco to Denver, higher than the rates charged at the same time over the same line from San Francisco to Kansas City, was justifiable under the 4th section of the Act to Regulate Commerce. The opinion of the Commission, filed May 17, 1888, discussed this question as involving "the entire subject of relative rates as between shorter and longer hauls on all the trans-continental lines." The conclusion reached was that in the case stated no fact was shown to exist which justified the greater charge for the shorter haul.

On September 1, 1888, an entirely new system of making rates upon the trans continental lines was put into effect. The new tariffs were exceedingly different from the system previously in force; the changes made were many and radical, affecting not only all joint tariffs and the rates to and from terminal or competitive points, but also the rates to and from local and intermediate points on all the lines. In so great a mass of new matter affecting so complicated a subject, promulgated at one time, and at the last completed and issued in some haste, it is not surprising that irregularities should be found to exist and that some of the indirect results of the changes made were unexpected.

While this Commission was not responsible for the construction or practical operation of these tariffs to any extent beyond that indicated by the above statement of its decision in the *Denver Case*, and had no opportunity of inspecting any of them before they were put into effect, nevertheless it clearly appears that their formulation is the result of an honest effort to revise the transcontinental tariffs in conformity with the provisions of the Act to Regulate Commerce; that the carriers have undertaken

this important matter in good faith; and that the immediate result aimed at has been directly in the line indicated by the Commission. Whatever modification of detail may be expedient or necessary, the general plan on which the new tariffs have been framed represents a long step in advance, as compared with the irregular and in many respects illegal methods previously in use.

Eighteen railroads, composing the Trans-Continental Association so called and representing an aggregate length of about forty thousand miles, have united in the new tariffs. The Canadian Pacific is one of them. Differential rates are provided in its favor, under which its through tariffs are slightly less than the through rates of the more direct lines which are situated wholly within the United States.

One of the most important changes made is in respect to the classification of freight. The Pacific Coast classifications, both east bound west bound, have been discarded; so far as the transportation of freight is governed by class rates the western classification alone is used. This change enables a comparison to be easily and accurately made between the rates charged on the various classes at different points; and the exceptions which remain are only such as appear in the commodity lists containing articles upon which rates different from the class rates are named. The establishment of a common classification to which all rates are now referred upon the tariffs issued by the trans-continental lines, is a long step in the direction of eliminating the injustice which has heretofore existed in the treatment of their local traffic.

The series of tariffs so prepared and issued is numbered from 8 to 16, inclusive. No. 10 of the series is the general basis of the new system. The rates named in this tariff apply to both east and west bound business, between Pacific Coast common points and the several groups of eastern points named below, as follows:

country. Rates which have not been regarded as unreasonable in the large territory in which the western classification is employed on both through and local business, are so nearly prohibitory upon shipments from California and Oregon to the East, that large reductions are made in order to secure the movement of the traffic. A few of the reductions so effected on east bound rates from the Pacific Coast to the Missouri River, are given as illustrations:

| Articles. | Class rate. | Commodity rate. |
|---------------------------|-------------|-----------------|
| Beans.....C. L. | \$1 75 | \$1 00 |
| Borax.....do. | 2 50 | 1 00 |
| Canned goods.....do. | 1 75 | 1 10 |
| Dried fruit.....do. | 2 00 | 1 40 |
| Chicory.....do. | 2 50 | 1 60 |
| Chocolate.....do. | 3 50 | 2 00 |
| Canned fish.....do. | 1 75 | 1 00 |
| Honey, strained.....C. L. | 2 00 | 1 20 |
| Wine.....do. | 2 00 | 1 25 |
| Lumber.....do. | 1 25 | 50 |
| Raisins.....do. | 2 50 | 1 40 |
| Tea.....do. | 3 50 | 1 55 |

West bound commodity rates are also given on tariff No. 10 upon some fifteen or twenty articles, which are all produced to some extent west of the Missouri River.

The several lines, by circulars and instructions issued upon each, have carried into execution the general plan upon which the present system was devised, to wit: that no more shall be charged for a shorter than for a longer haul upon business which is handled under this tariff; the result being that, so far as No. 10 is applied, no violation of the fourth section of the Act to Regulate Commerce is permissible at local and intermediate points on either east or west bound business. This is true not only in respect to the class rates but also the commodity rates above described.

The class rates in effect from San Francisco to Denver remain as before, and are now considerably less than the class rates to the Missouri River; the latter rates, though higher than formerly, are not so high as the rates formerly made to and from points in Kansas,

Between Pacific Coast Common Points and

| | First Class. | Second Class. | Third Class. | Fourth Class. | Fifth Class. | Class A. | Class B. | Class C. | Class D. | Class E. |
|---|--------------|---------------|--------------|---------------|--------------|----------|----------|----------|----------|----------|
| Missouri River Common Points; also St. Paul and Minneapolis, Minn., and Galveston and Houston, Tex. | 3 50 | 3 00 | 2 50 | 2 00 | 1 75 | 1 75 | 1 55 | 1 25 | 1 10 | 1 00 |
| Mississippi River Common Points, Dubuque, Ia., to New Orleans, La., inclusive..... | 3 70 | 3 20 | 2 60 | 2 05 | 1 80 | 1 82½ | 1 62½ | 1 30 | 1 15 | 1 05 |
| Chicago, Milwaukee and Common Points..... | 3 90 | 3 40 | 2 70 | 2 10 | 1 85 | 1 90 | 1 70 | 1 35 | 1 20 | 1 10 |
| Detroit, Toledo and Common Points..... | 3 95 | 3 45 | 2 75 | 2 15 | 1 90 | 1 95 | 1 75 | 1 40 | 1 25 | 1 15 |
| Buffalo, Pittsburgh and Common Points, and Points East thereof and West of Atlantic Seaboard Common Points..... | 4 00 | 3 50 | 2 80 | 2 20 | 1 95 | 1 95 | 1 75 | 1 40 | 1 25 | 1 15 |

Special east bound rates are named upon fifty or sixty enumerated commodities, upon about half of which carload and less than car load rates are separately given. These commodity rates are lower than the rates which would be made by applying the above class rates to the articles in question.

This long list of articles, chiefly products of California, illustrates one of the difficulties which exist in attempting to frame a universal classification, to be applied in all parts of the

Nebraska, etc. While the through rates as a whole are advanced, there are thousands of points west of the Missouri River which are now receiving rates lower than were ever before given them, and which are made in order to conform to the rule prescribed in the short haul clause of the Act to Regulate Commerce.

So far as the terms of the decision in the *Denver Case* extended they have been complied with by the carriers. The change thus accomplished amounts almost to a revolution. It

will not be surprising if friction is developed in quarters where the new schedules work oppressively to local interests established before the passage of the Act; but the new system was clearly required by the language of the Law, and it can now be fairly and thoroughly tried. The opinion of many sagacious men will be at fault if in the long run the results do not prove highly satisfactory both to the roads and to the general public.

The method which was adopted for reconstructing the tariffs west of the Missouri River unfortunately gave rise to much complaint at points between the Missouri River and the Atlantic Ocean. In tariff No. 10 no class rates were stated for traffic from ocean to ocean, which is governed by Nos. 8 and 9 exclusively. No. 8 is a west bound tariff and No. 9 an east bound tariff, in which rates are stated in cents, to be applied on each article enumerated, and all articles are separately named. These seaboard rates do not differ very materially in amount from those heretofore in force between the Atlantic and the Pacific coasts, while the rates from points west of the Atlantic coast as far as the Missouri River have been quite materially increased.

The justification alleged for the infringement upon the short haul principle of the Act to Regulate Commerce found in tariffs Nos. 8 and 9, is the water competition which is met at the seaboard for the same traffic. The following statement is made on the part of the carriers in explanation:

"These rates are established with the idea of fairly competing with the clipper ships for the transaction of business between Atlantic seaboard cities and the Pacific coast. Necessarily the rates were made low but they did not establish the maxima to be charged on like commodities from the Atlantic seaboard to points on the transcontinental lines east of the Pacific coast. In that respect the Transcontinental Association availed itself of the opinion in the *Louisville & Nashville Case*, wherein the Commission decided that 'The existence of actual competition which is of controlling force in respect to traffic important in amount may make out the dissimilar circumstances and conditions entitling the carrier to charge less for the longer than for the shorter haul over the same line in the same direction, the shorter being included in the longer, when the competition is with carriers by water not subject to the Interstate Law. The competition in this instance is both actual and of controlling force, inasmuch as there are several lines of clipper ships, and they are able to, and doubtless would, carry most of the business, were their competitors not to approximately meet the rates thus made. Furthermore, the traffic is important in amount, seeing that the seaboard business constitutes full 40 per cent of the revenue derived from traffic carried by transcontinental lines to the Pacific coast. If the ships were to take business destined to an interior point east of San Francisco or Sacramento, the freight would then be subject to the local rate of the Southern Pacific Co. from the coast to destination; therefore the competition in such event begins at the Atlantic seaboard and ends at the Pacific coast."

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Tariff No. 8 on west bound business from the Atlantic to the Pacific coast, giving commodity rates in most cases considerably less than the rates on No. 10, an effort was made to ameliorate its operation in respect to west bound traffic from interior points by issuing a series of commodity tariffs numbered from 11 to 16, each of which named certain articles upon which rates lower than those given in No. 10 were made on west bound business to the Pacific coast, from the various points specified, and which were not made from other points. They bore this notation: "Rates as provided herein will only apply upon such articles and from such points as are specifically mentioned." As related, however, to the vast number of articles shipped to the Pacific coast from interior points and the vast number of points participating in such traffic, the exceptions made in these special tariffs were relatively few. Their effect upon the business of inland cities was immediately noticeable; in Chicago and St. Louis particularly much opposition and active remonstrance were excited. This was met by issuing a series of supplements increasing the number of articles, and adding to the points from which commodity rates were allowed.

Meanwhile, the various tariffs, circulars, and letters of instruction which were issued by all the lines, were carefully examined by the Commission. The working of the new system was observed and it became obvious that certain changes were necessary in order to make it practically successful. A conference was invited between the Commission and representatives of the Trans-Continental Lines, which was held in the office of the Commission in Washington on October 16, at which time the subject was considered, and additional information was received which the Commission had not been able to obtain by an examination of the papers and by correspondence with shippers and others. In the course of this interview the Commission took occasion to lay before the representatives of the roads its views upon certain features of the tariffs in question. It is proper that those views should now be made public. In substance they were as follows:

First—East-Bound Trans-Continental Tariffs.

East bound rates are given in No. 9 to the Atlantic Coast on commodities only; and on No. 10 specified class rates and over fifty commodity rates are given to interior points.

A comparison of the east bound commodity rates on the two tariffs shows same anomalous results. In many, in fact in most, cases the rates are identical; in but very few cases are the rates to interior points higher than the rates to New York City, liquors being the principal if not the only example. The discrepancy in respect to them is not great, and it is a fair query whether the Atlantic coast rate would not bear a sufficient advance to bring them into line, or whether the rates to interior eastern points could not be reduced to the same extent.

Another class of cases indicates a want of relation between the two sets of tariffs; for example:

| Articles. | San Francisco to— Buffalo. | New York. |
|--|-------------------------------|-----------|
| Matting, China, 15,000 lbs., C. L. | 1 20 | 1 60 |
| Nuts, edible, C. L. | 1 00 | 2 00 |
| Sauerkraut, C. L. | 1 00 | 1 80 |
| Garden seed, boxed, L. C. L. | 2 00 | 2 50 |
| Tanks, iron, empty, returned | 1 00 | 1 40 |
| Macaroni, C. L. | 1 40 | 2 00 |

It is obvious that in these instances a shipper would make money by routing his goods to Buffalo and then at local rate to New York. Other inconsistencies will be found under vegetables, lumber, barley, bark, etc.

A comparison of the commodities on No. 9 with the class rates to Buffalo under No. 10, does not disclose many articles of importance on which the carriers are protecting themselves against east bound clipper-ship competition, by charging rates materially less to New York than to interior points. The leading articles shipped from California (except sugar, which is not brought largely to points east of the Missouri River) appear to be covered by the commodity list in No. 10. As to the articles of minor importance, very many of them bear the same rate to New York that is given to Buffalo, under the western classification. Some bear a somewhat higher rate, on others the rate to New York is lower. California products have however been so thoroughly covered by the commodity rates on No. 10 that these examples cannot be of great consequence, and the policy adopted has evidently been such that if shipments in large quantities were expected to interior points, the commodity list on No. 10 would be extended accordingly.

There are also on No. 9 quite a number of articles, products of California or imported from Japan, China, etc., which are not found at all in the western classification. Some of these are named in No. 10 also; and if any general principle is to be adopted the same course should be taken with the rest, or the classification should be amended.

It should be observed moreover that in some of the instances in which, as the matter is now left, a higher rate to interior points than to the Atlantic coast exists, the difference is unreasonable, *e. g.*: Beeswax, 1.80 to New York, 4.00 to all interior points. In a case like this shippers of course would route their goods to New York and return at local rates. It is not perceived however that any great amount of valuable traffic from the Pacific coast, is charged higher rates to interior points than to Atlantic coast points while it is apparent that the tariffs were prepared in haste and are in considerable confusion.

So far as this subject has been examined no important reason appears why the east bound business could not be thrown into a single tariff sheet, giving commodity rates to all points, even or progressive, upon such articles as it is judged expedient to reduce from the western classification; and class rates upon the remainder. This would substantially establish the full operation of the short haul principle upon east bound business.

Upon this last suggestion it must not be forgotten that the proportion earned by the Trans-Continental Lines on business to the Mississippi Valley is considerably higher than that

which they receive on business to the Atlantic seaboard, at even rates.

Second—West Bound Trans-Continental Tariffs.

No. 8 of the series is a west bound commodity tariff covering all business from the Atlantic coast to the Pacific coast. Additions and amendments have been made to the first issue by Supplement. The list of articles has no relation to the western classification, either in nomenclature or arrangement. In fact the difference in language is so great that it is frequently difficult to determine what rate articles named in No. 8 would bear under No. 10. The list of articles in No. 8 is apparently a perpetuation of the old Pacific coast west bound classification.

The last named classification however was applied upon business from the Missouri River and all points east thereof. The effect of the new scheme is to apply the western classification for the first time on business originating between the Missouri River and the Atlantic seaboard, destined for the Pacific coast. The grading of the western classification is decidedly higher than that of the old Pacific coast west bound classification. The result therefore is a very material advance in rates from all the interior territory upon the business in question. Meanwhile, from the Atlantic seaboard the rates have not been greatly changed.

This situation has been further complicated by the issue of a set of tariffs numbered from 11 to 16 inclusive, which give commodity rates from various named interior points to the Pacific coast, on long lists of enumerated articles, the rates so named being almost invariably the Atlantic seaboard rates. Upon articles not enumerated in these special lists the changes have been such as to throw everything out of line and into confusion. There is no fixed standard of proportion. On a few articles the west bound classification, as applied in No. 10 makes lower rates than No. 8. In most cases however the rates under No. 10 are so much higher than the rates under No. 8 that they are subject to the obvious objection that they exceed to a considerable extent the combination rate made by shipping East locally to the seaboard and return on No. 8 to the Pacific coast.

The system is subject to the further objection of giving rates to favored points only, and suggesting that rates will be made to other points on application showing that some considerable amount of traffic will follow. This practice is directly opposed to the fundamental principles of the Act to Regulate Commerce.

By the class rates of Tariff No. 10 under the western classification, which would govern at all points not named in the commodity lists, the charges would be considerably higher than at the points which are specified. Why one rate should be named on hammers and hatchets from Cohoes and another from Troy or Schenectady; why windmills should have a certain rate established from forty-six specified points named in the various tariffs of the series, to the exclusion of all the rest of the United States, presents a question to which no answer can be found in the tariffs themselves. It is no doubt,

however, the fact that the enumerated places as to each commodity are the places where the respective articles are chiefly manufactured for California consumption. In fact it has been semi-officially announced that manufacturing points were important shipments of each commodity have been heretofore received for the Pacific coast have been selected and named; and that it is the intention to supplement these lists with new points when any important amount of traffic in the articles named, or perhaps in other articles, shall be offered for shipment by manufacturers or producers. The theory on which this has been done is by no means clear. If these rates are just and reasonable from the selected points, ranging as they do through the entire territory east of the Missouri River and west of the Atlantic seaboard, it would seem to follow that they would likewise be just and reasonable from all points in the same territory.

If no traffic now exists it certainly can do no harm to the carriers to announce the rate. They say that they are ready to make the rate in case traffic is offered. A tariff naming a rate from one locality lower than that enjoyed by its neighbor, when the circumstances are the same, tenders a preference or advantage to the first; and when any shipper is damaged by the exaction of an additional burden the preference becomes undue and unreasonable, unless it can be justified upon some sound and sufficient ground.

Further than this, common carriers are under obligation to take all descriptions of ordinary traffic from all points; and it is right that the rates should be known and announced publicly in advance of the offering of traffic. Even if there is no reasonable prospect that traffic will be tendered, there is no reason why the schedules should not be given the broadest possible field. Under the existing system of almost universal joint tariffs and rates it would be much less burdensome to carriers in the matter of expense, and much less perplexing to everybody interested, for the tariffs to state, for example, that the rate on windmills is \$1.40 from all points, than to go through with long lists of detail to arrive at the same result.

Moreover, there appears to be a feature which is inherently vicious in the system above described, for its tendency and effect are to put manufacturers and dealers at the mercy of the carriers. The Act to Regulate Commerce contemplates that an end be put to the practice which previously prevailed, under which the shippers were required to ask the carriers for rates. It requires that the reverse practice should be pursued and that known and equal rates should always be announced to shippers at every point. The patron of the common carrier is not to be put in a position of subservience to the road; on the contrary he is entitled to equal privileges with his competitors, at all times open and free; not as a matter of favor or to be granted upon petition, but as a right under the franchise granted to the common carrier and under the Law. As the case now stands no man can manufacture hammers or hatchets, windmills or hundreds of other articles for the California trade, except at the designated points from which traffic is announced as to be taken at special rates. What

right has a common carrier to keep this hold upon merchants and manufacturers? Where is its power to say to the People of the United States, as these tariffs practically do, that if any citizen desires to start a new industry for the California market he must ask the permission of the Trans Continental Association? It is not easy to see what interests the carriers seek to promote by maintaining this policy of exhibited power; the result of it is that they are thus enabled to say who shall ship to California and who shall be excluded from shipping.

Probably this view of the case did not occur to the framers of the tariffs; but they necessarily work unjust discriminations and give undue advantages, to wit: between places named and those not named; between manufactured articles named and those not named; between manufactures, and jobbers and other dealers; between jobbers at manufacturing points and jobbers at other points; and generally, in attempting to select specified exceptions to the general exception which it is sought to make to the rule of section 4, a violation of section 3 is wrought.

Moreover, the arrangement has not met the approval of the Trunk Lines and the roads of the Central Traffic Association, which are unwilling to charge more on business from interior points than from the Atlantic coast, and they have refused to participate in the system.

No other method seems to be practical except to extend No. 10 to the Atlantic coast; to cancel Nos. 11 to 16, and to publish a commodity list which shall be fully applicable at all points east of the Missouri River. Even this would result in some increase of rates upon some articles from interior points, and upon a class of business in which the western lines are more profitably interested than upon the thorough business,—for as distance diminishes, the rate per ton per mile increases.

No intelligent examination of the tariffs and circulars can be made without observing the fact that the real object of the system, with all of its complex machinery, is to establish a maximum rate for intermediate business which is contained in Tariff No. 10, and within this limit to provide for combination rates to all Pacific Slope points east of the west coast terminals, on business from the Missouri River and all points east thereof.

This system is better than the old practice in this: that now Tariff No. 10 is to be used as a maximum, to control the unreasonable operation of such combination rates, so that the rates to the points in question must be considerably less oppressive than in the past. It will not do, however, for the carriers maintaining this system to claim that they have brought their lines wholly into conformity with the rule of section 4 of the Act to Regulate Commerce upon west bound business.

It should further be observed that this system can be worked much more easily, by combining all the west bound commodity tariffs from points east of the Missouri River upon a single sheet, as above suggested, than by the cumbrous system of seven different tariff sheets, containing from ten to twenty pages each, applicable to different Territories, and discriminating intensely among different points

in their respective Territories. As to the legality of the practice, no opinion is now offered; its operation can be better understood by experience.

As a result of the aforesaid conference, and in compliance with the views of the Commission as then expressed, the Trans-Continental Association, by circular taking effect October 23, suspended Tariffs Nos. 11 to 16, inclusive, and announced that west bound Tariff No. 8 and its supplements will govern on all west bound freight traffic destined to Pacific coast terminals and originating at the Atlantic seaboard common points, and common points west thereof, and east of the 97th meridian of longitude.

The effect of this change is to establish the principle that no higher rate can be charged to Pacific coast points on any articles from points between the Atlantic Ocean and the Missouri River than is charged on the same article from points situated on the Atlantic seaboard.

Meanwhile Tariff No. 10 remains in effect as a maximum in all cases, and to and from all points upon all the lines.

It is believed that still further revision and corrections may profitably be made, in accordance with some of the views above suggested.

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Re ACT OF CONGRESS OF AUGUST 7, 1888.

CIRCULAR letter of the Commission as to compliance with the provisions of the Act of Congress approved August 7, 1888, in reference to railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit.

Interstate Commerce Commission, Office of the Secretary, Washington, October 26, 1888.
To the—

Your attention is called to the provision of the Act of Congress approved August 7, 1888, entitled "An Act Supplementary to the Act of July 1, 1862, entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes,' and Also of the Act of July 2, 1864, and Other Acts Amendatory of Said First Named Act."

Certain duties are devolved, by this Act, upon the Interstate Commerce Commission; and the railroad and telegraph companies referred to in the Act are required to file with the Commission copies of all contracts and agreements described in its provisions.

Section 6 of the Act contains this provision:

That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this Act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the

telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated.

The duty imposed by this section has not yet been complied with by your company. The Commission calls your attention to this omission, and urges your compliance with the duty enjoined upon you as speedily as possible.

The first section of the Act is as follows:

That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the Acts incorporating them, or by any Act amendatory or supplementary thereto, are required to construct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad and telegraph lines shall forthwith and henceforward—by and through their own respective corporate officers and employees, maintain—and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the Acts making the grants as aforesaid.

You will also report to this Commission to what extent, and to what manner, the provisions of this section are complied with by your company.

Pursuant to the third section of said Act you will also report to this Commission whether you maintain and operate a telegraph line as provided in the Acts of Congress, for the use of the Government, or the public, for commercial and other purposes, without discrimination, and whether you have made, and continue, such arrangements for the interchange of business with any connecting telegraph company.

It is important that the matters herein brought to your attention should be communicated to the Commission with all reasonable promptitude.

By order of the Interstate Commerce Commission:

Very respectfully,

Edward A. Moseley, Secretary.

[Public No. 237.]

An Act supplementary to the Act of July 1, 1862, entitled "An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes," and also of the Act of July 2, 1864, and other Acts amendatory of said first named Act:

Be it enacted, by the Senate and House of Representatives of the United States of America in Congress assembled. That all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the Acts incorporating them, or by any Act amendatory thereto, are required to con-

struct, maintain, or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward—by and through their own respective corporate officers and employees—maintain, and operate, for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the franchises conferred upon them and obligations assumed by them under the Acts making the grants as aforesaid.

Sec. 2. That whenever any telegraph company which shall have accepted the provisions of title 65 of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of said railroad or telegraph companies, referred to in the first section of this Act, said telegraph company so extending its line shall have the right and said railroad or telegraph company shall allow the line of said telegraph company so extending its line to connect with the telegraph lines of said railroad or telegraph company to which it is extended at the place where their lines may meet for the prompt and convenient interchange of telegraph business between said companies; and such railroad and telegraph companies, referred to in the first section of this Act, shall so operate their respective telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company, or corporation whatever, and shall receive, deliver and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines; and such exchange of business shall be on terms just and equitable.

Sec. 3. That if any such railroad or telegraph company referred to in the first section of this Act, or company operating such railroad or telegraph line shall refuse or fail, in whole or in part, to maintain, and operate a telegraph line as provided in this Act and Acts to which this is supplementary, for the use of the Government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then any person, company, corporation, or connecting telegraph company may apply for relief to the Interstate Commerce Commission, whose duty it shall thereupon be—under such rules and regulations as said Commission may prescribe—to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, and the railroad or telegraph company concerns shall abide by and perform such order; and it shall be the duty of the Interstate Commerce Commission, when such determination and order are made, to notify the parties concerned, and, if necessary, enforce the same by writ of *mandamus* in the courts of the United States, in the name of the United States, at the relation of either of said Interstate Commerce Commissioners; *Provided*, That the said Commissioners may institute any inquiry, upon their own motion, in the same manner and to the same effect as though complaint had been made.

Sec. 4. That in order to secure and preserve to the United States the full value and benefit

of its liens upon all the telegraph lines required to be constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this Act, and to have the same possessed, used, and operated in conformity with the provisions of this Act, and of the several Acts to which this Act is supplementary, it is hereby made the duty of the Attorney-General of the United States, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under this Act, and under the Acts hereinbefore mentioned, and under all Acts of Congress relating to such railroads and telegraph lines, and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations whatever claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, or any of them, with any other person, company, or corporation.

Sec. 5. That any officer or agent of said railroad or telegraph companies, or of any company operating the railroads and telegraph lines of said companies who shall refuse or fail to operate the telegraph lines of said railroad or telegraph companies under his control, or which he is engaged in operating, in the manner directed in this Act and by the Acts to which it is supplementary, or who shall refuse or fail, in such operation and use, to afford and secure to the Government and the public equal facilities, or to secure to each of said connecting telegraph lines equal advantages and facilities in the interchange of business, as herein provided for, without any discrimination whatever for or adverse to the telegraph line of any or either of said connecting companies, or shall refuse to abide by, or perform and carry out within a reasonable time the order or orders of the Interstate Commerce Commission, shall in every such case of refusal or failure be guilty of a misdemeanor, and on conviction thereof, shall in every such case be fined in a sum not exceeding \$1,000, and may be imprisoned not less than six months; and in every such case of refusal or failure the party aggrieved may not only cause the officer or agent guilty thereof to be prosecuted under the provisions of this section, but may also bring an action for the damages sustained thereby against the company whose officer or agent may be guilty thereof in the Circuit or District Court of the United States in any State or Territory in which any portion of the road or telegraph line of said company may be situated; and in case of suit process may be served upon any agent of the company found in such State or Territory, and such service shall be held by the court good and sufficient.

Sec. 6. That it shall be the duty of each and every one of the aforesaid railroad and telegraph companies, within sixty days from and after the passage of this Act, to file with the Interstate Commerce Commission copies of all contracts and agreements of every description existing between it and every other person or

corporation whatsoever in reference to the ownership, possession, maintenance, control, use or operation of any telegraph lines, or property over or upon its rights of way, and also a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated; and it shall be the duty of each and every one of said railroad and telegraph companies annually hereafter to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent value and condition of the telegraph lines and property then belonging to it, the gross earnings and all expenses of maintenance, use and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe; and if any of said railroad or telegraph companies shall refuse or fail to make such reports as may be called for by said Commission, or refuse to submit its books and records for inspection, such neglect or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than \$1,000 nor more than \$5,000, to be recovered by the Attorney General of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided.

Sec. 7. That nothing in this Act shall be construed to affect or impair the right of Congress, at any time hereafter, to alter, amend or repeal the said Acts hereinbefore mentioned; and this Act shall be subject to alteration, amendment or repeal as, in the opinion of Congress, justice or the public welfare may require; and nothing herein contained shall be held to deny, exclude or impair any right or remedy in the premises now existing in the United States, or any authority that the Postmaster-General now has, under title 65 of the Revised Statutes, to fix rates, or of the Government to purchase lines as provided under said title, or to have its messages given precedence in transmission.

Approved, August 7, 1888.

IMPERIAL COAL CO. and Andrews, Hitchcock & Co.

v.

PITTSBURGH & LAKE ERIE R. CO. and New York, Lake Erie & Western R. Co., as Lessee of New York, Pennsylvania & Ohio Railroad.

(No. 139.)

Mr. W. B. Rodgers, for complainants.

Messrs. Knox & Reed, for Pittsburgh & Lake Erie R. Co.

Messrs. Buchanan & Steele, for New York, Lake Erie & Western R. Co.

Mr. John K. Cowen, for Baltimore & Ohio R. Co. (allowed to join in taking of further testimony on behalf of defendants, or to intervene directly.)

ORDER OF THE COMMISSION.

At a General Session of the Interstate Commerce Commission, held at its office in the City of Washington on the 23d day of October, 1888:

It appearing by the testimony taken in this case, upon which the case was submitted, that the rates of which complaint is made are rates for the transportation of coal from mines of the complainants to points on Lake Erie as compared with like rates from mines more remote from the same points, and that the rates in question are parts of a system of grouped rates for a considerable extent of territory embracing a number of coal mines, and that railroads other than those made parties are engaged in the transportation of coal from the district to which the same rates are made, and that coal is also shipped from the district to other destinations than lake points, and the testimony not having shown sufficiently the facts and circumstances in respect to the other mines in the district and other roads engaged in the transportation therefrom;

It is Ordered: That further testimony be taken in this case, and that the parties to this proceeding be notified to take additional evidence by deposition, showing the number and location of the coal mines in the grouped district, the character and quantities of the coal they mine and ship, the points to which the coal is shipped, the lines of road by which it is transported, the rates charged for the transportation, and such other facts bearing upon the questions in controversy as the parties may deem relevant and material to a just and proper disposition of the case; and that the depositions taken be filed with the Commission by the first Monday of December next.

James C. SAVERY & CO., Doing Business Under the Name of the American Emigrant Co.,
v.

NEW YORK CENTRAL & HUDSON RIVER R. CO., New York, West Shore & Buffalo R. Co., New York, Ontario & Western R. Co., New York, Lake Erie & Western R. Co., Delaware, Lackawanna & Western R. Co., Pennsylvania R. Co. and Baltimore & Ohio R. Co.

(No. 77.)

1. The matter of the **reception of immigrants at the Port of New York** having been put by the laws of the State under the control of a board of **commissioners of emigration**, and that board having made such regulations as it has deemed desirable for the protection of the immigrants until they are ticketed

ORDER for the taking of additional testimony. See complaint, *ante*, 18; answers, *ante*, 92.

and put on board railroad trains for their respective ultimate destinations, and the Federal Government through its legislative and executive departments having sanctioned the control by the commissioners of emigration, the **Interstate Commerce Commission** has **no authority to interfere with their regulations.**

2. Not having the authority to interfere directly and control the commissioners of emigration, it cannot do so indirectly by inhibiting the **railroad companies** from **carrying out the arrangements made by the commissioners** with them.
3. There is nothing illegal or wrongful in a railroad company making a **rate for immigrants** as a class, and declining to give the same rate to others for whom different accommodations are furnished.
4. A railroad company which transports **immigrants** in unfit cars will be required to provide better **accommodations**, and to ascertain their fitness the Commission will make its own inspection.
5. The **rates** complained of in this case as excessive were **voluntarily reduced** pending the proceedings.

(Heard at New York, February 23 to March 2, 1888 at Elberon, N. J., July 11 and 12, 1888.—Decided Nov. 9, 1888.)

PROCEEDING on complaint alleging unreasonable charges for the transportation of immigrants. *Complaint dismissed.*

The complaint is given in full, 1 Inters. Com. Rep. 695.

Messrs. Blai & Rudd, for complainants.

Mr. Frank Loomis, for New York Central & Hudson River Railroad Company.

Mr. Ashbel Green, for New York, West Shore & Buffalo Railway Company.

Mr. J. B. Kerr, for New York, Ontario & Western Railway Company.

Mr. J. A. Buchanan, for New York, Lake Erie & Western Railroad Company.

Mr. M. Taylor Pyne, for Delaware, Lackawanna & Western Railroad Company.

Mr. John Scott, James A. Logan, E. Randolph Robinson, and Osborne E. Bright, for Pennsylvania Railroad Company.

Mr. J. K. Cowen, for Baltimore & Ohio Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

The complaint in this case is by "James C. Savery & Company, citizens of the United States, doing business in the City of New York under the name of the American Emigrant Company, and as successors of the American Emigrant Company of Hartford, Conn.," and is against the New York Central & Hudson River Railroad Company, the New York, West Shore & Buffalo Railway Company, the New York, Ontario & Western Railway Company, the New York, Lake Erie & Western Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Pennsylvania Railroad Company, and the Baltimore & Ohio Railroad Company.

The complaint charges that the defendants, being common carriers of passengers subject to the Act to Regulate Commerce have been and are guilty of violating the provisions of the last clause of the first section of said Act, in that each of them has continuously since the first day of April, 1887, exacted unjust and unreasonable charges for the carriage of emigrants and their baggage from the said City of New York to the said City of Chicago, and to other points and places in the States and Territories west, northwest and southwest of the State of New York.

And for the particular grounds and specifications of this charge your petitioners show:

First Specification. That continuously, since the first day of April, 1887, said several railroad companies have exacted the sum of \$13 for the carriage of each adult emigrant carried by them from New York to Chicago, and a proportionate sum for each adult emigrant carried a less distance, while for each adult emigrant carried beyond Chicago the charge has been increased according to the local second class rate of the railroads running beyond that point, such exaction being made in pursuance of an agreement or compact existing between all of said railroad companies establishing rates for the carriage of emigrants and their baggage, which rates are unjust and unreasonable because of the character of the accommodations furnished for the transportation of emigrant passengers, said passengers being usually carried by said railroad companies in an inferior kind of cars called "emigrant cars," or in cars fitted with uncomfortable seats, such cars being run sometimes in connection with passenger trains and sometimes in connection with freight trains, according to the convenience of the carrier, and not on any schedule time, and sixty hours being sometimes occupied in making the trip from New York to Chicago; and which rates are unjust and unreasonable because the number of emigrants carried by said railroad companies from New York to Chicago and to other points west of the State of New York is so great (amounting to between 200,000 and 300,000 annually) as to warrant their being carried at much lower rates; and which rates are unjust and unreasonable because they are largely in excess of the rates at which the said railroad companies have heretofore carried emigrants and their baggage from New York to Chicago and other points west of the State of New York; which former rates the complaint sets out in detail.

Second Specification. That continuously since the first day of April, 1887, said several railroad companies have exacted from each emigrant carried from New York to Chicago, whose baggage weighed more than 100 pounds, compensation for extra baggage at the rate of \$2.60 per 100 pounds for the excess over 100 pounds; which charge for extra baggage is unreasonable and unjust because it is greater than the charge made by the same carriers for the carriage, between the same points, of extra baggage for first class passengers, which is carried on express passenger trains, such last mentioned charge being at the rate of only \$2.40 per 100 pounds.

The complaint further alleges that each of the said railroad companies is guilty of unjust

discrimination, in violation of the second section of said Act of Congress, in this, to wit:

First Specification. That each of said railroad companies in pursuance of said compact between them, sells, at the price of \$13, to recently arrived emigrants who are landed at Castle Garden, New York, tickets entitling the holders to transportation by rail from New York to Chicago, but refuses to sell the same grade of tickets for the same trains to any other person or persons at the same price or at any price; and also refuses to sell the same grade or kind of tickets at any other place or office than at Castle Garden, New York; and all persons other than recently arrived emigrants who are carried in the same cars with emigrants from New York to Chicago are compelled by each of said carriers to pay for such carriage the sum of \$17, the price of a second class ticket between said points.

Second Specification. That each of said railroad companies, in pursuance of the said compact between them, has continuously since April 1, 1887, discriminated against emigrants carried by it from New York to Chicago, by exacting from them \$2.60 each 100 pounds of extra baggage carried for them, while it has charged first class passengers for extra baggage carried for them upon express trains only \$2.40 per 100 pounds.

The complaint further alleges that said railroad companies have been and are guilty of violating section 5 of said Act of Congress in this: that since April 1, 1887, they have been, and they still are, dividing between them a portion of the aggregate earnings of said railroads, to wit: that portion derived from the carriage of emigrants and their baggage.

This charge was abandoned on the hearing, and the specifications under it are therefore omitted.

The complaint further shows that the said railroad companies have, by their combined action, subjected petitioners to undue and unreasonable prejudice and disadvantage in their business, hereinafter described, in violation of section 3 of said Act of Congress.

Specification. The business of the American Emigrant Company of Hartford, Connecticut, to which company petitioners are successors, which was established twenty-three years ago, has consisted in the sale to emigrants and others of lands situate in the Western States and Territories, and in the establishment of numerous colonies upon such lands, and in disseminating among the common people of various countries of Europe, but especially among the Scandinavians, correct information regarding the newer and more sparsely settled portions of our country, and in acting as the correspondent and agent of persons residing in foreign countries who were about to migrate hither, furnishing them specific information, purchasing their tickets, providing interpreters and agents to meet them upon their arrival, and rendering them whatever advice and assistance they might need; and in the course of said business the said American Emigrant Company has become favorably known to a great number of foreign born people residing in every State and Territory of the United States, and a great number of such people have made it their financial agent, intrusting to it

sums of money for a great variety of purposes, the chief of which has been the purchase of bills of exchange for transmission to relatives or friends in the old country and the purchase for relatives or friends coming to America of tickets for the journey from New York to their ultimate destination, and also intrusting to it sums of money to be handed to relatives or friends upon their arrival in New York; and have also solicited its advice for such relatives or friends as to the route by which they should travel, and its assistance in procuring for them transportation and whatever else they might need, either in New York or upon their journey; and petitioners in continuing the said business have become the financial agents of a very great number of said foreign born residents, who have intrusted to petitioners sums of money amounting, in the aggregate, to hundreds of thousands of dollars annually upon trusts, the performance of many of which is greatly hindered and impeded by the action of the said railway companies herein complained of; among which trusts are the meeting and assisting of emigrants upon their arrival; advising them as to the route to be traveled to reach their ultimate destination; acting for them in securing the most favorable rates possible and in purchasing their tickets; purchasing for them such articles of food or clothing as they might need for their journey; and delivering to them money supplied for their use; and, because of their said compact hereinbefore mentioned, and in pursuance thereof, said railroad companies have refused, and each of them has refused, and they and each of them still refuse, to sell to petitioners emigrant tickets for any purpose whatever, and they have caused the said commissioners of emigration to exclude and to continue to exclude petitioners and their agents and interpreters from said Castle Garden, and have hindered and prevented, and still hinder and prevent petitioners and their agents and interpreters from communicating with or advising or in any manner acting for or serving emigrants arriving at the Port of New York, and have hindered and prevented and still hinder and prevent emigrants desiring to do so from seeing or communicating with petitioners, their agents, and interpreters; whereby petitioners are greatly annoyed, and are hindered and prevented from discharging the duties and obligations they have assumed towards many of their principals and depositors, by reason whereof their business standing and reputation are impaired, their credit is injured, and they are subjected to great prejudice and disadvantage.

All of the defendants answered, but for the purposes of a presentation of the issues, it will be sufficient to state the substance of the answer made by the New York Central & Hudson River Railroad Company. That Company, by way of challenging the right of James C. Savery & Company to make the complaint, averred that the American Emigrant & Trust Company of Hartford, Connecticut, after an existence of several years became insolvent in 1886; and its assets were transferred to the petitioner, James C. Savery, and one Callahan, whereby and not otherwise is the former enabled to describe himself and "Company" as "successors of the American Emigrant Com-

pany of Hartford, Connecticut." The defendant denies that there is now any such corporation or joint stock association as the American Emigrant Company, and avers ignorance who the petitioners are, except Savery, and asks that he be required to disclose the names, if any, constituting the "company."

The defendant admits that it is engaged in the transportation of emigrants from the City of New York to the West; avers that its own charges are within limits prescribed by statute in the State of New York, and the aggregate charge made by itself and its connections is reasonable and such as is warranted by law.

It proceeds to state that the subject of the proper care of emigrants landing at the City of New York, and at other points of the State of New York, and their protection against frauds, impositions and swindles, has been frequently legislated upon in that State; that an Act passed in 1847 provided for six commissioners of emigration—which commissioners were authorized to acquire a place for the landing exclusively of emigrants and their baggage arriving at the Port of New York, and they have acquired Castle Garden for that purpose, and it is not permitted by the Laws of New York that emigrants and their baggage shall be landed elsewhere; that by the same laws said commissioners are required to designate a place or places in the City of New York for the sale of railroad tickets to emigrants, and to allow every railroad company desiring it to have an agent at the place or places designated, and it is made a misdemeanor to sell or offer for sale such tickets elsewhere, except that any railroad company may sell tickets to any persons at the rates charged to first class passengers, and may sell tickets at its principal ticket offices to emigrants and other second class passengers, provided it has at the same time an agent for the sale of tickets at the place or places so designated by the commissioners.

The answer proceeds to state certain other provisions of the statute in the State of New York designed for the protection of emigrants, among which is that no person other than an agent of a railroad company, duly authorized in writing therefor, may sell any railroad passage ticket, and such authorized person may not sell any railroad passage ticket excepting at the office designated in his appointment, and the unauthorized sale of a railroad passage ticket is punishable by fine or imprisonment.

It states, further, that the said commissioners of emigration of the State of New York, by virtue of the authority conferred upon and possessed by them, heretofore designated Castle Garden as the place in the City of New York for the sale of railroad tickets, and that the railroad companies mentioned in the petition, other than the New York, West Shore & Buffalo Railroad Company, provided for the sale of railroad tickets at Castle Garden by a joint agent of said railroad companies, and that this respondent, with respect to the carriage of emigrants and their baggage, has and does in all respects conform to, obey and comply with the laws of the State of New York, and that the other railroad companies named in the petition in like manner conform to, comply with and obey the laws of the State of New York

so far as they are applicable to them respectively.

The answer then sets forth reasons to justify such charges as are made in the transportation of emigrants and their baggage, and avers that the arrangement for such transportation and the service performed in respect thereto are in all respects suitable and adequate. It further says: "On information and belief, that the principal business and chief source of gain heretofore of the so called 'American Emigrant Company'—the name under which the petitioners say they do business—has been in the vending of the transportation of emigrants to competing and rival transportation companies and obtaining 'commissions' from them, and that the only interest the petitioners have in the matter set forth in the petition, and in the relief sought, is to be able to resume the same business and to have access to the same sources of profit."

Other answers were equally specific, but did not present further issues. That of the New York, Ontario & Western Railway Company says as to the complaint of excessive charge on extra baggage that "The cause of complaint, if any cause ever existed, has been removed by the increase of the amount of baggage allowed each adult passenger to 150 pounds, and the reduction of the rate for excess baggage from \$2.60 to \$1.95 for each 100 pounds; which reduction will go into effect on the first day of November, 1887."

All of the answers call attention to the fact that defendants have no authority whatever over the commissioners of emigration for the State of New York; that on the contrary their agencies are established in Castle Garden at the request of the said commissioners, and entirely subject to their direction in all matters pertaining to railroad business; and that in all other matters defendants have no right to control whatsoever.

The answer of the New York, West Shore & Buffalo Railroad Company was in the nature of a disclaimer, its road being operated by the New York Central & Hudson River Railroad Company.

When the case came to a hearing it appeared that Mr. Savery was in fact the sole complainant, though he seemed to be doing business under a partnership or corporate name; but as the fact does not affect the merits of the case it is not noticed in what follows.

Upon the issue so made a large amount of evidence was taken by the Commission. The manner in which the emigrant business is conducted by the commissioners appointed by the State of New York for the purpose was explained by the commissioners and by such other witnesses as the parties offered for the purpose. It was shown that the circumstances surrounding immigration afforded abundant opportunity for fraud and rapacity of every sort, and that there was not wanting a horde of rapacious persons eager to make the emigrant their prey. As was no doubt truly said by one of the early commissioners: "Their extortions and frauds in all the forms that rapacity could invent or suggest, finally assumed such fearful proportions and became the object of such general abhorrence that legislation for

the protection of emigrants seemed the only possible remedy. The community finally began to understand that it had to suffer in the same if not in a greater proportion than the emigrants themselves if the latter were not secured from the cupidity of runners and the mercenary attempts of agents."

To remedy the evils the Legislature of New York, in 1847 passed an Act creating a board of emigrant commissioners, whose duty it should be to supervise emigration and protect the immigrants. The creation of such a body probably had some influence in affording protection, but it was far from being effectual. Most of the immigrants had no knowledge of the English language, and if when they landed in New York they had any definite notions of further destination, they were utterly ignorant of routes and of means of transportation. They were therefore easy prey for any unscrupulous persons who might secure control of their movements while in the city, and for the runners for steamboats and railroads; and it was essential to their protection that all such classes of persons should be kept from them until their transportation was secured.

In 1855 the New York Commissioners of Emigration took possession of Castle Garden as an immigrant landing depot, and under an Act passed by the Legislature of New York the same year, all vessels bringing immigrants into the Port of New York were required to land them there. The commissioners also induced the principal railroad and steamboat lines from New York to the interior to organize in Castle Garden a central and joint ticket office for sale at regular public prices of passage tickets for emigrants to their respective places of destination, and to place such office and the entire business of forwarding the persons and property of emigrants under the immediate supervision of the commissioners. Having done this, they deemed it necessary to a complete reform that the system of through booking from points in Europe to points of final destination in America should be abolished—it being found that the agents engaged in that business were chargeable with enormous extortions; and they issued a circular to the Governments of foreign States, inviting their co-operation in the measures taken by them for the protection of emigrants.

In 1868 the Legislature of New York passed an Act which provided that "It shall not be lawful for any agent, employee, or other officer of any railroad company, or for any other person, to sell, offer for sale, or otherwise to dispose of any ticket or tickets, or written or printed instrument, or instrument partly written and partly printed for the transportation or conveyance on or by any railroad or steamboat, of any immigrant or deck or steerage passenger, or second class passenger, arriving at the Port of New York from a foreign country at any place or places in the City of New York except such as may be designated by the commissioners of emigration, which place or places may from time to time, as they may deem best, be changed by the said commissioners; *Provided, however,* That nothing herein contained shall prevent any railroad company from selling tickets to any person at the rates of fare charged for first class passengers, nor

from selling tickets at the principal ticket offices of such company, to immigrant and other second class passengers, provided that such company has at the same time an agent who shall sell tickets at the place designated by the said Commissioners for selling tickets to immigrants."

The State of New York had at an early day passed an Act for the levy upon every master of a vessel bringing immigrants to the ports of the State of a tax of \$1.50 in respect to each cabin passenger, and \$1.00 for each steerage passenger for hospital purposes. The Act was declared by the Federal Supreme Court, in the *Passenger Cases*, 48 U. S. 7 How. 283 [12 L. ed. 703], to be unconstitutional; but in 1882 Congress passed an Act for the levy of the sum of fifty cents for each and every passenger not a citizen of the United States who shall come by vessel from a foreign port to any port within the United States. The money collected was directed to be paid into the Treasury of the United States as an immigrant fund, and to be used under the direction of the Secretary of the Treasury to defray the expense of regulating immigration, and for the care of immigrants, the relief of such as are in distress, and for the general purpose of carrying the Act into effect. The Act allowed no more to be expended at any port than had been collected thereat. The Secretary of the Treasury was authorized by the Act to enter into contracts with state boards for carrying into effect the objects which the Act had in view.

Under the authority conferred by this Act the Secretary of the Treasury entered into a contract with the commissioners of emigration of the State of New York, whereby the commissioners undertook to receive all immigrant passengers at Castle Garden, or at some other suitable place under their control, and there provide means for their accommodation, including interpreters, and suitable accommodations for such as shall become sick or in distress, or idiots or lunatics, or a public charge, for a period not exceeding a year. The board also undertook to carry out such regulations as might be established by the secretary, to employ all necessary persons to effectuate the purposes of the contract, and to render monthly account of expenses, which were to be paid from the treasury.

To give complete effect to the intent of the Act of Congress the commissioners of emigration invited the co-operation of the railroad companies whose lines enter New York City, and assigned to them suitable and sufficient space within Castle Garden for their immigrant ticket and luggage departments, and wharf accommodations abreast the Garden for their immigrant transfer barges. In accepting these accommodations the railroad companies requested that arrangements be made under which all details of the receiving of emigrants, furnishing them with the desired information respecting rates and charges, selling them tickets, trucking, weighing and checking their luggage should be placed under the immediate supervision of a joint agent to be appointed with the approval of the board, and that all the expenses of such joint agency should be shared by the railroad companies in proportion to the number of immigrants tick-

eted over their respective lines. The suggestions of the railroad companies were accepted by the board, and the joint agent was appointed, who made his office in Castle Garden, and sold tickets, weighed baggage, and transacted other incidental business for all the roads.

Notwithstanding this joint arrangement the several railroads did not co-operate in entire harmony, and the volume of immigration was sufficient to tempt them to underhanded and secret arrangements under which the rates for transportation of immigrants from New York to Chicago were reduced from the normal rate of \$13 to \$7.50, and were finally for a time reduced to \$1. In this great cutting of rates the benefits of the reduction were not, as a rule, received by the immigrant, but were monopolized by agents and other middlemen, who were thus enabled to reap enormous profits.

In January, 1886, eleven railroad companies united to form an immigrant clearing house, having for its purpose the adjustment of accounts with steamboat agencies, the enforcement of uniform rules for the conduct of the immigrant business at the various receiving points on the Atlantic seaboard, the sale of tickets at uniform published prices, and the abolition of secret contracts between railroad and steamship companies, booking companies, or private forwarding firms. The companies uniting to form the clearing house were the Grand Trunk Railway of Canada, the New York Central & Hudson River Railroad Company, the New York, West Shore & Buffalo Railroad Company, the New York, Lake Erie & Western Railroad Company, the Pennsylvania Railroad Company, the Boston & Lowell Railroad Company, the Central Vermont Railroad Company, the Fitchburg Railroad Company, the Boston & Albany Railroad Company and the New York & New England Railroad Company. Afterwards the New York, Ontario & Western Railway Company and the Baltimore & Ohio Railroad Company joined them.

A joint agent was placed in Castle Garden by these companies who was supplied with tickets over all their lines. The emigrants when brought into the Garden were registered before outsiders were permitted to have any communication with them, and if they saw fit to remain in the Garden until they took train for their final destination they were supplied with provisions by licensed dealers at prices which were fixed by the emigrant commissioners and posted on the walls in different European languages to prevent deception and extortion. If any emigrant desired to stay in New York temporarily or permanently his luggage was transferred for him, as directed, by a local express company at a charge named by the commissioners; if his destination was to some interior point, he was routed by the joint agent, who endeavored to apportion the transportation in such manner as to give to each road the share which had been agreed upon by all as its fair proportion.

In their dealings with emigrants the inland railroad fare has been regulated and treated by the railroad companies as part of a through fare from Europe to the destination in this country. When the steamer fare from Liver-

pool to New York was \$20 and the fare from New York to Chicago was \$13, the whole fare from Liverpool to Chicago, being \$33, could be paid in a round sum in Liverpool, and the passenger so paying would receive a contract for transportation the whole distance, which would be honored by the clearing house, and a railroad ticket furnished by it for the inland passage, for the price of which the railroad company would look to the carrier by water to whom the fare was paid. But instead of paying to Chicago the immigrant might want to pay to New York only, and when that was done the ticket for the inland transportation would be sold in Castle Garden.

While the operations of the clearing house were continued without interruption and with the co-operation of all the carriers represented in it, the immigrant business was apportioned them on percentages agreed upon. It was a part of the agreement under which this apportionment was made that "In this distribution of business the convenience of passengers will of course be considered;" and the joint agent was instructed to "Take all reasonable care to prevent the separation of families or parties of friends traveling together."

It is not necessary for the purposes of this case to enter upon the statement of the various devices resorted to for the purpose of circumventing the commissioners of emigration, and the measures taken by them for the protection of emigrants. Such devices had for their object the making of money out of the emigrant business by unscrupulous parties in New York, or by parties who made it a business to direct and control the route of the emigrant, and who received commissions therefor from the roads over which they were sent, and then, except as the regulations of the commissioners prevented it, the emigrants were in effect sold to persons who controlled the direction of the route without the emigrants themselves receiving any benefit therefrom. The commissions paid were sometimes very large, reaching in some cases \$11 and even \$14 on emigrants for the Pacific slope. While the arrangement between the commissioners and the roads represented in the clearing house continued to be observed, the efforts of outside parties were, to a large extent, rendered ineffectual, though there were evasions sometimes, and probably with the connivance of one or more of the railroad companies.

In the spring of the present year the fact that the arrangement with the commissioners was being disregarded by some of the roads was brought very plainly to the attention of the board. Mr. Stevenson, who has for some time been a leading member of the commission, in testimony given in this case states that in the latter part of April his attention was called one afternoon to the fact of a suspension of business in Castle Garden and of the emigrants being taken out of Castle Garden across the Battery to the various railroad offices and ticketed there. He made inquiry why this was being done in violation of the contract entered into between the commissioners and the railroads, whereby they agreed that all the business should be done in the Garden and none of it outside. He ascertained they were not selling emigrant tickets outside, but were selling

to the emigrants second class tickets; that the second class tickets were not kept in the Garden, and consequently they had to go over to the offices of the roads and be ticketed there.

He says: "I found in two of the offices a scene which made me angry. I found emigrants crowded in, women with children in their arms and bundles in their hands, trying to get their tickets changed, and then stopped to investigate the cause of it. I found that the West Shore Road was the first line that did this business of taking the emigrants out of the Garden. The next day I learned that the Erie Road had chartered a tug, gone down the bay and changed the order for tickets on the clearing house for orders on the Erie Road before the vessel got to the dock; and those emigrants were compelled to go outside of Castle Garden, and the entire business was taken from under the control and jurisdiction of the commissioners. I immediately asked two of the commissioners to join with me and call a special meeting of the board, which was done two days after this occurrence."

At this meeting a preamble and resolutions were adopted, reciting that the board has positive knowledge that the trunk lines of railroad and other lines since admitted to Castle Garden, without their concurrence, are now taking emigrants outside of Castle Garden to their offices, in violation of their agreement and greatly to the discomfort and detriment of the emigrants, exposing them to imposition and injury and removing them from the protection and care of the board. It was therefore resolved that the existing agreement between the commissioners and the trunk lines of railroad cease and determine; that a new agreement be made with each trunk line of railroad desirous of doing business in Castle Garden—said agreement to provide that all emigrants arriving at the port and going over said trunk lines shall be ticketed in Castle Garden and at no other office or place, and that the weighing and checking of immigrants' baggage shall be done in Castle garden; also that no higher price shall be charged immigrants thus ticketed in Castle Garden for their inland transportation or for their overweight of baggage than is charged for similar service at any railroad office in New York City or vicinity; also that said trunk lines shall agree to convey all parties of immigrants numbering fifty or over by barge or steamer from Castle Garden to the railroad depot; also that each trunk line pay a rental to be agreed upon for such necessary desk room and space as may be allowed to it by the commissioners, and to pay for the handling, trucking and checking of the baggage of the emigrants and its transfer to the depot; the said agreement to provide fully for the general supervision by the board of the ticketing and forwarding of emigrants, and any violation of its provisions by the railroad company to be a cancellation of the whole agreement and to be a sufficient cause for the immediate exclusion of the railroad company and its agents from Castle Garden. The several railroad companies on being notified of these resolutions entered into the contract required by it, and each of them severally appointed an agent in Castle Garden, all of them, however, with one exception appointing the same one, Mr. Chillion F.

Doane. The Delaware, Lackawanna & Western appointed its agent, Mr. Nicholas Mulier. This change in arrangement was attended by no change in the rate, the emigrant rate to Chicago remaining \$13 as before. And it seems proper to state that those roads which were first found to be selling second class tickets to emigrants outside of Castle Garden claimed to justify their action upon the discovery of similar conduct on the part of other roads; and which road was in fact the party chiefly responsible the Commission cannot undertake to say. The question is not one important to a decision of this case. Upon the reasonableness of the \$13 rate Commissioner Stevenson testified that in his opinion the rate was low enough, but thought it ought to carry with it an improvement of the service as well in time as in the vehicles of conveyance. The schedule time he thought was as short as could reasonably be expected or asked, but emigrant trains were often four, five and even six hours behind time, to the great inconvenience of the friends who were waiting to to meet the immigrants at the place of destination. Complainants contend that the rate ought to be reduced to \$10.

The first and most obvious fact apparent upon the face of the record is that the arrangements for the reception of immigrants arriving at the Port of New York, for their care before their transportation is secured, and for the sale of railroad tickets to them, are entirely under the control of official authorities other than this Commission. The State of New York has, by statute, so far as it has the power to do so, vested complete control in the board of emigrant commissioners, and its legislation for that purpose is so far recognized and sanctioned by federal legislation, and by the action of the Treasury Department, that this Commission is without the power to interfere. Even if the commission was of opinion that the action of the commissioners of emigration was unwise and unjust, it would still remain true that this commission cannot set aside or modify it.

This is in effect conceded by counsel for the complainants, who admit that as against arbitrary action by the commissioners of emigration this Commission can give no relief. It is insisted, however, that as against the respondents this Commission may issue its order requiring them to desist from interfering in any way with the access of complainants' agents to the presence of the immigrants before they have been required to procure their railroad tickets and with interfering with complainants' receiving those consigned to their care, and advising them as to the choice of routes, or performing for them any other service which complainants may have undertaken to perform. It is also contended that the Commission may by its order require each of the respondents to sell to complainants such tickets as they may desire to purchase for immigrants coming to their care at the same price at which they sell like tickets to others.

It is very obvious, however, that an order to that effect, if it could be enforced, would very seriously interfere with the regulations of the commissioners of emigration, and would distinctly antagonize their general policy. What the respondents now do (which the com

plainants deem to their prejudice) is done by concert with the commissioners of emigration, who could not otherwise give effect to their general views as to what is necessary for the protection of the immigrants, and the orders suggested would hamper the action of the commissioners of emigration quite as much as it would restrain or compel the action of the respondents; and it would open the door to all the abuses which those commissioners are appointed to prevent.

It is but just to the complainants to say that nothing in the evidence fairly tends to show that the American Emigrant Company, while it continued in business, or complainants, as its successors, were ever guilty of the wrongs and frauds which the commissioners of emigration are appointed to prevent. Conceding this to the fullest extent, and that the privileges they seek to establish in this proceeding would not be abused in their hands, it still remains true that we cannot give them the relief they desire. And it may be added that if the commissioners of emigration were to open the doors to complainant they must do the same thing for others, and the old condition of things would soon be restored. Such at least would seem to be the inevitable result.

No part of the relief which complainants seek on their own behalf can, therefore, be granted.

In so far as complainants ask an order for the benefit of the immigrants themselves, it is based on three grounds, namely: 1, excessive charge for transportation; 2, excessive charge for baggage; and 3, unsuitable transportation.

Emigrant fare, when the complaint was filed, was \$13 from New York to Chicago. The evidence which was given to establish the fact that this charge was unreasonable consisted largely of proofs that the charge had formerly been much lower. Not much, can be predicated of this fact. There is scarcely a road in the country that has not at some time carried passengers or freight at a compensation that would bankrupt it if long persisted in. This fact is very well known and understood. The other evidence brought forward on the hearing did not so much tend to establish the fact that the charge made was unreasonable, as that the immigrants were not given suitable transportation. Since this case was heard, however, that rate has been reduced \$5, at which figure it now stands. The reduction is the result of a rate war brought about, as there is reason to believe, by the payment of commissions to secure the routing of the immigrants. While the war continues the carriers will doubtless do what they can to injure each other in respect to this branch of their business, and in doing so they will at the same time to a greater or less extent break down or weaken the protections devised for the immigrants. Meantime there is no occasion for an expression of an opinion upon the reasonableness of the former rate.

When the complaint was filed the allowance of free baggage to an immigrant was 100 pounds, and the charge for extra baggage was \$2.60 per 100 pounds. The allowance of free baggage was increased before the hearing to 150 pounds, and the charges for extra baggage

reduced to \$1.95 per 100 pounds. The charge does not seem to be excessive.

The transportation was supposed to be unsuitable because the vehicles of conveyance were unfit for the purpose, and also because the time made was unreasonably long. On the last point the evidence was not sufficiently specific to enable the Commission to say that there is clear failure in duty. It is no doubt true that in very many cases immigrant trains do not make the time intended, and that the immigrants and the friends who may be waiting for them at the points of destination are greatly inconvenienced thereby; but this in a great many cases happens with the first class passenger trains also, and it is not possible at all times to prevent it. The schedule time between New York and Chicago over the different routes at the time of the hearing varied from about thirty-three hours to thirty-nine. This, if the trains were run to it, could hardly be deemed unreasonable for a distance averaging over the several lines about 1,000 miles.

As regards the cars used for the transportation of emigrants the Commission deemed personal inspection better than the taking of evidence, and caused one to be made in the several yards at New York City and vicinity and on the routes of the several railroad carriers. The result of the inspection was in some cases satisfactory and in others not. The most unsatisfactory cars were found in use by the New York Central & Hudson River Railroad Company, those employed on the West Shore Road being the worst of all. The attention of the executive officers of the Company was at once called to the necessity of improvement in this regard, and assurances were given that the unfit cars then in use on the road should be put in proper condition or be replaced by such as were suitable as soon as it could well be done. Former deficiencies in respect to cleanliness it was also promised should not be discoverable hereafter.

It is suggested on the part of complainants that defendants are guilty of discrimination in refusing to sell tickets to other persons on the same rates that they make to immigrants. But we are not satisfied that this is unjust discrimination. The roads west of Chicago it seems have only first and second class rates; the respondents have an immigrant rate in addition. *If they were to give immigrant rates to other persons the distinction on which the rates are made and which limits them to a particular class of persons, would be done away with, and the second class rates and the immigrant rates would almost necessarily become merged.* We are not satisfied that this would be best; and in any view we might be inclined to take of it, we should not order it to be done in a case where the point is raised so indirectly as it is here, and not by parties interested in it.

The case of *Smith v. Northern Pacific Railroad Company*, 1 Inters. Com. Com. Rep. 208, 1 Inters. Com. Rep. 611, is cited against the right to make the distinction between immigrant and second class rates; but we do not think it applicable.

In that case a distinction in charge was attempted to be made between classes of persons who could not by any practicable tests be dis-

tinguished and who were all to enjoy the same accommodations. In the case before us we have a class of persons readily distinguishable from the general public, and so far constituting a special class that up to the time when they are received upon the cars they are subject to exceptional regulations for reasons which, being accepted as a basis of legislation, must be deemed sufficient. This special class of persons are given accommodations essentially different to those provided for others, in cars specially set apart for their use, and which are commonly made up into trains by themselves and returned to the seaboard empty. The service is thus seen to be special, and the rates charged correspond to it.

We cannot say that under such circumstances the classing them by themselves on the rate sheets is either illegal or wrongful. It harmonizes with the policy of legislation on the general subject so far as it has been expressed, and it wrongs nobody else to give them rates restricted to the particular class exclusively. There is no such danger of fraud through other persons passing themselves off as immigrants as was pointed out in *Smith v. Northern Pacific Railroad Company*, in the case of pretended land explorers.

The result of this opinion is that the complaint must be dismissed.

David Hostetter and Milton L. Meyers, Partners, Engaged in Business as HOSTETTER & CO.,

v.

The PENNSYLVANIA COMPANY *et al.*
(No. 148.)

ANSWERS to complaint given *ante*, 151, charging the exaction of unjust rates for the transportation of "Hostetter's Stomach Bitters."

SEPARATE ANSWER OF PENNSYLVANIA CO. AND PENNSYLVANIA R. CO.

(Filed November 1, 1888.)

The Pennsylvania Company and the Pennsylvania Railroad Company, two of the respondents in the above stated case, severally answering to such portions of complainants' petition as they are advised it is important and necessary to make answer unto, say:

1. That the allegations contained in the first paragraph of complainants' complaint have reference to facts as to which these respondents are not informed; and that so far as the same are material respondents ask that the complainants be held to proof thereof.

2. In answering to the allegations contained in the second paragraph of the petition, these respondents state that bitters in glass may be shipped at the carriers' risk, at the rate provided in the published tariff of the respondents; but, at the option of the shippers, such bitters may also be shipped at the owners' risk at a lower rate, also provided for in such published tariff, being one half the rate of freight charged when shipped at the carriers' risk.

3. These respondents deny that they have advanced their rates, since the enactment of the Act to Regulate Commerce, upon stomach

bitters to an unfair and unreasonable extent, but aver that the rates charged since the passage of said Act are fair and reasonable.

4. These respondents deny that the charges made by them for transportation of the traffic of the said complainants referred to in their said petition, are excessive, unjust and unreasonable; or have the effect of unlawfully discriminating against the complainants, or that the said rates are contrary to the provisions of the first section of "An Act to Regulate Commerce," or are contrary to the requirements of the second or third sections of said Act, as these respondents are advised and believe; but on the contrary aver that they have not unlawfully discriminated against complainants and that the rates charged, considering the quality, character and incidents of their shipments, are reasonable and just.

Wherefore, your respondents pray that the petition of the complainants be dismissed.

The Pennsylvania Company,

By F. H. Kingsbury.

J. T. Brooks, Counsel.

The Pennsylvania Railroad Company,

By F. H. Kingsbury.

James A. Logan,

John Scott, Counsel.

SEPARATE ANSWER OF BALTIMORE & OHIO R. CO.

(Filed October 11, 1888.)

To the Honorable the Interstate Commerce Commission:

The answer of the Baltimore & Ohio Railroad Company to the complaint filed in this matter respectfully shows:

First. This defendant has no knowledge of the matters and things alleged in the first paragraph of the said complaint, and therefore neither admits nor denies the same, but leaves the complainants to such proof thereof as they may be advised.

Second. This defendant admits that bitters in bottles are by the classification agreed upon by the defendants in this matter and other railroads, known as the *official classification*, put in the first class when carried at the owners' risk, and in double first class when transported at carriers' risk, and says that the rates thereon to all points will appear by reference to said classification and tariff thereunder filed with the Commission—to which it refers for an accurate statement of the same.

And this defendant further says that said official classification was made for the sake of uniformity, to meet the requirements of the Act commonly known as the Interstate Commerce Law, to cover a large territory between the seaboard and the Mississippi River, and to take the place of a greater number of varying and conflicting classifications theretofore in force in said territory, both on local and through traffic.

Third. This defendant alleges that the classification of bitters as aforesaid is just and right, and denies all the allegations to the contrary contained in the 3d, 4th, 5th and 6th paragraphs of the said complaint, and especially denies that the charges for transportation of the complainants' goods are excessive, unjust or un-

reasonable, or discriminate in any way against the complainants, or violate any of the provisions and requirements of the said Act.

The Baltimore & Ohio Railroad Company,
By Charles E. Ways,

General Freight Agent.

John R. Cowen, Counsel,
Baltimore, Md.

SEPARATE ANSWER OF LAKE SHORE & MICHIGAN SOUTHERN R. Co.

(Filed October 27, 1888.)

The Lake Shore & Michigan Southern Railway Company answers the petition herein as follows:

First. Admits the allegations contained in the first paragraph of said petition, except the allegation that the shipments by petitioners of Hostetter's stomach bitters over defendant's railroad amount to between 70,000 and 80,000 boxes annually, and denies that any such amount or quantity of said bitters is shipped over this defendant's road annually;

Second. Admits the allegations contained in the second paragraph of said petition;

Third. Respondent avers, claims and insists that all the allegations in said petition as to rates which existed and facts which occurred prior to the 5th day of April, 1887, are not, under Rule IV adopted by this Commission, material, and are not claimed to and do not constitute or tend to constitute a violation of the Act to Regulate Commerce, and that said allegations are improperly stated in said petition, and should be stricken out or disregarded, and that respondent is not by the rules adopted by this Commission required to answer, admit or deny the same; and said respondent does not admit the truth of any of said allegations. The respondent denies that since the enactment of said Law, or at any time, it had advanced the rate upon said bitters to an unfair or unreasonable extent. The respondent admits that under the classification in force when said petition was filed, and which was adopted by the joint committee and accepted by respondent, the rate or charge upon bitters in glass was the same for car load and less than car load lots. But this respondent alleges that on or about the 18th day of October, 1888, said joint committee changed or amended said classification, which read:

Patent Medicines, N. O. S., in glass,
packed in wood, O. R., ferment-
ing, freezing or breakage..... 1
Patent Medicines, N. O. S., in glass,
packed in wood, O. R., ferment-
ing or breakage, valuation to be
on basis 25 cts. per quart, to be so
stated on shipping receipt by
shipper..... 3

as will more fully appear by circular No. 945, Joint Committee, on file with this Commission, to which defendant begs leave to refer.

This respondent accepted said amendment and change, and is governed thereby.

Fourth. Respondent denies that said charges for transportation which are now and have been since April 5, 1887, exacted by this defendant are excessive, unjust or unreasonable, or that petitioners are justly or equitably entitled to have their goods replaced in the classes occupied prior to 1887, and transported at the same rate, or that the rates now charged are unfair, unreasonable, or an unjust discrimination against said petitioners, or that any advance in rates made by defendant is unreasonable or unjust or contrary to the provisions of the first, second or third sections of the "Act to Regulate Commerce," or that the petitioners are injured or damaged by the acts of defendant, its servants or agents.

Wherefore, this respondent prays that the said petition be dismissed.

The Lake Shore & Michigan Southern Railway Company,
By John Newell,

President.

George C. Greene, General Counsel,
Buffalo, N. Y.

SEPARATE ANSWER OF ALLEGHENY VALLEY R. Co.

(Filed October 26, 1888.)

The Allegheny Valley Railroad Company, one of the respondents in the above stated cause, by John Scott and W. H. Barnes, Receivers of said Allegheny Railroad Company, appointed in a certain cause pending in the United States Circuit Court in the Western District of Pennsylvania, at No. 9, November Term, 1884, of said court, makes answer to the complaint in the above stated cause, or to such portions thereof as these respondents are advised it is necessary for them to answer, as follows, to wit:

First. It is true as alleged in said complaint, that the complainants are engaged in the City of Pittsburgh in the manufacture and sale of Hostetter's stomach bitters. As to the other averments of the first paragraph of said complaint these respondents are not informed, and so far as the same may be material, these respondents ask that complainants make proof thereof.

Second. The line of the Allegheny Valley Railroad operated by these respondents is entirely within the State of Pennsylvania, and except as to joint rates made by respondents with connecting lines to points outside the State of Pennsylvania, these respondents do no interstate business.

Third. In answer to the averments contained in the second paragraph of said complaint, these respondents state that since the passage

L. C. L. C. L.
Bitters, in glass, C. R..... D. 1
Bitters, in glass, O. R. B..... 1

so as to read as follows.

L. C. L. C. L.
Bitters, in glass, packed in wood,
C. R.,..... D. 1
Bitters, in glass, packed in wood,
O. R., fermenting, freezing, or
breakage..... 1
Bitters, in glass, packed in wood,
O. R., fermenting, freezing or
breakage, valuation to be on
basis 25 cts. per quart, to be so
stated on shipping receipt by
shipper..... 3

Additions.

L. C. L. C. L.
Patent Medicines, N. O. S., in glass,
packed in wood C. R.,..... D. 1

of the Act to Regulate Commerce the complainants have not offered to respondents any shipment of said bitters in car load lots. Under the classification known as the *official classification*, adopted and in use by these respondents and the lines of railway connecting with the Allegheny Valley Railroad since the passage of the Act to Regulate Commerce and up to October 18, 1888, said bitters were classified for shipment and transportation as follows, to wit:

Bitters in glass, carriers' risk, double first class; bitters in glass, owners' risk of breakage, first class.

On October 18, 1888, the said classification was however, changed and amended with respect to the shipment and transportation of bitters, as follows, to wit:

Bitters in glass, packed in wood, carriers' risk, less than car load, double first class; bitters in glass, packed in wood, owners' risk, fermenting, freezing or breakage, less than car loads, first class; bitters in glass packed in wood, owners' risk, fermenting, freezing or breakage, valuation to be on basis twenty-five cents per quart, to be so stated on shipping receipt by shipper, car loads, third class.

Fourth. These respondents are not informed in regard to the changes of rates specifically mentioned in the third paragraph of said complaint as none of the points referred to are reached by the Allegheny Valley Railroad or its connections, and said rates are not charged or collected by these respondents. The points of destination with respect to which these respondents in connection with other lines of railroad do any interstate business in the transportation of said bitters (except perhaps as to occasional small shipments to points between Pennsylvania State line and Buffalo) are Buffalo and points north of Buffalo and points in New York and New England east of Buffalo; and while under the said classification of October 18, 1888, the rates on said bitters to Buffalo and points taking Buffalo rates are slightly increased over the rates prevailing up to the time of the adoption of the said classification which was amended October 18, 1888, said rates to all points east of Buffalo reached by the line of respondents and its connections are largely reduced below the rates prevailing at the date of the passage of the Act to regulate Commerce, and the increase in Buffalo rates above mentioned is insignificant, amounting to less than one fifth of a cent per bottle on complainants' statement as to weight and contents of packages.

These respondents aver that the classification and rates now in effect are fair, just and reasonable, and favorable to complainants; and further state that under said official classification as changed or amended October 18, 1888, patent medicines not otherwise specified are classified in precisely the same manner as bitters as above set forth; and neither in the rates charged under said classification upon bitters, nor the rates charged to other persons upon similar classes of goods shipped as patent medicines, is there any unfair or unreasonable charge made against the complainants, nor any discrimination made against the complainants in favor of other shippers.

Wherefore, these respondents pray that said complaint may be dismissed.

The Allegheny Valley Railroad Company,
John Scott and W. H. Barnes, receivers,
By E. H. Utley, G. F. & P. A.

SEPARATE ANSWER OF NEW YORK CENTRAL & HUDSON RIVER R. Co.

(Filed October 22, 1888.)

The New York Central & Hudson River Railroad Company separately answering to such portions of complainants' petition as it is advised it is important and necessary to make answer unto, says:

First. It denies that it has any agency in Pittsburgh, Pa.;

Second. That the allegations contained in the first paragraph of complainant's complaint have reference to facts as to which this defendant is not informed; and that so far as the same are material this defendant asks that the complainants be held to proof thereof.

Third. In answer to the allegations contained in the second paragraph of the petition, this defendant states that bitters in glass may be shipped at the carriers' risk at the rate provided in the published tariff of this defendant; but at the option of the shippers, such bitters may also be shipped at the owners' risk at a lower rate also provided for in such published tariff, being one half the rate of freight charged when shipped at the carriers' risk.

Fourth. This defendant denies that it has advanced its rates, since the enactment of the Act to Regulate Commerce, upon stomach bitters to an unfair and unreasonable extent, but avers that the rates charged since the passage of such Act are fair and reasonable.

Fifth. This defendant denies that the charges made by it for transportation of the traffic of the said complainants referred to in their said petition, are excessive, unjust and unreasonable; or have the effect of unlawfully discriminating against the complainants, or that the said rates are contrary to the provisions of the first section of an Act to Regulate Commerce, or are contrary to the requirements of the second or third sections of said Act, as this defendant is advised and believes; but on the contrary avers that this defendant has not unlawfully discriminated against complainants, and that the rates charged, considering the quality, character and incidents.

Sixth. And this defendant further answering says that on the 18th of October, 1888, the classification and tariff of this defendant, and other railroad companies, in that part relating to the merchandise mentioned in the complaint was changed so as to read as follows, viz.:

| | L. C. L. | C. L. |
|------------------------------------|----------|-------|
| Bitters, in glass, packed in wood | | |
| O. R., | D 1 | |
| Bitters, in glass, packed in wood, | | |
| O. R., fermenting, freezing or | | |
| breakage | 1 | |
| Bitters, in glass, packed in wood, | | |
| O. R., fermenting, freezing or | | |
| breakage, valuation to be on | | |
| basis 25 cts. per quart, to be so | | |
| stated on shipping receipt by | | |
| shipper | | 3 |

Additions.

| | L. C. L. | C. L. |
|--|----------|-------|
| Patent medicines, N. O. S., in glass, packed in wood,..... | D 1. | |
| Patent medicines, N. O. S., in glass, packed in wood, O. R., fermenting, freezing or breakage..... | | 1 |
| Patent medicines, N. O. S., in glass, packed in wood O. R., fermenting, freezing or breakage, valuation to be on basis 25 cts. per quart, to be stated on shipping receipt by shipper..... | | 3 |

which change took effect October 18, 1888; and with respect to the merchandise mentioned in the complaint, provides for charges for transportation thereof more favorable to the complainants than the reasonable and just rates existing prior to October 18, 1888.

Wherefore, this defendant asks that the petition of the complainants be dismissed.

The New York Central & Hudson River R. R. Co.

By Nathan Guilford,

General Traffic Manager,

Frank Loomis, General Counsel,

New York City.

SUPPLEMENTAL ANSWER OF PITTSBURGH & LAKE ERIE RAILROAD COMPANY. *

(Filed Nov. 8, 1888.)

The further separate answer of the Pittsburgh & Lake Erie Railway Company to the complaint of Hostetter & Company filed in this case, sets forth as follows:

That since the filing of its answer in the above entitled case, the classification of bitters used by this respondent has been changed so that it reads as follows:

| | |
|---|------------|
| Bitters in glass, packed in wood, company's risk, less than car load lots,..... | Class D 1. |
| Bitters in glass, packed in wood, owners' risk, fermenting, freezing or breakage..... | Class 1 |
| Bitters in glass, packed in wood, owners' risk, fermenting, freezing or breakage, valuation to be on basis of 25 c. per quart, to be so stated on shipping receipt by shipper, car load lots..... | Class 3. |

That the effect of this change is to reduce the classification of bitters in car load lots to the third class, and to reduce the rate of freight to be charged and paid thereon, so that under the new classification or rate, car load lots will be charged less to the points referred to in the petition of the complainants than that charged upon less than car load lots.

That this change in classification took effect October 18, 1888, and from and after that date, this respondent has made its rates according to the new classification aforesaid for car load lots.

The Pittsburgh & Lake Erie Railroad Co.,

By Frank A. Dean, G. F. Ag't.

SUPREME COURT OF PENNSYLVANIA.

COMMONWEALTH of Pennsylvania, *Plff.*
in *Err.*,

v.

AMERICAN DREDGING CO.

1. The situs, for purposes of taxation, of tangible personal property, temporarily in another State but not permanently located there, is the State of the domicile of the owner.

2. The situs, for purposes of taxation, of unregistered vessels (including dredges and scows) engaged in interstate commerce, is the State of the domicile of their owner, although such vessels may never have been within that State, —in the absence of anything to show that they are so permanently located in another State as to be liable to taxation there.

(Argued June 1, Decided Oct. 1, 1888.)

MAY Term, 1888, No. 38, M. D., before Gordon, *Ch. J.*, Paxson, Clark, Sterrett and Williams, *JJ.*

Error to the Common Pleas of Dauphin Co., to review a judgment on an appeal by the American Dredging Company from settlement by the Auditor-General and State Treasurer for tax on capital stock under the Act of June 7, 1879. *Reversed.*

The case was tried without a jury, under the Act of 1874, and the court, MCPHERSON, *A. L. J.*, found the following facts:

The defendant is a corporation of this Com-

monwealth, chartered by the Act of April 9, 1867 (P. L. 956), with power "to own, construct, operate and dispose of dredging machines, steam tugs, lighters, machinery and appliances for improvement of harbors, channels, docks and watercourses." Under this Act and a Supplement of March 28, 1873 (P. L. 446), its capital stock for the tax year ending the first Monday of November, 1886, was \$495,000.

During this year \$232,803.22 of its capital stock was invested in land and buildings situate in the State of New Jersey; \$92,000 thereof was invested in four dredges, which were built outside of the State of Pennsylvania, three of which have never been within the limits of the State, and the fourth of which had never been within its limits until after the end of the said year; \$6,000 thereof was invested in a tug which was built outside of Pennsylvania, and was not within its limits during the said year; and \$38,500 thereof was invested in eleven scows which were built outside of Pennsylvania, and have never been within its limits. During the said year, the said real estate and other property were all employed for corporate purposes in the States of New Jersey, Maryland and Virginia.

The court held as matter of law that so much of the capital stock of the company as was invested in land and buildings in New Jersey, and in the said dredges, tug and scows, was not taxable by this Commonwealth.

The question presented by the writ of error is as to the correctness of the ruling in respect to the dredges, tug and scows.

Messrs. W. S. Kirkpatrick, *Atty-Gen.*,

* See original answer, *ante*, 152.

and **John F. Sanderson**, *Dep. Atty-Gen.*, for the Commonwealth, plaintiff in error:

The ordinary rule as to the *situs* of tangible personal property for purposes of taxation is not applied to vessels. Their *situs* for the purpose of taxation is their home port of registry, or the residence of their owner, if unregistered.

See *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658; *Hays v. Pacific Mail S. S. Co.* 58 U. S. 17 How. 596 (15 L. ed. 254); *Morgan v. Parham*, 85 U. S. 16 Wall. 471 (21 L. ed. 303); *Perry v. Torrence*, 8 Ohio, 521; *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555; *People v. New York*, 64 N. Y. 541.

Where vessels are owned by a corporation the residence of the corporation is their home port; and there they are taxable, notwithstanding the corporation may have its office in another State.

St. Louis v. Wiggins Ferry Co. 78 U. S. 11 Wall. 431 (20 L. ed. 194); *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273 (25 L. ed. 412); *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Pelton v. Cleveland Trans. Co.* 37 Ohio St. 450; *People v. New York*, 47 How. Pr. 164. See also *People v. Comrs. of Taxes*, 23 N. Y. 224; *St. Joseph v. Saville*, 39 Mo. 460; *Gunther v. Baltimore*, 55 Md. 457.

Messrs. J. Warren Coulston and Weiss & Gilbert, for defendant in error:

The power of taxation is necessarily limited to subjects within the jurisdiction of the State.

State Tax on Foreign Held Bonds, 82 U. S. 15 Wall. 300 (21 L. ed. 179); *Com. v. Standard Oil Co.* 101 Pa. 119; *Com. v. Montgomery L. & Z. Min. Co.* 5 Pa. County Court Reports, 88; *Com. v. Pennsylvania Coal Co.* 5 Pa. County Court Reports, 89.

"Goods and chattels, horses, cattle and other movable property of a visible or tangible character are liable to taxation in the jurisdiction or State wherein the same are, and are ordinarily kept, irrespective of the residence or domicile of the owner. Legal protection and taxation are reciprocal, so that such personal property and effects of a corporeal nature, that may be handled and removed, as receive the protection of the law is liable to be taxed by the law where it is thus protected."

Rorer, *Interstate Law*, ed. 1879, p. 204, and cases there cited; 1 Potter, *Corporations*, §§ 189, 190, and cases there cited; Pierce, *Railroads*, 472, and cases there cited.

The cases cited by plaintiff in error, which refer to the law taxing "vessels" engaged in interstate or foreign commerce, are without application in the present controversy. Each case presents the fact of a vessel registered under the Act of Congress of 1792, which declares that the port of registration shall be the home port fixing the *situs* of the registered vessel.

In *Morgan v. Parham*, 85 U. S. 16 Wall. 471 (21 L. ed. 303), the Supreme Court declared that the effect of such registration is that of wholly excluding the idea of such vessel permanently abiding in another State or changing her home port.

But the property in question here was built for and has been continuously engaged in excavating the soil of the States of Virginia and Maryland.

Mr. Justice Paxson delivered the opinion of the court:

The court below correctly held that the defendant company was not liable to taxation upon so much of its capital stock as was represented by lands and buildings situate in the State of New Jersey; but we are of opinion that the learned judge erred in his ruling that the \$92,000 of said stock represented in the form of dredges, tug-boat, and the eleven scows, conceding that they, or at least a part of them, were built outside of the State, and have never been within it, were not liable to taxation. This is not because of the technical principle that the *situs* of personal property is where the domicile of the owner is found. This rule is doubtless true as to intangible property such as bonds, mortgages and other evidences of debt; but the better opinion seems to be that it does not hold in the case of visible tangible personal property permanently located in another State. In such cases it is taxable within the jurisdiction where found and is exempt at the domicile of the owner. Goods and chattels, horses and cattle, and other movable property of a tangible or visible character are liable to taxation in the jurisdiction of the State wherein the same are, and are ordinarily kept, irrespective of the residence or domicile of the owner. Legal protection and taxation are reciprocal; so that such personal property and effects of a corporeal nature, or that may be handled and removed, as receives the protection of the law, is liable to be taxed by the law where it is thus protected. Rorer, *Interstate Law*, 204 and cases there cited; Potter, *Corporations*, §§ 189, 190; Pierce, *Railroads*, 472.

No fault is found with this principle; but does it apply to the facts of this case?

It must be conceded that the property in question must be liable to taxation in some jurisdiction. If it were permanently located in another State, it would be liable to taxation there. But the facts show that it is not permanently located out of the State. From the nature of the business it is in one place today and another tomorrow, and hence not taxable in the jurisdiction where temporarily employed. It follows that if not taxable here it escapes altogether. The rule as to vessels engaged in foreign or interstate commerce is that their *situs* for the purpose of taxation, is their home port of registry, or residence of their owner if unregistered. *Pullman Palace Car Co. v. Twombly*, 29 Fed. Rep. 658; *Hays v. Pacific Mail Steamship Co.* 58 U. S. 17 How. 596 (15 L. ed. 254).

These vessels, if they may be so called, were not registered. Hence their *situs* for taxation is the domicile of the owners. This rule must prevail in the absence of anything to show that they are so permanently located in another State as to be liable to taxation under the laws of that State.

Judgment reversed and a procedendo awarded.

DELAWARE & HUDSON CANAL CO.,
Plff. in Err.,

v.

COMMONWEALTH of Pennsylvania.

1. The tax upon railroads for gross receipts from transportation, etc., prescribed by section 7 of Pennsylvania Act of 1879 (P. L. 116), if valid in other

respects, cannot be evaded by the fact that the railroad company is a foreign corporation and has sent such receipts to its home office so that they are **not physically within this State.**

2. The **Railway Gross Receipts Case—*Philadelphia & Reading R. Co. v. Com.***—82 U. S. 15 Wall. 284 (21 L. ed. 164), has been in effect **overruled** by *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888) and *Phila. & Southern M. S. S. Co. v. Com.* 122 U. S. 326 (31 L. ed. 1200).

3. A **state statute** which attempts to **tax** the gross receipts of transportation companies derived "from tolls and transportation, telegraph business, or express business," is not valid, so far as such receipts are derived from **commerce between points within and points without the State.**

4. Such statute is valid, however, as to all receipts derived from **commerce** wholly confined **within the limits of the State;** and this, although the company doing the business is a **foreign corporation.**

5. Section 7 of the **Pennsylvania Act of June 7, 1879**, imposing a tax upon the gross receipts of railroad companies from transportation, etc., is valid in respect to receipts from business between points both of which are in Pennsylvania.

6. Receipts for transportation between points within and points without the State of Pennsylvania, or between points without that State but passing through the State on its way, being **interstate commerce**, cannot be taxed under the Pennsylvania Act of June 7, 1879.

7. Where transportation of goods destined for a point without the State has been actually begun, **temporary stoppage** within the State, without the intention of abandoning the original movement (which movement is ultimately completed), will **not deprive** the transportation of the **character of interstate commerce.**

(Argued May 31, Decided Oct. 1, 1888.)

MAY Term, 1888, No. 26, M. D., before Gordon, *Ch. J.*, Paxson, Clark, Sterrett, and Williams, *JJ.*

Error to the Common Pleas of Dauphin County, to review a judgment upon an appeal from a settlement of an account by the Auditor-General and State Treasurer, June Term 1887, No. 534. *Affirmed.*

The account in suit was against the Delaware & Hudson Canal Company for tax upon its gross receipts for the six months ending December 31, 1886, under section 7 of Act of June 7, 1879 (P. L. 116).

The *specifications of appeal* filed by the Company were as follows:

1. The Delaware & Hudson Canal Company is a Corporation and citizen of the State of New York, having its principal office and place of business and general treasury in the City of New York, in said State; and at the time when the taxes claimed in the settlement hereby ap-

pealed from are alleged to have accrued or become due, and also at or prior to the time of the settlement of the account by the auditor-general, all of the receipts upon which taxes are charged were the personal property of said Company in the City and State of New York, mingled with its other receipts and personal property in said State, and were not subject to taxation by the State of Pennsylvania.

2. Of the gross amount of \$742,635.03 upon which tax is charged in the settlement hereby appealed from, no more than \$158,141.98 was received, or ever was, physically, within the Commonwealth of Pennsylvania; and the said sum of \$158,141.98 received in Pennsylvania by agents of the Company had been by them paid into the general treasury of the Company in the City of New York, before the time at which the taxes claimed are alleged to have accrued and become due, and before the date of the settlement of the account by the auditor-general.

3. The taxation, by the State of Pennsylvania, of property owned in New York by a corporation of the State of New York, is in violation of a necessary implication of the Constitution of the United States, that each State shall have jurisdiction only over property within its own territorial limits.

4. A large proportion of the receipts taxed in the settlement hereby appealed from, including a part of the \$158,141.98 actually received within the State of Pennsylvania, as well as the receipts never physically within the State of Pennsylvania, was derived from freight and passengers carried by continuous transportation from points in Pennsylvania to points in other States, or from points in other States to points in Pennsylvania, or from points in other States to points in other States passing through the State of Pennsylvania. The taxation of freight or passengers transported by continuous lines of transportation out of, into, or through the State of Pennsylvania, or of the receipts for such transportation out of, into, or through the State of Pennsylvania, is in violation of that clause of section 8, of article I, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign Nations and among the several States and with the Indian Tribes. And the Act of June 7, 1879, under which said tax is claimed, or any other Act of Assembly, if it shall be found to warrant the imposition of the said tax, is unconstitutional and void.

5. The taxation, or attempted taxation, by the State of Pennsylvania, of moneys never physically within the State of Pennsylvania, but received and owned in New York by a corporation of the State of New York, because said moneys were received for the transportation of freight or passengers into, out of, or through the State of Pennsylvania, is in violation of that clause of section 8, of article I, of the Constitution of the United States which reserves to Congress the power to regulate commerce with foreign Nations and among the several States and with the Indian Tribes; and is therefore void.

The case having been tried without a jury,

under the Act of 1874, the following opinion was rendered by the court, MCPHERSON, A. J.:

We find the facts to be as follows:

1. The defendant is a Transportation Company incorporated by the State of New York. It owns and operates a canal and a line of railroad, part of which is in New York and part in Pennsylvania. It is doing business in this Commonwealth.

2. For the six months ending December 31, 1886, its gross receipts for business not done wholly within the State of New York were as follows:

| | |
|---|--------------|
| For tolls and transportation of freight and passengers..... | \$375,516.87 |
| For telegraph business..... | 1,193.64 |
| For express..... | 3,186.05 |
| For transportation of coal mined, purchased and sold.. | 362,738.47 |

Total.....\$742,635.03

3. Of the amount received for tolls and transportation, \$220,780.95 was received for transportation between points both of which are within the State of Pennsylvania; \$89,635.07 was received for transportation beginning in Pennsylvania and ending in other States; \$56,797.95 was received for transportation beginning in other States and ending in Pennsylvania; and \$8,302.90 was received for transportation beginning and ending in other States but passing through Pennsylvania on the way. In the last three classes the transportation was continuous from the point of beginning to the point of ending; and the freight and passengers were carried for a single sum or charge and upon a single way-bill or ticket.

4. The amounts received for telegraph business and for express business were wholly for business done between points both of which are in Pennsylvania.

5. Of the amount received for transportation of coal mined, purchased, and sold, \$930.14 was received for transportation between points both of which are in Pennsylvania; \$27,610.63 was received for the transportation of coal shipped from the defendant's mines in Pennsylvania and then destined to points without the State, but temporarily detained at Honesdale, Pennsylvania, and actually there on December 31, 1886; and \$334,197.70 was received for the transportation of coal shipped from the defendant's mines in Pennsylvania and ending in other States. The coal at Honesdale was afterwards carried to its destination outside the State.

6. Of the amounts received for transportation, telegraph and express business between points both of which are in Pennsylvania, viz.:

| |
|-------------------|
| \$220,780.95 |
| 1,193.64 |
| 3,186.05 |
| 930.14 |
| —————\$226,090.78 |

only \$156,948.34 was received or ever physically within the State of Pennsylvania, the rest having been paid to the defendant in the State of New York. The said sum of \$156,948.34 was remitted to New York from time to time by the defendant's agents in Pennsylvania, and no part thereof was physically within the State on December 31, 1886.

7. This settlement taxes the entire gross re-

ceipts mentioned in paragraph 2 for the six months ending December 31, 1886, and is made under section 7 of the Act of 1879 (P. L. 116).

Conclusions of Law.

The first, second, third, and fifth specifications of appeal cannot be sustained. If any part of the Company's gross receipts are taxable, the tax cannot be evaded by simply sending the money out of the State. The defendant itself is here for purposes of proper taxation, and it does not matter where its funds are physically kept. *W. U. Tel. Co. v. Com.*, 110 Pa. 405.

The fourth specification raises a question which we have been reluctant to entertain, and which nothing but a clear conviction of the present state of the law could bring us to consider. The argument which supports it is directly in the face of the *Railway Gross Receipts Case*, in 82 U. S. 15 Wall. 284 (21 L. ed. 164); and *Phila. & S. M. S. Co. v. Com.*, 104 Pa. 169; *Pullman P. C. Co. v. Com.*, 107 Pa. 148; and *W. U. Tel. Co. v. Com.*, 110 Pa. 405. It is perhaps more correct to say that the argument chiefly attacks the case in 15 Wallace, for the Pennsylvania cases rest upon that, and must stand or fall with it. If we had any doubt upon the subject, we would be bound to give the Commonwealth the benefit thereof and uphold the tax in suit, leaving it to the Supreme Court of the United States to choose its own occasion of saying plainly how much authority its own decision should continue to have. But if that court has already spoken, and has plainly limited or destroyed the force of its earlier opinion, we are bound by this action also in the sphere of federal law, and cannot refuse to follow, even if some of our own decisions are still formally in the way. That this is in fact the present situation, and that the case in 15 Wallace has been in effect overruled,—carrying with it, of course, the cases in which our own court simply followed that decision,—we are entirely satisfied, and we think a short review of the late authorities will make clear.

The *Railway Gross Receipts Case* was that of the Reading Railroad Company, a domestic corporation, and its receipts from all sources were held to be taxable by Pennsylvania for two reasons: first, because the receipts had passed into the general property of the company, and had thus lost their distinctive character as freight earned for transportation; and second, because the tax was held to be upon the company's franchise, and to be only measured by the amount of its business as shown by its receipts. As the same court had just decided at the same term,—in the *Freight Tax Case*, 82 U. S. 15 Wall. 232 (21 L. ed. 146),—that a tax upon the freight or tonnage carried from one State into another was a regulation of commerce, and could not be imposed by the State of Pennsylvania, even upon a domestic corporation engaged in such carriage, it is not too much to say that the *Gross Receipts* decision was received with surprise. It was at once felt that the distinction thus drawn between freight and the money paid for carrying freight was unsound in principle, and that the decision must soon be overruled. Even at the first its force was much weakened by the strong dissent of three judges; but of course it bound all in-

ferior courts, whatever their opinion of its reasoning might be, and it was followed here in the cases above cited.

Since 1872, however, several cases on the subject of interstate commerce have been decided by the Supreme Court of the United States, in which the reasoning of the court opposed both the conclusion and the logic of the earlier decision, and finally in *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888), the *Railway Gross Receipts Case* was taken up by name for consideration. This case was decided in April, 1887, while the last case on this subject was decided by the Supreme Court of Pennsylvania in June, 1885. Mr. Justice Miller easily and plainly distinguished the case in 15 Wallace from the case then before the court, and would naturally have then dismissed it without further discussion if its authority had been still unquestioned; but he went on to say, with much significance, and with an evident reference to the facts of the earlier case: "The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has often been set up as a defense to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign Nations, the constitutional provision cannot thereby be evaded, nor can the States by granting franchises to corporations engaged in the business of the transportation of persons or merchandise among them, acquire the right to regulate that commerce, either by taxation or in any other way." This was a sufficiently plain declaration that the second ground on which the tax was rested in 15 Wallace, viz.: that it was a franchise tax, could not be maintained if the receipts sought to be taxed were derived from interstate commerce, and were taxed as receipts from transportation.

Fargo v. Michigan was followed at the same term by *Philadelphia & Southern Mail Steamship Company v. Commonwealth*, 122 U. S. 326 (30 L. ed. 1200); S. C. 1 Inters. Com. Rep. 308, which was a case substantially identical in principle with the case of the *Railway Gross Receipts*. In each the defendant was a Pennsylvania corporation, and in each the tax was imposed by Pennsylvania upon its gross receipts, including those derived from transportation between this State and points beyond its limits. The differences were: first, that one defendant was a railroad company, and the other was a steamship company,—this difference being immaterial, since both were engaged in the business of transportation; and second, that the Act of 1868 taxed the railroad company upon its gross receipts from all sources, while the Act of 1877 taxed the steamship company only upon its gross receipts for tolls and transportation, telegraph business, and express business,—this, too, being immaterial from the present point of view. The Commonwealth naturally argued that the case in 15 Wallace was controlling, and that no rational distinction could be drawn between that decision and the case of the steamship company then before the court; and, as we understand the opinion,

2 INTER S.

which was delivered by Mr. Justice Bradley, no serious effort is made to draw such a distinction. On the contrary, he expressly declares on page 342 [312 Inters.] that "A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable;" and, as the second and only other ground had already been declared not to be a good one in *Fargo v. Michigan*, the decision itself would seem to be left with scanty support. But Mr. Justice Bradley goes on to speak also of this second ground; while he does not think that the tax imposed by the Act of 1877 was a franchise tax, he says with emphasis: "It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the Act, it was laid equally on the corporations of other States doing business in Pennsylvania. If intended as a tax on the franchise of doing business,—which in this case is the business of transportation in carrying on interstate and foreign commerce—it would clearly be unconstitutional." Further, speaking of the general subject of taxes upon interstate commerce, he says on page 336 [1 Inters. Com. Rep. 310]: "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the State, could the fares and freights received for carrying on that commerce be constitutionally taxed? If the State cannot tax the transportation, may it nevertheless tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

If the case thus referred to, with others therein cited, and the language quoted, do not completely overthrow the authority of the *State Tax on Railway Gross Receipts*, we are at a loss to understand their meaning. Believing that they do, we think it our duty to disregard that decision, and to follow the later cases in holding that a statute which attempts to tax the gross receipts of transportation companies, derived, in the language of the Act before us, from "tolls and transportation, telegraph business, or express," is not valid, so far as such receipts are derived from commerce between points within and points without the State. It is valid, however, as to all receipts derived from commerce which is internal, that is, the commerce which is wholly confined within the limits of the State, for this is as much under its control as foreign or interstate commerce is under the control of the general government. *Sands v. Manistee River I. Co.* 123 U. S. 295 (31 L. ed. 151), and therefore the State may lawfully tax receipts from such internal commerce, although the company doing the business is a foreign corporation. If such corporation comes into Pennsylvania and carries on here the business of internal commerce, its receipts therefrom may be taxed precisely as if it were a domestic corporation.

These principles require us to say that the defendant is only taxable upon \$226,090.78 of its gross receipts for the period in question. The rest, being the sum of \$516,544.25, was received for transportation between points within and points without the State, or between points without the State but passing through the State on its way, and therefore cannot be taxed by this Commonwealth.

One further word may be necessary. Included in the sum of \$516,544.25 is the sum of \$27,616.63 for transportation of coal from the defendant's mine to Honesdale, and there detained while in transit. This coal was all destined for points outside the State when it left the mines. Lack of storage room at points of destination, or some other reason detained it temporarily at Honesdale, but its place of destination continued to be outside the State, and thither it was ultimately carried. The transportation, therefore, had actually begun, the property was in the custody of the carrier, and as the article was destined for a point without the State, interstate commerce was already being carried on. The temporary stoppage was not an abandonment of the original movement, and the coal was therefore as fully protected at Honesdale as when in motion upon the Company's cars. *Coe v. Errol*, 116 U. S. 517 (29 L. ed. 715).

The amount due the Commonwealth is as follows:

| | |
|---|------------|
| $\frac{3}{10}$ of one per cent. upon \$226,090.78 ----- | \$1,808.72 |
| Interest from May 30, 1887, to April 2, 1888, ----- | 182.67 |
| Attorney-General's commission, ----- | 90.40 |
| Total ----- | \$2,081.79 |

For which sum we direct judgment to be entered if exceptions are not filed according to law.

The defendant, the Company, filed exceptions to the refusal of the court to sustain its first, second, and third specifications of appeal and in directing judgment for the Commonwealth and in not directing judgment for the defendant. These exceptions were overruled and judgment entered in accordance with the opinion; whereupon defendant took this writ, *assigning as error* the overruling of its exceptions, respectively.

Mr. M. E. Olmsted, for plaintiff in error:

The State of Pennsylvania could not lawfully reach over into the State of New York and tax receipts which had become mingled with the general mass of the Company's property in that State.

See State Tax on Foreign Held Bonds, 82 U. S. 15 Wall. 300, 319 (21 L. ed. 179, 186); *Gloucester Ferry Co. v. Pa.* 114 U. S. 196 (29 L. ed. 158); *Phila. etc. Steamship Co. v. Pa.* 122 U. S. 326 (30 L. ed. 1200); *Fargo v. Mich.* 121 U. S. 230 (30 L. ed. 888); *Com. v. Standard Oil Co.* 101 Pa. 146.

The domicile of a corporation is the State of its origin.

Potter, Corp. 10.

It cannot migrate to another sovereignty.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 586 (10 L. ed. 306); *Paul v. Virginia*, 75 U. S.

8 Wall. 168 (19 L. ed. 357); *St. Louis v. Ferry Co.* 78 U. S. 11 Wall. 423 (20 L. ed. 192).

All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation.

McCulloch v. Md. 17 U. S. 4 Wheat. 429 (4 L. ed. 607); *St. Louis v. Ferry Co. supra*; *Hayes v. Pacific Mail Steamship Co.* 58 U. S. 17 How. 596 (15 L. ed. 254); *Morgan v. Parham*, 83 U. S. 16 Wall. 471 (21 L. ed. 303); *Hoyt v. Comrs. of Taxes*, 23 N. Y. 224; *People v. Comrs. of Taxes*, 58 N. Y. 242; *State v. Engle*, 34 N. J. L. 425; *Gloucester Ferry Co. v. Pa.* 114 U. S. 196 (29 L. ed. 158).

If the tax on gross receipts, imposed by section 7 of the Act of June 7, 1879, is to be treated as a tax on property, as the tax on gross receipts, imposed by the Act of 1866, was treated, in *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 (21 L. ed. 164), then it must be found that no portion of the receipts of the Delaware & Hudson Canal Company are taxable, and the judgment of the court below must be reversed.

Messrs. W. S. Kirkpatrick, Atty-Gen., and John F. Sanderson, Dep. Atty-Gen., for the Commonwealth, defendant in error.

Per Curiam:

We have examined with care the opinion of the learned judge who tried the above stated case in the court below, and we are satisfied that the conclusions reached by him are correct. Nor do we deem it advisable to attempt to add anything to what he has so well said.

The judgment is affirmed.

LEHIGH VALLEY R. CO., *Plff. in Err.*,

v.

COMMONWEALTH of Pennsylvania.

(Two cases.)

1. The **gross receipts of railroad companies** from transportation between points within the State are **taxable under** section 7 of the Pennsylvania Act of June 7, 1879 (P. L. 116); but receipts from interstate transportation are not taxable thereunder.
2. The carrying of freight and passengers from a point within a State to their destination in the same State, by continuous transit, does not become **interstate commerce** merely because the railroad passes through another State on a part of the route between the points of departure and destination.

(Argued May 31. Decided Oct. 1, 1888.)

MAY Term, 1888, Nos. 24 and 25, M. D., before Gordon, *Ch. J.*, Paxson, Clark, Sterrett and Williams, *JJ.*

Two writs of error to the Common Pleas of Dauphin County, to review judgments upon appeals from settlements of accounts by the Auditor-General and State Treasurer, No. 114, September Term, 1887, and No. 516, January Term, 1888. *Affirmed.*

The accounts in question were for taxes upon the gross receipts of the Lehigh Valley Railroad Company, a Pennsylvania Corporation, from transportation, for the six months ending December 31, 1886, and June 30, 1887, respectively, under the provisions of section 7 of Act of June 7, 1879 (P. L. 116).

The line of road operated by the company extends from Wilkes Barre, Pennsylvania, to Perth Amboy, New Jersey. The Company also has numerous branches in Pennsylvania and New Jersey, and has running arrangements with other companies whose lines extend into other States.

The facts, together with the questions presented, are further stated in the following opinion of the court below, McPHERSON, A. L. J., in the first of the two cases—the opinion in both cases being the same, except as to dates and amounts:

This case was tried without a jury, under the Act of 1874. We find the facts to be as follows:

1. The defendant is a Railroad Company, incorporated by this Commonwealth, and engaged in the business of transporting freight and passengers. Its railway connects with other lines in other States.

2. For the six months ending December 31, 1886, its gross receipts for transportation were \$4,798,933.53. Of this amount, \$1,353,441.50 was received for transportation beginning and ending in Pennsylvania, without passing out of the State in the course of transit; \$207,660.42 was received for transporting, by continuous carriage, freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit; and \$3,237,831.61 was received for transportation beginning in Pennsylvania and ending in other States, or beginning in other States and ending in Pennsylvania, or beginning in other States, passing through Pennsylvania, and ending in other States, or beginning and ending in other States without touching Pennsylvania. In the last five classes the transportation was continuous from the point of beginning to the point of ending, and the freight and passengers were carried for a single sum or charge, and upon a single way-bill or ticket.

3. This settlement taxes $\frac{207,660.42}{4,798,933.53}$ of the entire sum of \$4,798,933.53 (that fraction representing the defendant's milage within the State), for the six months ending December 31, 1886, and is made under section 7 of the Act of 1879 (P. L. 116).

Conclusions of Law.

The questions raised by this appeal have been discussed in *Commonwealth v. Delaware & Hudson Canal Company*, No. 534, June Term, 1887, and *Commonwealth v. New York, Lake Erie & Western Railroad Company*, No. 523, June Term, 1887. For reasons there given we hold that the Commonwealth can only recover tax upon the two items of \$1,353,441.50 and \$207,660.42, being the amount received for transportation between points both of which are within this State.

The sum due the Commonwealth is as follows:

| | |
|---|-----------------------------|
| $\frac{2}{10}$ of 1 per cent upon \$1,353,441.50 | |
| 207,660.42 | |
| | <hr/> |
| | \$1,561,101.92, \$12,488.80 |
| Interest from June 2, 1887, to April 2, 1888----- | 1,248.88 |
| Auditor-General's Commission---- | 734.40 |
| | <hr/> |
| Total----- | \$14,462.08 |

For which amount we direct judgment to be entered if exceptions are not filed according to law.

(For the opinion in *Commonwealth v. Delaware & Hudson Canal Co.*, referred to as stating reasons for the decision in this case, see *ante*, 224.)

The material portion of the opinion in *Commonwealth v. New York, Lake Erie & Western R. Co.*, also referred to as stating the reasons for the decision in this case, is as follows:

Most of the questions raised in this case have been discussed in *Commonwealth v. Delaware & Hudson Canal Company*, No. 534, June Term, 1887, Dauphin, C. P., to which we now refer.

A new question arises here, however, which needs a short consideration. It is argued that the sum of \$16,450.13 received for transportation by continuous carriage between points both of which are in Pennsylvania, cannot be taxed because during the transit, the goods and passengers were carried out of the State and in again. This, it was urged, makes the whole carriage interstate commerce, and we were referred to several cases in support of the argument. None of them goes that length.

In *Coe v. Errol*, 116 U. S. 517 (29 L. ed. 715), the court remarks, in discussing another question, that New Hampshire could not tax logs which were started in Maine destined for another point in the same State, were floated down the Androscoggin River into New Hampshire, and were there temporarily detained. Treating this as a decision, however—and we do not deny its correctness—it is not in point. If the court had decided that *Maine* could not tax the logs because they had passed through New Hampshire, the case would be like the one before us.

Lord v. Steamship Company, 102 U. S. 541 (26 L. ed. 224), simply holds that a steamship plying upon the Pacific Ocean between two ports of California was engaged in commerce with foreign Nations so as to be subject to the regulating power of Congress; the reason being that she was navigating the high seas, on the common highway of Nations, where the United States was responsible for her conduct and owed her protection. The question of California's power to tax the steamship's receipts was in no way involved or considered.

In principle the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent. In reality and substance the commerce here is purely internal, whatever the mere form of it may be; the freight and passengers start from a point in Pennsylvania, destined for another point in Pennsylvania, and are carried to their destination by continuous

transit. Does this become interstate commerce merely because the railroad curves for a few miles into another State, and then curves back into Pennsylvania? If it does, we reach the somewhat surprising conclusion that the State of New York cannot tax the defendant's receipts for transportation between the Cities of New York and Buffalo, simply because the cars are hauled over a few miles of rails within the State of Pennsylvania; and also that merely to cross the Delaware River and then cross back a mile or two beyond would make any railroad corporation of Pennsylvania or New Jersey an interstate carrier as to all traffic which passed over the two bridges. So, too, the receipts of a steamboat plying between two ports in the State of Ohio along the Ohio River would be free from taxation by that State if the channel carried her for a few moments only into the State of Kentucky. We do not believe this to be the law, and accordingly hold that the defendant is taxable upon the item of \$16,450.13 above named, as being receipts from internal commerce only.

The defendant, the railroad company, filed the following exceptions to the decision of the court:

1. The court erred in including in the judgment, in favor of the Commonwealth, a tax upon \$207,660.42, receipts for transporting freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in the course of transit.

2. The court erred in deciding that "In principle, the case before us does not seem to be within the mischief which the commercial clause of the Federal Constitution was intended to prevent; in reality and substance the commerce here is purely internal, whatever the mere form of it may be."

3. The court erred in not deciding that the transportation, by continuous carriage, of freight and passengers from one point in Pennsylvania to another point in Pennsylvania, which freight and passengers were carried out of the State and in again in course of transit, was interstate transportation, and that the tax-

ation of the receipts for such transportation was in violation of that clause of the Constitution of the United States which declares that Congress shall have power "to regulate commerce with foreign Nations and among the several States and with the Indian Tribes."

4. The court erred in directing judgment to be entered in favor of the Commonwealth \$14,462.08.

Similar exceptions were filed in the second case, and both sets of exceptions having been overruled, judgment was entered upon the decision; whereupon defendant took these writs, assigning as error the overruling of the exception, respectively.

Mr. M. E. Olmsted, for plaintiff in error:

Transportation is not merely an aid to or an instrument of commerce, but is itself commerce.

Passenger Cases, 48 U. S. 7 How. 416 (12 L. ed. 758); *Case of the State Freight Tax*, and *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 275, 284, 299 (21 L. ed. 161, 164, 169); *Fargo v. Mich.* 121 U. S. 230, 247 (30 L. ed. 888, 895); *Telegraph Co. v. Texas*, 105 U. S. 460, 464 (26 L. ed. 1067, 1068).

Any carriage of goods which crosses a state line is interstate commerce.

Ex parte Kohler, 1 Inters. Com. Rep. 28, 30 Am. & Eng. R. Cas. 71. See also *Coe v. Errol*, 116 U. S. 517 (29 L. ed. 715); *Lord v. Steamship Company*, 102 U. S. 541 (26 L. ed. 234); *Hall v. DeCuir*, 95 U. S. 485 (24 L. ed. 547); *Fargo v. Mich.* 121 U. S. 230-247 (30 L. ed. 888-895); *Pacific Coast Steamship Co. v. R. R. Comrs.* 18 Fed. Rep. 10.

Messrs. W. S. Kirkpatrick, *Atty-Gen.*, and **John F. Sanderson**, *Dep. Atty-Gen.*, for the Commonwealth, defendant in error.

Per Curiam:

We have examined with care the opinion of the learned judge who tried the above stated cases in the court below, and we are satisfied that the conclusions reached by him are correct. Nor do we deem it advisable to attempt to add anything to what has been so well said.

The judgments are severally affirmed.

INTERSTATE COMMERCE COMMISSION.

MANUFACTURERS & JOBBERS UNION
of Mankato, Minnesota,

v.

MINNEAPOLIS & ST. LOUIS R. CO. *et al.*

(No. 76.)

THE original petition herein, charging the imposition of unjust rates, was filed September 5, 1887. See 1 Inters. Com. Rep. 488. A hearing was thereafter had by the Commission, and after it was closed, but before a decision was announced, notice was given that the Minneapolis & St. Louis Railway Company, the principal defendant, had conceded the relief demanded and had issued a new tariff by which the rates complained of were reduced. The Commission thereupon, on November 21, 1887, filed a report stating that such action on the part of the Railway Company disposed of the complaint. See 1 Inters. Com. Rep. 630.

Thereafter the petitioner presented to the

Commission the following amended petition, and applied for leave to file the same:

AMENDED PETITION.

State of Minnesota, }
County of Blue Earth. }

In the Matter of the complaint of the Manufacturers & Jobbers Union of Mankato, Minnesota, against the Chicago, Rock Island & Pacific Railroad Co., the Kankakee & Seneca Railroad Co., the Burlington, Cedar Rapids & Northern Railroad Co., and the Minneapolis & St. Louis Railroad Co.

To the Honorable, the Interstate Commerce Commissioners:

The Manufacturers & Jobbers Union of Mankato petitions your honorable board, and alleges:

That said Railroad Companies are corporations duly created, organized and existing under the laws of their several States, and are

now doing business as common carriers and railway companies in the State of Minnesota and elsewhere, and make joint traffic arrangements and tariffs;

That your petitioner is an association of business men of the City of Mankato, in said State, whose object is to promote the business interests of said city.

That said Minneapolis & St. Louis Railroad Co., in connection and co-operation with the Chicago, Rock Island & Pacific Railroad Company, the Kankakee & Seneca Railroad Co., and the Burlington, Cedar Rapids & Northern Railroad Co., have established traffic arrangements for the transportation of passengers and freights for hire, from the City of Chicago in the State of Illinois to various stations on the line of said Minneapolis & St. Louis Railway in the State of Minnesota, including the City of Red Wing, City of Minneapolis, Village of Waterville and City of Mankato in said State.

We further represent: that the direct line of the said Minneapolis & St. Louis Railroad Co., operated in the State of Minnesota for such traffic, extends from Albert Lea northerly through Waterville to said City of Minneapolis;

That another line of railway called the Wisconsin, Minnesota & Pacific Railway, controlled and operated by the said Minneapolis & St. Louis Railroad Company, under the traffic arrangements heretofore referred to, extends from the City of Red Wing westward through said Village of Waterville to the City of Mankato—running in a general direction at right angles with said road running from Albert Lea northerly as aforesaid; that the rates of freight established and published by said railway companies from Chicago to Minneapolis are as follows:

| Class | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|-------|----|----|----|----|-----|-----|----|----|----|---|
| Rate | 50 | 40 | 30 | 20 | 12½ | 17½ | 15 | 13 | 10 | 8 |

That the rates of said companies established from Chicago to Waterville, are the same as established by said companies from Chicago to Minneapolis, by reason of the operation of section 4 of the Interstate Commerce Law—the distance from Waterville to Minneapolis being sixty-five miles.

We further allege that the said railroad companies have established and put in force a tariff on their said line from Red Wing to Mankato which rates from Chicago through Waterville to all points on said line east of Waterville for a distance of sixty-seven miles, to the City of Red Wing, are the same as established by said companies to Waterville, while the said tariff established by the said companies from Chicago to all points on said line west of Waterville, to the City of Mankato, a distance of twenty-nine miles, are unreasonably and unjustly in excess of said rates to the Village of Waterville—that is to say the same are as follows:

| Class | 1 | 2 | 3 | 4 | 5 | A | B | C | D | E |
|-------|----|----|----|----|----|----|----|----|----|----|
| Rate | 60 | 50 | 35 | 25 | 17 | 22 | 18 | 16 | 13 | 10 |

Which rates from Chicago to points west of Waterville on said line, including said City of Mankato, are from 20 to 40 per cent in excess of the rates established and in force from Chicago to said Village of Waterville and points on said line east of Waterville to said City of 2 INTER S.

Red Wing, although as heretofore shown the distance is much less, and although said City of Mankato is the most important shipping point on said line of road; wherefore, your petitioners pray that if upon examination you find the alleged facts herein to be true, your honorable body will recommend and direct the said defendant railroad companies to so adjust their said tariffs from the City of Chicago in State of Illinois and other points, that their rates to the City of Mankato and all other points west of Waterville, on all classes of freight, shall now and hereafter be no higher than the rates established by said companies from said City of Chicago and other points to said Village of Waterville and to points east on said line to the City of Red Wing, and to points north on said line to the City of Minneapolis and that said rates be so adjusted that said City of Mankato shall be charged no higher rate per ton per mile than is charged to Waterville and other points on the said line of road at less distance, than is the City of Mankato, from Chicago or other points of origination—and for such other and further orders in the case as to the honorable Commissioners seem just and proper, your petitioners pray.

The Manufacturers & Jobbers Union of Mankato,

By L. Patterson, Vice Prest.

L. A. Moore, Secy.

I. L. Washburn, Atty.

Thereupon, on November 13, 1888, the Commission made the following order, permitting the above amended petition to be filed.

ORDER OF THE COMMISSION.

[Title of the Cause.]

In the above cause *it is now ordered*, by the Commission, that the amended petition of the petitioner in the above cause be filed, and that copies of the same be sent to each of the defendant railroad companies, and that they answer the same as prescribed by the rules of procedure of the Commission.

W. L. Bragg, Commissioner.

COXE BROTHERS & CO.

v.

LEHIGH VALLEY R. R. CO.

(No. 150.)

ANSWER filed November 13, 1888, to complaint given *ante*, 195, charging the imposition of unjust and discriminating rates for the transportation of coal.

The answer of the Lehigh Valley Railroad Company to the petition and complaint of above named petitioners respectfully sets forth:

I. We admit the truth of the averments of the first paragraph of the complaint, saving that being without sufficient information or knowledge as to the annual capacity of complainants' mines and collieries we are unable to answer concerning the same, and pray that the averments in said paragraph as to said capacity, if material, shall be proven.

II. We admit the truth of the averments of

the second, third and fourth paragraphs of the complaint.

III. We admit the truth of the averments of the fifth paragraph, saving as hereinafter particularly set forth. It is not true that large quantities of bituminous coal mined, shipped or purchased by the Lehigh Valley Coal Company are shipped as interstate traffic over the railroads operated by us.

The total amount of bituminous coal in any way dealt in by said coal company, as miner, shipper, purchaser and seller, bears a very small proportion to the quantity of anthracite coal thus dealt in.

IV. We deny all the averments of the sixth paragraph, saving as is hereinafter set forth.

Bituminous coal is found in different localities from anthracite. It is mined in a very different way, under very different circumstances, and at a very different cost. Bituminous coal is used mainly for manufacturing purposes, while anthracite is used mainly for domestic purposes.

The transportation of bituminous coal sometimes, as averred in the complaint, though not often, is conducted contemporaneously with that of anthracite; that is to say, bituminous is sometimes hauled in the same train with anthracite coal. The bituminous coal from the Snow Shoe region, however, is usually hauled in our mixed freight trains; anthracite coal is not. The circumstances and conditions under which the traffic in these coals is conducted are dissimilar in the particulars above given and in many others.

V. We admit the truth of the averments of the seventh paragraph, saving as the same are hereinafter qualified.

The rates are grouped to enable the shippers in the regions named to compete on equal footing at the leading ports of delivery with the coal from the same regions transported by lines competitive with ours. It is true that the distance from the Wyoming region to points in the State of New Jersey is greater than from the Lehigh and Mahanoy regions to the same points. But as there are many competitive lines from the Wyoming region to tidewater and other points in New Jersey, and from the Lehigh and Mahanoy regions to the same points, our rates must necessarily be such as to enable our shippers to meet this competition.

The same reasons which have forced a concession of rates in favor of Wyoming shippers who send their coal to tidewater and other points in New Jersey, have forced a like concession in favor of the Lehigh and Mahanoy shippers who send their coal to the City and Harbor of Buffalo, and to certain other points in the State of New York. Although the average length of carry from the Lehigh and Mahanoy regions to Buffalo is greater than the average length of carry from the Wyoming region, the rate of freight is the same. There are many competitive lines between the Wyoming region and Buffalo and other points in the State of New York, and between the Lehigh and Mahanoy regions and the same points. The same reasons which have forced a concession of rates in the above instances have forced a like concession in the matter of transportation of bituminous coal.

Uniform rates, irrespective of distance, are not charged for the transportation of anthracite coal as interstate traffic northward or westward to points in New York State where such uniformity is not compelled by competition.

VI. We deny the argument of the eighth paragraph, that shippers of anthracite coal in the Wyoming, Lehigh and Mahanoy coal regions "are entitled to such reduced charges on anthracite coal, as compared with those on bituminous coal, as their proximity in distance compared with that of the Snow Shoe bituminous region justifies." We aver that the difference in charges for the transportation of anthracite and bituminous coal made by the coal carrying companies is not new, but that the custom of the coal carrying companies of this State, including ourselves, in fixing their charges for transportation, has been to make a distinction in classification between anthracite and bituminous coal. The rates on the former have not been in accord with the rates on the latter, but have usually, if not always been higher.

We are willing to concede the substantial truth of the averments of fact in said paragraph.

VII. We admit the substantial truth of the averments of the ninth paragraph.

VIII. We deny the truth of the averments of the tenth paragraph. It is not true that we charge less than one half the rates per ton per mile for the transportation of bituminous coal than we do for the transportation of anthracite coal to interstate points in New York and in New Jersey. The average distance to Perth Amboy from the Mahanoy and Lehigh regions, as stated in the petition, is about 149 miles, and from Snow Shoe 295 miles. The present rate on anthracite above the sizes of pea and buckwheat between the same points is \$1.40, or nine and four tenths mills per ton per mile; and that on anthracite known as culm between the same points is \$1.20, or eight mills per ton per mile. The average distance to Perth Amboy from the Wyoming region, as stated in the petition, is about 171 miles. The present rate on anthracite above the sizes of pea and buckwheat from the Wyoming region to Perth Amboy is \$1.90, or eleven mills per ton per mile; that on pea and buckwheat between the same points is \$1.50, or eight and eight tenths mills per ton per mile; and that on culm between the same points is \$1.30, or seven and six tenths mills per ton per mile. The average distance from the Wyoming region to Buffalo is 268 miles, and the rate is \$2.25, or eight and four tenths mills per ton per mile; and we are now carrying coal for the petitioners from the Lehigh region to Buffalo, a distance of 321 miles, at the rate of \$2.25, or seven mills per ton per mile. The present rate on bituminous coal from Snow Shoe to Perth Amboy, a distance (as stated) of 295 miles, is \$2.25, or seven and sixty-three hundredths mills per ton per mile.

We also deny that anthracite coal is transported by us under substantially similar circumstances and conditions as those under which bituminous coal is transported.

IX. We deny the truth of the averments in

the eleventh paragraph. We deny that the shippers of certain sizes and qualities of anthracite coal as interstate traffic are excluded from interstate market points by reason of the higher charges for the transportation of anthracite coal.

We are not informed, saving by the complaint, as to the disposition which the petitioners have made of certain sizes and qualities of their anthracite coal. We pray that the averments concerning such disposition, if material, may be proven.

X. We deny all the averments of fact in the twelfth paragraph, saving that we admit our rates on anthracite coal are higher than those on bituminous coal.

Our charges are not unreasonable and unjust. Our railroad was constructed expressly for the transportation of anthracite coal, and does not enter the bituminous coal fields. It would never have been constructed but for the necessity of such transportation, because, though other traffic has been created by reason of the development of the anthracite coal fields, there was not at the time of its construction, and there is not now, notwithstanding the immense improvements which have been made upon its lines, sufficient tonnage, outside of anthracite coal, to pay operating expenses.

We have heretofore referred to the difference in the use of anthracite and of bituminous coal, and to the comparatively slight extent of the competition between them.

The present average royalty value of anthracite coal is about forty cents per ton, while that of bituminous coal is about ten cents per ton. The present average selling price of the five largest sizes anthracite coal at the mines is about \$2.30 per ton, while that of Snow Shoe bituminous coal at the mines is about eighty cents per ton.

We deny that bituminous coal is a like traffic and is carried contemporaneously with, and under substantially similar circumstances and conditions as, anthracite.

Our terminal expenses for the handling of anthracite coal, both at our mines and at shipping ports, are much greater than those required for bituminous coal.

As we have heretofore stated, our total carriage of bituminous coal is small, as compared with our carriage of anthracite. Were we to charge the same rate for bituminous coal as for anthracite we would injure the shippers, but would neither help nor hurt ourselves. The rate of transportation of bituminous coal is regulated like that of all other merchandise, viz.: by the necessity of delivering the same at the points of use or transshipment at prices such as will permit competition with similar coal from other points. The railroad companies which carry bituminous coal from regions other than the Snow Shoe to interstate points carry it at such rates of freight as would make it impossible for our shippers of bituminous coal to deliver it at like points at prices which would enable them to sell it if we failed, in our rates, to recognize the necessity of meeting competition.

As a proof of the reasonableness of our rates we state that for years we have been able to earn for our stockholders only a low rate of interest upon their capital.

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XI. We deny the averments of fact in the thirteenth paragraph.

Neither directly in our own name, nor indirectly in the name of the Lehigh Valley Coal Company, nor in any other, have we purchased anthracite coal, transported the same as interstate commerce, and sold the same at tide-water or elsewhere.

If it be intended to charge that we have transported coal for the Lehigh Valley Coal Company at less rates than those charged to petitioners for a like contemporaneous service under substantially similar circumstances and conditions, we aver that such charge is not true.

XII. We deny each, all and every of the innuendoes, insinuations, and inferential charges in various forms made and repeated in the fourteenth paragraph, to the effect that an advantage, direct or indirect, is given to the Lehigh Valley Coal Company in the transportation of anthracite coal or of any other commodity. We aver that said company pays the same transportation rates as do other shippers. The losses (the nature and amount of which concern not the petitioners) sustained by it in its business are borne by it and not directly or indirectly by us. The market price of anthracite in the Bay of New York is not dependent upon, nor established by, our charges. The Lehigh Valley Coal Company pays the regular traffic rates for transportation at the same time and in the same manner as do other shippers. It receives reimbursements, rebates or privileges in no way, directly or indirectly. The contracts made by it are made at its own risk, and subject to all the chances of changes in rates of transportation which others must take.

XIII. We deny all the charges inferentially made in the fifteenth paragraph to the effect that the Lehigh Valley Coal Company in the establishment and maintenance of rates is treated in any manner differently from that in which the petitioners and the public generally are treated by us. Said company takes, as do all other shippers, all the risks of changes of rates. We deny that we discriminate in its favor directly or indirectly, in any way or manner whatever. We do not agree to transport its contract coal, nor any of its coal, during any fixed period at a fixed rate. It is unnecessary for us to say what we did prior to the passage of the Interstate Commerce Act; and we do not intend, therefore, in limiting the time covered by our denial, to admit that aught different was ever done; but we aver that since the passage of said Act we have not paid over nor agreed to pay over to that company, in any manner, any portion of any losses it has sustained or may sustain on any of its contracts. We do not receive less money per ton from that company for transportation of coal than we receive from any other shipper under like circumstances. Said company is treated by us with absolute impartiality.

In view of our denial (which we mean to make as positive as it is possible to make any averment) of any discrimination, direct or indirect, in favor of said coal company, we submit that it is not necessary for us to make any reply to an allegation we deem impertinent, of improvidence by said coal company in the making of its contracts.

XIV. We deny the truth of each, every and all of the charges and averments in the sixteenth paragraph.

Wherefore, we pray that the petition and complaint in this case may be dismissed.

Lehigh Valley Railroad Company,

By E. P. Wilbur,
President.

LITTLE ROCK & MEMPHIS R. R. CO.

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO., and St. Louis, Iron Mountain & Southern R. Co.

(No. 146.)

MOTION, filed November 14, 1888, for leave to amend answer given *ante*, 192.

Now comes John S. Blair, Attorney for the St. Louis, Iron Mountain & Southern Railway Company, and prays the court for leave to amend its answer in this behalf heretofore filed, as follows:

Strike out the following in said answer:

"Respondent is not informed other than by the complaint in this case that the East Tennessee, Virginia & Georgia Railroad Company is selling through tickets over the Kansas City, Springfield & Memphis Railroad by way of respondent's road to points in Texas and the West; and if it is material to the present issue, respondent calls for strict proof of complainant's allegation in that respect. The line of railway directly between Little Rock and Memphis was at one time a component part of the St. Louis, Iron Mountain & Southern Railway. During this period a system of ticket exchange was established with other roads, and tickets calling for transportation over the main line of respondent and its branch line between Memphis and Little Rock were distributed to eastern roads. In the year 1887, by judicial proceedings, the line between Memphis and Little Rock, ceased to be a part of the respondent's road, and since the opening of the Bald Knob Branch respondent has notified the East Tennessee, Virginia & Georgia Railroad to discontinue sale of such tickets. It admits that it continues to permit sale of tickets over the Bald Knob Branch in connection with its main line."

And insert in lieu thereof, the words:

"If at the time complaint was made in this case, or since, tickets were sold in the Southeast by way of Kansas City, Springfield & Memphis Railroad to Hoxie, and thence by the St. Louis, Iron Mountain & Southern Railway to

the Southwest, it was without the knowledge or consent of respondent and in violation of the regulations of the respondent, duly communicated to the railroad companies in that section of country. Prior to the opening of its Bald Knob Branch as aforesaid, a system of ticket exchange with other roads existed, and tickets were distributed to eastern roads calling for transportation over respondent's line in connection with the railroad now operated by the company complainant. Upon the opening of said branch, these tickets were called in by respondent, and tickets calling for continuous passage over the branch and the main line were distributed to the eastern roads."

Respectfully submitted,

John S. Blair,
for the

St. Louis, Iron Mountain & Southern R. Co.

Re BUREAU OF RATES AND TRANSPORTATION.

Re BUREAU OF STATISTICS.

CIRCULAR of the Commission.

Interstate Commerce Commission,

Washington, November, 14, 1888.

The bureau in charge of the Auditor will hereafter be known as the Bureau of Rates and Transportation, Auditor C. C. McCain remaining at the head thereof.

In view of the importance of providing for an exhaustive compilation of statistics from the annual reports of carriers, and the great amount of detail work involved, a Bureau of Statistics has been established which is in charge of Professor Henry C. Adams, Statistician.

All freight tariffs, passenger tariffs, classifications, rate sheets, circulars and other printed or written matter relating to rates, together with all contracts, agreements and traffic arrangements which are required to be filed with the Commission under section 6 of the Act to Regulate Commerce, and correspondence relating thereto, will be addressed as heretofore to C. C. McCain, Auditor, Interstate Commerce Commission, Washington, D. C.

Annual reports of carriers under section 20 of said Act, and correspondence relating thereto, will be addressed to Henry C. Adams, Statistician, Interstate Commerce Commission, Washington, D. C.

By order of the Commission:

Edward A. Moseley,
Secretary.

UNITED STATES SUPREME COURT.

JOHN S. KIDD, *Plff. in Err.*,

v.

I. S. PEARSON *et al.*

(From Lawyers' ed. U. S. Reports, Bk. 32.)

1. The law of Iowa authorizing the abating as a nuisance of a distillery used for the unlawful manufacture and sale of intoxicating liquors (chap. 6 tit. 11 of the Code of Iowa, amended by chapter 143 of the Laws of 1884) does not conflict with section 8, article 1 of

the Constitution of the United States, by undertaking to regulate commerce between the States.

2. Such law of Iowa does not conflict with the Fourteenth Amendment to the Constitution of the United States, by depriving the owners of the distillery of their property therein without due process of law.

3. A State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to pro-

hibit all sale and traffic in them in the State; to inflict penalties for their manufacture and sale, and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes.

4. Whether a **State**, in the exercise of its undisputed power of local administration, can enact a **statute prohibiting** within its limits the **manufacture of intoxicating liquors** except for certain purposes, is no longer an open question before this court.

(Argued April 4, 1888. Decided Oct. 22, 1888.)

IN ERROR to the Supreme Court of the State of Iowa, to review a judgment ordering that a distillery, used by plaintiff in error, be abated as a nuisance and enjoining him from the manufacture therein of intoxicating liquors. *Affirmed.*

Reported below, *sub nom. Pearson v. International Distillery*, 72 Iowa, 348.

Statement by **Mr. Justice Lamar**:

This is a writ of error to the Supreme Court of the State of Iowa, allowed by the Chief Justice thereof, upon the ground that the judgment in the case affirmed the validity of a statute of that State, which the plaintiff in error claimed to be in conflict with the Federal Constitution. The case arose upon a petition in equity, filed December 24, 1885, in the Circuit Court of Polk County, Iowa, by defendants in error, I. E. Pearson and S. J. Loughran, against the plaintiff in error, J. S. Kidd, praying that a certain distillery erected and used by said Kidd for the unlawful manufacture and sale of intoxicating liquors be abated as a nuisance, and that the said Kidd be perpetually enjoined from the manufacture therein of all intoxicating liquors. The provisions of the law under which these proceedings were instituted are found in chapter 6, title 11, of the Code of Iowa, amended by chapter 143 of the Acts of the General Assembly in 1884. The sections necessary to be quoted for the purposes of this decision are as follows:

Section 1523 provides:

No person shall manufacture or sell, by himself, his clerk, steward or agent, directly or indirectly, any intoxicating liquors, except as hereinafter provided; and the keeping of intoxicating liquors, with intent on the part of the owner thereof, or any person acting under his authority or by his permission, to sell the same within this State, contrary to the provisions of this chapter, is hereby prohibited; and the intoxicating liquor so kept, together with the vessels in which it is contained, is declared a nuisance, and shall be forfeited and dealt with as hereinafter provided.

Section 1524 provides:

Nothing in this chapter shall be construed to forbid the sale by the importer thereof of foreign intoxicating liquor imported under the authority of the laws of the United States regarding the importation of such liquors and in accordance of [with] such laws; *Provided*, That the said liquor at the time of said sale by said importer remains in the original casks or packages in which it was by him imported, and in quantities not less than the quantities in which the laws of the United States require such liquors to be imported, and is sold by him in said original casks or packages and in said quantities only; and nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold, according to the provisions of this chapter, to be

used for mechanical, medicinal, culinary, or sacramental purposes.

Section 1525 prescribes a penalty for a violation of the law by manufacturers, as follows:

Every person who shall manufacture any intoxicating liquors as in this chapter prohibited, shall be deemed guilty of a misdemeanor, and upon his first conviction for said offense shall pay a fine of two hundred dollars and costs of prosecution, or be imprisoned in the county jail not to exceed six months; and on his second and every subsequent conviction for said offense he shall pay a fine of not less than five hundred dollars, nor more than one thousand dollars, and costs of prosecution, and be imprisoned in the county jail one year.

Section 1526 defines who may be permitted to manufacture under the law, and for what purpose the manufacture may be carried on, as follows:

Any citizen of the State, except hotel keepers, keepers of saloons, eating houses, grocery keepers, and confectioners, is hereby permitted, within the county of his residence, to manufacture or buy and sell intoxicating liquors for mechanical, medicinal, culinary, or sacramental purposes only, provided he shall first obtain permission from the board of supervisors of the county in which such business is conducted, as follows.

Sections 1527 and 1529 provide for the manner of obtaining the permit, and section 1530 sets out the conditions under which it may be granted. It is as follows:

At such final hearing, any resident of the county may appear and show cause why such permit should not be granted; and the same shall be refused, unless the board shall be fully satisfied that all the requirements of the law have, in all respects, been fully complied with, that the applicant is a person of good moral character, and that, taking into consideration the wants of the locality and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood.

The manufacturer, like the seller, is required to make monthly reports to the county auditor, the evident purpose of the requirement being to show whether or not the holder of a permit was manufacturing or selling in compliance with the law.

Section 1543 provides for proceedings in equity to abate and enjoin unlawful manufacture.

The averments of the petition are, in substance, that the distillery described therein was erected by said J. S. Kidd for the manufacture of intoxicating liquors, contrary to the statute of Iowa; that said Kidd had been, ever since the 4th of July, 1884, and is still, engaged in the manufacture of intoxicating liquors, upon the premises aforesaid, for other than mechanical, medicinal, culinary and sacramental purposes; with the concluding averment "that the defendant manufactures, keeps for sale and sells, within this State and at the place aforesaid, intoxicating liquors, to be taken out of that State and there used as a beverage, and for other purposes than for mechanical, medicinal, culinary and sacramental purposes, contrary to the statute of Iowa."

Kidd in his answer specifically pleaded that he is now, and has been ever since the 4th of July, 1884, authorized by the board of supervisors to manufacture and sell intoxicating liquors, except as prohibited by law; and that, in the manufacture and sale of liquors, this defendant has at all times complied with the requirements of the law in that behalf. Upon the trial it was proved by undisputed evidence that Kidd held each year, from July 4, 1884, a

permit regularly issued from the board of supervisors of Polk County, covering the period of the alleged violations of law, authorizing him to manufacture and sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes; that his monthly reports, made on oath, in compliance with the requirements of the law, show that there were no sales for mechanical, medicinal, culinary and sacramental or any other purpose, in the State of Iowa; and that all the manufactured liquors were for exportation and were sold outside of the State of Iowa. A decree was rendered against Kidd, ordering that the said distillery be abated as a nuisance, according to the prayer of the petitioner, and enjoining said Kidd from the manufacture therein of any and all intoxicating liquors. On appeal to the Supreme Court of Iowa this decree was affirmed by that court. Hence this writ of error.

Messrs. Benjamin Harris Brewster and F. W. Lehmann, for plaintiff in error:

Where the subject is national in its character, the power of Congress is exclusive of all state authority.

Welton v. Mo. 91 U. S. 275 (23:347); *Mobile Co. v. Kimball*, 102 U. S. 691 (26:238); *Brown v. Houston*, 114 U. S. 622 (29:257).

The nonexercise of its power by Congress is tantamount to a declaration that such commerce shall be free.

Wabash etc. R. Co. v. Ill. 118 U. S. 557 (30:244); *Passenger Cases*, 48 U. S. 7 How. 416 (12:758).

Intoxicating liquors are property, and traffic in them is within the meaning of the term *commerce* in the Federal Constitution.

Boston Beer Co. v. Mass. 97 U. S. 25 (24:939); *Monty v. Arneson*, 25 Iowa, 383; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6:23).

Exports and imports stand upon precisely the same footing.

Almy v. Cal. 65 U. S. 24 How. 169 (16:644); *State Freight Tar.* 82 U. S. 15 Wall. 232 (21:146); *Phila. etc. Steamship Co. v. Pa.* 122 U. S. 326 (30:1200); *Robbins v. Shelby Co. Tar. Dist.* 120 U. S. 489 (30:694).

The limitation of authority is to purely domestic concerns.

Hall v. De Cuir, 95 U. S. 485 (24:547); *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347 (31:1187).

The State must not encroach upon the free exercise of the power vested in Congress by the Constitution.

Tiernan v. Rinker, 102 U. S. 127 (26:104).

The police power cannot be set up to control the inhibitions of the Federal Constitution or the powers of the United States Government created thereby.

N. O. Gas Co. v. La. Light Co. 115 U. S. 650 (29:516); *Hannibal & St. Jo. R. Co. v. Husen*, 95 U. S. 465 (24:527); *Mayor of N. Y. v. Miln*, 36 U. S. 11 Pet. 102 (9:648); *Chy Lung v. Freeman*, 92 U. S. 275 (23:550); *People v. Compagnie Générale*, 107 U. S. 59 (27:383).

The States, under cover of exerting their police powers, may not substantially prohibit or burden interstate or foreign commerce.

Niles v. Fries, 35 Iowa, 41; *Becker v. Betten*, 39 Iowa, 669; *Preston v. Drew*, 33 Maine, 558;

Crandall v. Nev. 73 U. S. 6 Wall. 35 (18:745); *Citizens Savings & Loan Asso. v. Topeka*, 87 U. S. 20 Wall. 655 (22:455); *State v. Saunders*, 19 Kan. 127.

The statute contravenes article 14 of Amendments to the Constitution, which enacts: "Nor shall any State deprive any person of life, liberty or property, without due process of law."

Pumpelly v. Green Bay Co. 80 U. S. 13 Wall. 177 (20:560); *Preston v. Drew*, and *Crandall v. Nev. supra*; *Re Jacobs*, 98 N. Y. 98.

Messrs. C. C. Cole and John S. Runnells, for defendants in error:

The fact that intoxicating liquors are an article of commerce does not deprive the State of the right to prohibit their manufacture.

Passenger Cases, 48 U. S. 7 How. 416 (12:758); *Welton v. Mo.* 91 U. S. 275 (23:347); *Sinking Fund Cases*, 99 U. S. 718 (25:496); *Mugler v. Kansas*, 123 U. S. 623 (31:205).

The prohibition of the manufacture of intoxicating liquors is within the police powers of the State.

Com. v. Alger, 7 Cush. 53; *Boston Beer Co. v. Mass.* 97 U. S. 32 (24:991); *Stone v. Miss.* 101 U. S. 814 (25:1079); *License Cases*, 46 U. S. 5 How. 504 (12:256); *Mayor of N. Y. v. Miln*, 36 U. S. 11 Pet. 102 (9:648); *Hannibal & St. Jo. R. Co. v. Husen*, 95 U. S. 463 (24:529); *State v. Stucker*, 58 Iowa, 496; *Thurlow v. Com.* 46 U. S. 5 How. 586 (12:293).

The Iowa Statute does not contravene article 14 of Amendments to the Constitution.

Mugler v. Kansas, supra; *Pumpelly v. Green Bay Co.* 80 U. S. 13 Wall. 177 (20:560).

Mr. Justice Lamar delivered the opinion of the court:

The Supreme Court of Iowa, in its opinion, a copy of which, duly authenticated, is found in the record, having been transmitted according to our 8th Rule of Practice, held the sections in question to mean: (1), that foreign intoxicating liquors might be imported into the State, and there kept for sale by the importer, in the original packages (or for transportation in such packages and sale beyond the limits of the State); (2), that intoxicating liquors might be manufactured and sold within the State for mechanical, medicinal, culinary and sacramental purposes, but for no other—not even for the purpose of transportation beyond the limits of the State; (3), that the statute thus construed raised no conflict with the Constitution of the United States, and was therefore valid.

As the record presents none of the exceptional conditions which sometimes impel this court to disregard inadmissible constructions given by state courts to even their own state statutes and State Constitutions, we shall adopt the construction of the statute of Iowa under consideration, which has been given it by the supreme court of that State.

The questions, then, for this court to determine are: 1. Does the statute as thus construed conflict with section 8, article 1, of the Constitution of the United States, by undertaking to regulate commerce between the States? and 2. Does it conflict with the Fourteenth Amendment to that Constitution by depriving the owners of the distillery of their property therein without "due process of law?" All of the as-

signments of error offered are but variant statements of one or the other of these two propositions.

The second of the propositions has been disposed of by this court in the case of *Mugler v. Kansas*, 123 U. S. 623 [31:205], wherein this very question was raised upon a statute similar, in all essential respects, to the provisions of the Iowa Code whose validity is contested. The court decided that a State has the right to prohibit or restrict the manufacture of intoxicating liquors within her limits; to prohibit all sale and traffic in them in said State; to inflict penalties for such manufacture and sale; and to provide regulations for the abatement as a common nuisance of the property used for such forbidden purposes; and that such legislation by a State is a clear exercise of her undisputed police power, which does not abridge the liberties or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor in any way contravenes any provision of the Fourteenth Amendment of the Constitution of the United States. Upon the authority of that case, and of the numerous cases cited in the opinion of the court, we concur in the decision of the Iowa courts that the provisions here in question are not in conflict with the said amendment. The only question before us, therefore, is as to the relation of the Iowa Statutes to the regulation of commerce among the States.

The line which separates the province of federal authority, over the regulation of commerce, from the powers reserved to the States has engaged the attention of this court in a great number and variety of cases. The decisions in these cases, though they do not in a single instance assume to trace that line throughout its entire extent, or to state any rule further than to locate the line in each particular case as it arises, have almost uniformly adhered to the fundamental principles which *Chief Justice Marshall*, in the case of *Gibbons v. Ogden*, 22 U. S. 9 *Wheat*. 1 [6:23], laid down as to the nature and extent of the grant of power to Congress on this subject, and also of the limitations, express and implied, which it imposes upon state legislation with regard to taxation, to the control of domestic commerce, and to all persons and things within its limits, of purely internal concern.

According to the theory of that great opinion, the supreme authority in this country is divided between the Government of the United States, whose action extends over the whole Union, but which possesses only certain powers enumerated in its written Constitution, and the separate governments of the several States, which retain all powers not delegated to the Union. The power expressly conferred upon Congress to regulate commerce is absolute and complete in itself, with no limitations other than are prescribed in the Constitution; is to a certain extent exclusively vested in Congress, so far free from state action; is coextensive with the subject on which it acts, and cannot stop at the external boundary of a State, but must enter into the interior of every State whenever required by the interests of commerce with foreign Nations, or among the several States. This power, however, does not comprehend the purely internal domestic com-

2 INTER S.

merce of a State which is carried on between man and man within a State or between different parts of the same State.

The distinction is stated in the following comprehensive language:

"The genius and character of the whole government seem to be that its action is to be applied to all the external concerns of the Nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself." p. 195, [6: 70].

Referring to certain laws of State Legislatures which had a remote and considerable influence on commerce, the court said that the acknowledged power of the State to regulate its police, its domestic trade, and to govern its own people, may enable it to legislate over this subject to a great extent; but these and other state laws of the same kind are not considered as an exercise of the power to regulate commerce with foreign Nations and among the several States, or enacted with a view to it; but, on the contrary, are considered as flowing from the acknowledged power of a State to provide for the safety and welfare of its people, and form a part of that legislation which embraces everything within the territory of a State not surrendered to the general government. Sacred, however, as these reserved powers are regarded, the court is particular to declare with emphasis the supreme and paramount authority of the Constitution and laws of the United States, relating to the regulation of commerce with foreign Nations, and among the several States; and that whenever these reserved powers, or any of them, are so exercised as to come in conflict with the free course of the powers vested in Congress, the law of the State must yield to the supremacy of the federal authority, though such law may have been enacted in the exercise of a power undelegated and indisputably reserved to the States.

In the light of these principles, and those which this court in its numerous decisions has added in illustration and more explicit development, it will not be difficult to determine whether the law of Iowa under consideration invades, either in purpose or effect, the domain of federal authority.

To support the affirmative, the plaintiff in error maintains that alcohol is, in itself, a useful commodity, not necessarily noxious, and is a subject of property; that the very statute under consideration, by various provisions, and especially by those which permit, in express terms, the manufacture of intoxicating liquors for mechanical, medicinal, culinary or sacramental purposes, recognizes those qualities, and expressly authorizes the manufacture; that the manufacture being thus legalized, alcohol not being *per se* a nuisance, but recognized as property and the subject of lawful commerce, the State had no power to prohibit the manufacture of it for foreign sales.

The main vice in this argument consists in the unqualified assumption that the statute legalizes the manufacture. The proposition

that, supposing the goods were once lawfully called into existence, it would then be beyond the power of the State either to forbid or impede their exportation, may be conceded. Here, however, the very question underlying the case is whether the goods ever came lawfully into existence. It is a grave error to say that the statute "expressly authorized" the manufacture, for it did not; to say that it had not prohibited the manufacture, for it had done so; to say that the goods were of Iowa's lawful manufactures, for that is substantially the very point at issue. The exact statute is this: "No person shall manufacture or sell, . . . directly or indirectly, any intoxicating liquors, except as hereinafter provided." In a subsequent section it is provided further, that "Nothing contained in this law shall prevent any persons from manufacturing in this State liquors for the purpose of being sold according to the provisions of this chapter, to be used for mechanical, medicinal, culinary or sacramental purposes." Here then is, first, a sweeping prohibition against, not the manufacture and sale; not a dealing which is composed of both steps, and consequently must include manufacture as well as sale, or, *e converso*, sale as well as manufacture, in order to incur the denunciation of the statute, but against either the sale or the manufacture. The conjunction is disjunctive. The sale is forbidden, the manufacture is forbidden; and each is forbidden independently of the other. Such being the case, on the subject of the lawfulness or unlawfulness of the *manufacture* (which is the point before the court), it is useless to argue as to the conditions under which it is permissible to sell intoxicating liquors in possession, or to hold them.

Looking again to the statute, we find that the unqualified prohibition of any and all manufacture made by section 1523 is by the joint operation of a proviso in section 1524 and of sections 1526 and 1530, modified by four exceptions, viz.: sale for mechanical purposes, to an extent limited by the wants of the particular locality of the seller; sale for medicinal purposes, to the same extent; sale for culinary purposes, to the same extent; and sale for sacramental purposes, to the same extent. The supreme court of the State held (and we agree with it) that these exceptions do not include sales outside of the State. The effect of the statute, then, is simply and clearly to prohibit all manufacture of intoxicating liquors except for one or more of the four purposes specified. "For the purpose," says the statute. The expected purpose is all that saves it from being, *ab initio* and through each and every step of its progress, unlawful.

It is a mistake to say, as to this case, that the act of transporting the alcohol from the State in the course of lawful commerce with other States not being a crime, to perform that act was not a criminal intent, no matter when formed, whether before or after the alcohol was manufactured. It is not the criminality of the intent to *export* that is here the question, but it is the innocence or criminality, under the statute, of the *manufacture*, in the absence of all four of the specific exceptions to the prohibition, the actual and controlling and *bona fide*

presence of at least one of which was indispensable to the legality of the manufacture.

We think the construction contended for by plaintiff in error would extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is inconsistent with its objects and scope. The language of the grant is: "Congress shall have power to regulate commerce with foreign Nations and among the several States," etc. These words are used without any veiled or obscure signification. "As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they have said." *Gibbons v. Ogden, supra*.

No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term as given by this court in *County of Mobile v. Kimball*, 102 U. S. 691, 702 [26: 238, 241], is as follows: "Commerce with foreign Nations and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multifarious, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management.

It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details.

It was said by Chief Justice Marshall that it is a matter of public history that the object of

vesting in Congress the power to regulate commerce with foreign Nations and among the several States was to insure uniformity of regulation against conflicting and discriminating state legislation. See also *County of Mobile v. Kimball*, *supra*, 697 [26: 240].

This being true, how can it further that object so to interpret the constitutional provision as to place upon Congress the obligation to exercise the supervisory powers just indicated? The demands of such a supervision would require, not uniform legislation generally applicable throughout the United States, but a swarm of statutes only locally applicable and utterly inconsistent. Any movement toward the establishment of rules of production in this vast country, with its many different climates and opportunities, could only be at the sacrifice of the peculiar advantages of a large part of the localities in it, if not of every one of them. On the other hand, any movement toward the local, detailed and incongruous legislation required by such an interpretation would be about the widest possible departure from the declared object of the clause in question. Nor this alone. Even in the exercise of the power contended for, Congress would be confined to the regulation, not of certain branches of industry, however numerous, but to those instances in each and every branch where the producer contemplated an interstate market. These instances would be almost infinite, as we have seen; but still there would always remain the possibility, and often it would be the case that the producer contemplated a domestic market. In that case the supervisory power must be executed by the State; and the interminable trouble would be presented, that whether the one power or the other should exercise the authority in question would be determined, not by any general or intelligible rule, but by the secret and changeable intention of the producer in each and every act of production. A situation more paralyzing to the State Governments, and more provocative of conflicts between the General Government and the States, and less likely to have been what the framers of the Constitution intended, it would be difficult to imagine.

We find no provisions in any of the sections of the statute under consideration, the object and purpose of which are to exert the jurisdiction of the State over persons or property or transactions within the limits of other States; or to act upon intoxicating liquors *as* exports; or while they are in process of exportation or importation. Its avowed object is to prevent, not the carrying of intoxicating liquors *out* of the State, but to prevent their manufacture, except for specified purposes, *within* the State. It is true that, notwithstanding its purposes and ends are restricted to the jurisdictional limits of the State of Iowa, and apply to transactions wholly internal and between its own citizens, its effects may reach beyond the State by lessening the amount of intoxicating liquors exported. But it does not follow that, because the products of a domestic manufacture may ultimately become the subjects of interstate commerce, at the pleasure of the manufacturer, the legislation of the State respecting such manufacture is an attempted exercise of the

power to regulate commerce exclusively conferred upon Congress. Can it be said that a refusal of a State to allow articles to be manufactured within her borders (for export) any more directly or materially affects her external commerce than does her action in forbidding the retail within her borders of the same articles after they have left the hands of the importers? That the latter could be done was decided years ago; and we think there is no practical difference in principle between the two cases.

"As has been often said, legislation (by a State) may in a great variety of ways affect commerce and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution," unless, under the guise of police regulations, it imposes a direct burden upon interstate commerce, or directly interferes with its freedom. *Hall v. De Cuir*, 95 U. S. 485, 487 [24: 547]; *Chief Justice Waite* delivering the opinion of the court in that case, citing *Sherlock v. Alling*, 93 U. S. 103 [23: 820]; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 [21: 164]; *Munn v. Ill.*, and *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 113, 155 [24: 77, 94]; *Wilson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7: 412]; *Pound v. Turck*, 95 U. S. 459 [24: 525]; *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713 [18: 96]; *Gibbons v. Ogden*, *supra*, and *Cooley v. Board of Wardens*, 53 U. S. 12 How. 299 [13: 996].

We have seen that whether a State, in the exercise of its undisputed power of local administration, can enact a statute prohibiting within its limits the manufacture of intoxicating liquors, except for certain purposes, is not any longer an open question before this court. Is that right to be overthrown by the fact that the manufacturer *intends* to export the liquors when made? Does the statute, in omitting to except from its operation the manufacture of intoxicating liquors within the limits of the State for export, constitute an unauthorized interference with the power given to Congress to regulate commerce?

These questions are well answered in the language of the court in the *License Tax Cases*, 72 U. S. 5 Wall. 470 [18: 500]: "Over this commerce and trade [the internal commerce and domestic trade of the States] Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the Legislature. The power to authorize a business within a State is plainly repugnant to the exclusive power of the State over the same subject." The manufacture of intoxicating liquors in a State is none the less a business within that State because the manufacturer intends, at his convenience, to export such liquors to foreign countries or to other States.

This court has already decided that the fact that an article was manufactured for export to another State does not of *itself* make it an article of interstate commerce within the meaning of section 8, article 1, of the Constitution, and that the intent of the manufacturer does not

determine the time when the article or product passes from the control of the State and belongs to commerce.

We refer to the case of *Coe v. Errol*, 116 U. S. 517 [29: 715]. In that case certain logs cut at a place in New Hampshire had been hauled to the Town of Errol on the Androscoggin River, in that State, for the purpose of transportation beyond the limits of that State to Lewiston, Maine; and were held at Errol for a convenient opportunity for such transportation. The selectmen of the town assessed on the logs state, county, town and school taxes; and the question before the court was whether these logs were liable to be taxed like other property in the State of New Hampshire. The court held them to be so liable, and said, *Mr. Justice Bradley* delivering the opinion:

"Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation? This is the precise question for solution . . . There must be a point of time when they cease to be governed exclusively by the domestic law and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the State of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an *entrepot* for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of property of that State, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination, in the usual way and manner in which such property is taxed in the State . . . The point of time when state jurisdiction over the commodities of commerce begins and ends is not an easy matter to designate or define, and yet it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question . . . But no definite rule has been adopted with regard to the point of time at which the taxing power of the State ceases as to goods exported to a foreign country or to another State. What we have already said, however, in relation to the products of a State intended for exportation to another State, will indicate the view which seems to us the sound one on that subject, namely, that such goods do not cease to be a part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey . . . It is true, it was said in the case of *The Daniel Ball*, 77

U. S. 10 Wall. 557, 565 [19: 999, 1002]: 'Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other."

The application of the principles above announced to the case under consideration leads to a conclusion against the contention of the plaintiff in error. The police power of a State is as broad and plenary as its taxing power; and property within the State is subject to the operations of the former so long as it is within the regulating restrictions of the latter.

The judgment of the Supreme Court of Iowa is affirmed.

NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY COMPANY, *Plff. in Err.*,

v.
STATE OF ALABAMA.

(From Lawyers' ed. U. S. Reports, Bk. 32.)

1. **The Statute of Alabama, declaring all persons afflicted with color blindness disqualified from serving on railroad lines within the State in certain capacities, and providing for an examination and imposing a fine for any railroad company to employ a person in any of such capacities who has not a certificate of fitness from the examiners, is not repugnant to the power vested in Congress to regulate commerce among the States, and does not violate the clause of the Fifth Amendment which declares that no person shall be deprived of his property without due process of law.**
2. Such statute is **not in conflict with article 3 of the Constitution**, which provides that the trial of all crimes shall be held in the State where they were committed.
3. That provision in said **article 3 of the Constitution** has reference only to **trials in federal courts**; it has **no application** to trials in the state courts.
4. **Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on the railroad in one of the capacities mentioned is not depriving them of property without due process of law.**
5. Until legislation by Congress is had, as to the **qualifications, duties and liabilities of employes on railway trains engaged in interstate commerce**, it is within the power of the State to provide against accidents on trains while within their limits.

(Argued Oct. 11, 1888. Decided Oct. 22, 1888.)

IN ERROR to the Supreme Court of the State of Alabama, to review a judgment of the Supreme Court of that State affirming a conviction of plaintiff in error in the Circuit Court of the State, for a violation of a statute of the

State as to the qualifications of railroad employes. *Affirmed.*

The facts are stated in the opinion.

Mr. Oscar R. Hundley, for plaintiff in error:

The Act in question is repugnant to article 1, § 8, subd. 3, of the Constitution of the United States, which provides that "Congress shall have power to regulate commerce among the several States."

Smith v. Ala. 124 U. S. 465 (31:598); *Western Union Tel. Co. v. Pendleton*, 122 U. S. 359 (30:1190); *Mobile Co. v. Kimball*, 102 U. S. 691 (26:238); *Fargo v. Mich.* 121 U. S. 231 (30:890); *Gloucester Ferry Co. v. Pa.*, and *Brown v. Houston*, 114 U. S. 196, 692 (29:158, 257); *Pickard v. Pullman-Southern Car Co.* 117 U. S. 34 (29:785); *Wabash, St. L. & P. R. v. Ill.* 118 U. S. 557 (30:244); *Walling v. Mich.* 116 U. S. 446 (29:691); *Corson v. Md.* 120 U. S. 502 (30:699); *Case of State Freight Tax*, 82 U. S. 15 Wall. 232 (21:146); *Hannibal & St. Jo. R. Co. v. Huseen*, and *Hall v. DeCuir*, 95 U. S. 465, 485, 497 (24:527, 547, 551).

The Act is repugnant to article 3, § 2, subd. 3, which provides that "The trial of all crimes shall be held in the State where the said crimes shall have been committed."

Graham v. Monsergh, 22 Vt. 543; *Richardson v. Burlington*, 33 N. J. Law, 190; *Slack v. Gibbs*, 14 Vt. 357; *Nashville etc. R. Co. v. Eakin*, 6 Coldw. 582; *Crowley v. Panama R.* 30 Barb. 99; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48.

The Act is repugnant to the Fifth Amendment to the Constitution of the United States, which provides, that "No person shall be deprived of life, liberty or property, without due process of law."

Baldwin v. Kouns, 81 Ala. 272; *Zeigler v. South & North Ala. R. Co.* 53 Ala. 599; *Wilburn v. McCalley*, 63 Ala. 443; *Westervelt v. Gregg*, 12 N. Y. 202, 209; *State v. Staten*, 6 Coldw. 233; *McMillen v. Anderson*, *Pearson v. Jewdall*, and *Pennoyer v. Neff*, 95 U. S. 37, 294, 714 (24:335, 436, 565); *Davidson v. N. O.* 96 U. S. 97 (24:616); *State R. Tax Cases*, 92 U. S. 609 (23:672).

Mr. T. N. McClellan, *Atty-Gen. of Alabama*, for defendant in error:

Questions relating to the interpretation of a state enactment are of a final state arbitration.

Cooley, Const. Lim. 18 n.; *Elmendorf v. Taylor*, 23 U. S. 10 Wheat. 152 (6:289); *Green v. Neal*, 31 U. S. 6 Pet. 291 (8:402); *Burgess v. Seligman*, 107 U. S. 20 (27:359); *McCutchen v. Marshall*, 33 U. S. 8 Pet. 220 (8:923).

It is competent for a State to require the examination and certification by its officers, of railroad operatives, as to fitness, in those respects which involve public safety; and it may require the railroad companies to pay the expenses of all acts and proceedings necessary to that end.

Morgan's La. & Tex. R. & S. Co. v. La. 118 U. S. 455 (30:237); *Blair v. Milwaukee & P. R. Co.* 20 Wis. 262; *New Albany & S. R. Co. v. Tilton*, 12 Ind. 3; *Jones v. Galena & C. R. Co.* 16 Iowa, 6; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Waldron v. Rensselaer & S. R. Co.* 8 Barb. 390; *Kansas Pacific R. Co. v. Mower*, 16 Kan. 573; *Gorman v. Pac. R. Co.* 26 Mo. 441; *Thorpe v.* 2 INTER S.

Rutland & B. R. Co. 27 Vt. 140; *People v. Squire*, 10 Cent. Rep. 437, 107 N. Y. 593.

Mr. Justice Field delivered the opinion of the court:

A Statute of Alabama which took effect on the first of June, 1887, "for the protection of the traveling public against accidents caused by color blindness and defective vision," declares that all persons afflicted with color blindness and loss of visual power to the extent therein defined are "disqualified from serving on railroad lines within the State in the capacity of locomotive engineer, fireman, train conductor, brakeman, station agent, switchman, flagman, gate tender, or signal man, or in any other position which requires the use or discrimination of form or color signals," and makes it a misdemeanor, punishable by fine of not less than ten nor more than fifty dollars for each offense, for a person to serve in any of the capacities mentioned without having obtained a certificate of fitness for his position in accordance with the provisions of the Act. It provides for the appointment by the Governor of a suitable number of qualified medical men throughout the State to carry the law into effect and for the examination by them of persons to be employed in any of the capacities mentioned; prescribes rules to govern the action of the examiners, and allows them a fee of three dollars for the examination of each person. It declares that re-examinations shall be made once in every five years, and whenever sickness or fever or accidents calculated to affect the visual organs have occurred to the parties, or a majority of the board may direct; that the examinations and re-examinations shall be made at the expense of the railroad companies; and that it shall be a misdemeanor, punishable by a fine, of not less than fifty nor more than five hundred dollars for each offense, for any such company to employ a person in any of the capacities mentioned, who does not possess a certificate of fitness therefor from the examiners in so far as color blindness and the visual organs are concerned.

The defendant, the Nashville, Chattanooga & St. Louis Railway Company, is a corporation created under the laws of Tennessee, and runs its trains from Nashville in that State to various points in other States, twenty-four miles of its line being in Alabama, two miles in Georgia, seven in Kentucky, and 464 in Tennessee.

On the second of August, 1887, one James Moore was employed by the Company as a train conductor on its road, and acted in that capacity, in the County of Jackson, in Alabama, without having obtained a certificate of his fitness so far as color blindness and visual powers were concerned, in accordance with the law of that State. For this employment the Company was indicted in the Circuit Court of the State for Jackson County, under the statute mentioned, and on its plea of not guilty was convicted, and fined fifty dollars. On appeal to the supreme court of the State the judgment was affirmed, and to review it the case is brought on error to this court.

It was contended in the court below, among other things, that the Statute of Alabama was repugnant to the power vested in Congress to regulate commerce among the States, and that

it violated the clause of the Fifth Amendment which declares that no person shall be deprived of his property without due process of law. The same positions are urged in this court, with the further position that the statute is in conflict with the clause in the third article of the Constitution, which provides that the trials of all crimes shall be held in the State where they were committed.

The first question thus presented is covered by the decision of this court rendered at the last term in *Smith v. Alabama*, 124 U. S. 465 [31: 508]. In that case the law adjudged to be valid, required as a condition for a person to act as an engineer of a railroad train in that State, that he should be examined as to his qualifications by a board appointed for that purpose, and licensed if satisfied as to his qualifications, and made it a misdemeanor for anyone to act as engineer who violated its provisions. The Act now under consideration only requires an examination and license of parties, to be employed on railroads in certain specified capacities, with reference to one particular qualification, that relating to his visual organs; but this limitation does not affect the application of the decision. If the State could lawfully require an examination as to the general fitness of a person to be employed on a railway, it could of course lawfully require an examination as to his fitness in some one particular. Color blindness is a defect of a vital character in railway employes in the various capacities mentioned. Ready and accurate perception by them of colors, and discrimination between them, are essential to safety of the trains, and of course of the passengers and property they carry. It is generally by signals of different colors, to each of which a separate and distinct meaning is attached, that the movement of trains is directed. Their starting, their stopping, their speed, the condition of switches, the approach of other trains, and the tracks in such case which each should take, are governed by them. Defects of vision in such cases on the part of anyone employed may lead to fatal results. Color blindness, by which is meant either an imperfect perception of colors, or an inability to recognize them at all, or to distinguish between colors, or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject represent as the result of extended examinations that a fraction over 4 percent of males are color blind. With some the defect is congenital, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in which they have indulged. It presents itself in a great variety of forms, from an imperfect perception of colors to absolute inability to recognize them at all.

Such being the proportion of males thus affected, it is a matter of the greatest importance to safe railroad transportation of persons and property that strict examination be made as to the existence of this defect in persons seeking employment on railroads in any of the capacities mentioned.

It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employes and others on railway trains engaged in

that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the States, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

In *Smith v. Alabama* this court, recognizing previous decisions where it had been held that it was competent for the State to provide redress for wrongs done and injuries committed on its citizens by parties engaged in the business of interstate commerce, notwithstanding the power of Congress over those subjects, very pertinently inquired: "What is there to forbid the State, in the further exercise of the same jurisdiction, to prescribe the precautions and safeguards foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, it is admitted the State has power to redress and punish? If the State has power to secure to passengers conveyed by common carriers in their vehicles of transportation a right of action for the recovery of damages occasioned by the negligence of the carrier in not providing safe and suitable vehicles, or employes of sufficient skill and knowledge, or in not properly conducting and managing the act of transportation, why may not the State also impose, on behalf of the public, as additional means of prevention, penalties for the nonobservance of these precautions? Why may it not define and declare what particular things shall be done and observed by such a carrier in order to insure the safety of the persons and things he carries, or of the persons and property of others liable to be affected by them?" Of course but one answer can be made to these inquiries, for clearly what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent. And the court in that case held that the provisions in the Statute of Alabama were not strictly regulations of interstate commerce, but parts of that body of the local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with an express enactment of Congress in the exercise of its power over commerce, and that until so displaced they remain as the law governing carriers in the discharge of their obligations, whether engaged in purely internal commerce of the State, or in commerce among the States. The same observations may be made with respect to the provisions of the state law for the examination of parties to be employed on railways with respect to their powers of vision. Such legislation is not directed against commerce, and only affects it incidentally, and therefore cannot be called, within the meaning of the Constitution, a regulation of commerce. As said in *Sherlock v. Alling*, 93 U. S. 99, 104 [23:819], legislation by a State of that char-

acter, "relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit." In our judgment the Statute of Alabama under consideration falls within this class.

The second position of the plaintiff in error, that the state statute is repugnant to the provision of article 3 of the Constitution, which declares that the trial of all crimes shall be held in the State where they have been committed, is readily disposed of. The provision has reference only to trials in the federal courts; it has no application to trials in the state courts.

As to the third position of the plaintiff in error, assuming that counsel intended to rely upon the Fourteenth instead of the Fifth Amendment (as the latter only applies a limit to federal authority, not restricting the powers of the State), we do not think it tenable. *Barron v. Balt. and Livingston v. Moore*, 32 U. S. 7 Pet. 243, 469 [8:672,751]. Requiring railroad companies to pay the fees allowed for the examination of parties who are to serve on their railroads in one of the capacities mentioned is not depriving them of property without due process of law. It is merely imposing upon them the expenses necessary to ascertain whether their employé possess the physical qualifications required by law.

Judgment affirmed.

WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,
v.
COMMONWEALTH OF PENNSYLVANIA.

(From Lawyers' ed. U. S. Reports, Bk. 32.)

The Commonwealth of Pennsylvania is not entitled to recover of a telegraph company **taxes on telegraphic messages** sent, except in respect to messages transmitted wholly within the State. *Western Union Tel. Co. v. Texas*, 105 U. S. 460 (Bk. 26 L. ed. 1067); *Ratterman v. Western Union Tel. Co.* 127 U. S. 411 (Bk. 32 L. ed. 229).

(Submitted Oct. 18, 1888. Decided Oct. 22, 1888.)

IN ERROR to the Supreme Court of the State of Pennsylvania, to review a judgment against plaintiff in error for taxes on telegraphic messages. *Reversed.*

The facts are stated by the court.

Reported below, 110 Pa. 405.

Messrs. M. E. Olmsted and Brown & Wells, for plaintiff in error:

The domicile of a corporation is the State of its origin.

Potter, Corp. § 10.

It cannot migrate to another sovereignty.

Bank of Augusta v. Earle, 38 U. S. 13 Pet. 586 (10: 306); *Paul v. Va.* 75 U. S. 8 Wall. 168 (19: 357); *St. Louis v. Ferry Co.* 78 U. S. 11 Wall. 423 (20: 192).

The power of taxation is necessarily limited to subjects within the jurisdiction of the State.

2 INTER S.

McCulloch v. Md. 4 Wheat. 429 (4: 607); *Hays v. Pacific Mail Steamship Co.* 58 U. S. 17 How. 596 (15: 254); *Morgan v. Parham*, 83 U. S. 16 Wall. 471 (21: 303); *People, Hoyt v. Comrs. of Taxes*, 23 N. Y. 224; *People v. Comrs. of Taxes*, 58 N. Y. 242; *State v. Engle*, 34 N. J. Law, 425; *Gloucester Ferry Co. v. Pa.* 114 U. S. 196 (29: 158); *State Freight Tax*, 82 U. S. 15 Wall. 232 (21: 146).

The interstate business of a telegraph company is not subject to state taxation in any way.

Leloup v. Port of Mobile, 127 U. S. 640 (32: 311); *Walling v. Mich.* 116 U. S. 446 (29: 691); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29: 785); *Wabash etc. R. Co. v. Ill.* 118 U. S. 557 (30: 244); *Fargo v. Mich.* 121 U. S. 230 (30: 888); *Phila. etc. Steamship Co. v. Pa.* 122 U. S. 326 (31: 1200).

A State cannot regulate or tax the operations or objects of interstate or foreign commerce.

H. & St. Jo. R. Co. v. Husen, 95 U. S. 465 (24: 527); *Cook v. Pa.* 97 U. S. 566 (24: 1015); *Guy v. Baltimore*, 100 U. S. 434 (25: 743); *Webber v. Va.* 103 U. S. 344 (26: 565); *Moran v. N. O.* 112 U. S. 69 (28: 653); *Walling v. Mich.*, *Pickard v. Pullman Southern Car Co.*, *Wabash etc. R. Co. v. Ill.*, and *Fargo v. Mich. supra*; *Robbins v. Shelby Co. Tax. Dist.* 120 U. S. 489 (30: 694).

Messrs. John F. Sanderson, Dep. Atty-Gen., and W. S. Kirkpatrick, Atty-Gen., for defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

Judgment was rendered against plaintiff in error for taxes on telegraphic messages sent from point to point within the State of Pennsylvania; on messages sent from points within the State to points in other States; on messages sent from points in other States to points within the State, and on messages sent to and from points in other States, which passed over lines partly within the State; and the record discloses the several amounts of taxes upon the several classes of messages, which, with commissions and interest, make up the total recovery. It is clear, and this is conceded by the defendant in error, that, under the decisions in this court in *Western Union Telegraph Company v. Texas*, 105 U. S. 460 [26: 1067], and *Ratterman v. Western Union Telegraph Company*, 127 U. S. 411 [32: 229], the Commonwealth was not entitled to recover for the taxes in question, excepting in respect to the messages transmitted wholly within the State. *The judgment will therefore be reversed*, and the cause remanded for such further proceedings as justice may require.

Ordered accordingly.

William G. ASHER, *Plff. in Err.*,
v.

STATE OF TEXAS.

(From Lawyers' ed. U. S. Reports, Bk. 32.)

The law of Texas requiring every commercial traveler or drummer to obtain a license and to pay a tax therefor

is **unconstitutional** and void when applied to citizens of other States soliciting trade in Texas.

(Argued Oct. 11, 12, 1888. Decided Oct. 29, 1888.)

IN ERROR to the Court of Appeals of the State of Texas, to review a judgment denying a *habeas corpus* for the discharge of plaintiff in error, who was imprisoned for failure to pay a fine imposed for a violation of the law in regard to drummers. *Reversed*.

Reported below, 23 Tex. App. 662.

The facts are stated in the opinion.

Messrs. Abel Crook and John J. McElhone, for plaintiff in error:

The State possesses the power to impose an occupation tax without discrimination upon its own citizens; but the statute imposing such tax, when applied to the citizens of other States, is unconstitutional.

Ward v. Md. 79 U. S. 12 Wall. 418 (20: 449); *Robbins v. Shelby Co. Tax Dist.* 120 U. S. 489 (30: 694); *Re Hennick*, 1 Inters. Com. Rep. 66, 7 Cent. Rep. 357; *Simmons Hardware Co. v. McGuire*, 2 South. Rep. 592; *Ex parte Rosenblatt*, 24 Rep. 570; *Ficklen v. Shelby Co.* 3 Ry. & Corp. L. J. 579; *Ex parte Stockton*, 33 Fed. Rep. 95; *Fargo v. Mich.* 121 U. S. 230 (30: 888); *Phila. & South. S. S. Co. v. Pa.* 122 U. S. 326 (30: 1200); *Leloup v. Port of Mobile*, 127 U. S. 640 (32: 311).

Messrs. J. S. Hogg, Atty-Gen. of Texas, and *W. L. Davidson, Asst. Atty-Gen.*, for defendant in error:

A tax on property that may be the subject of commerce is not a tax on commerce.

Com. v. Holbrook, 10 Allen, 202; *Cooley*, Tax. 62.

As to the levying and collection of taxes, Congress has not exclusive jurisdiction, but that power belongs to the State.

Cooley, Tax. 384, 605; *Loughborough v. Blake*, 18 U. S. 5 Wheat. 317 (5: 98).

The States may tax subjects of commerce where Congress has not acted at all upon the subject.

Cooley v. Bd. of Wardens, 53 U. S. 12 How. 299 (13: 996); *Crandall v. Nev.* 73 U. S. 6 Wall. 35 (18: 745); *Cooley*, Const. Lim. 605, 606.

A State can levy taxes upon business or property of non-residents within that State.

Duer v. Small, 4 Blatchf. 263; *Com. v. Milton*, 12 B. Mon. 212, 218; *Catlin v. Hull*, 21 Vt. 152; *Nathan v. La.* 49 U. S. 8 How. 73, 82 (12: 996); *Corfield v. Coryell*, 4 Wash. C. C. 380.

The license issued by the Federal Government for revenue purposes does not supersede state regulations, and must be received subject to all such requirements of license fees as the State may have seen fit to impose.

McGuire v. Com. 70 U. S. 3 Wall. 388 (18: 226); *Pervear v. Com.* 72 U. S. 5 Wall. 475, 480 (18: 608); *Com. v. Thorniley*, 6 Allen, 445; *Com. v. Keenan*, 11 Allen, 262; *Block v. Jacksonville*, 36 Ill. 301; *State v. Carney*, 20 Iowa, 82; *State v. Stutz*, 20 Iowa, 488.

A law imposing a license tax on transient persons doing business within the State does not violate the provisions of the Federal Constitution.

2 Desty, Taxn. 1389; *Cole v. Randolph*, 31 La. Ann. 535; *State v. Shapleigh* and *State v.*

North, 27 Mo. 344, 464; *Biddle v. Com.* 13 Serg. & R. 405.

Mr. Justice Bradley delivered the opinion of the court:

This is a writ of error to the Court of Appeals of the State of Texas in a case of *habeas corpus*. By an Act of the Legislature of Texas, passed May 4, 1882, it was provided that there shall be levied on and collected "from every commercial traveler, drummer, salesman or solicitor of trade by sample or otherwise an annual occupation tax of thirty-five dollars, payable in advance; . . . to be paid to the controller of public accounts, whose receipts under seal shall be evidence of the payment of such tax;" and it was provided that every such commercial traveler, drummer, etc., "shall, on demand of the tax collector of any county of the State, or any peace officer of said county, exhibit to such officer the comptroller's receipt;" and on refusal "shall be deemed guilty of misdemeanor and fined in a sum not less than twenty-five nor more than one hundred dollars." And by article 110, chap. 5, title 4 of the Penal Code of the State of Texas, it is provided that "Any person who shall pursue or follow any occupation, calling or profession, or do any act taxed by law without first obtaining a license therefor, shall be fined in any sum not less than the amount of the taxes so due, and not more than double that sum."

By a statement of facts agreed upon by the parties in the court below, it appears that William G. Asher, the plaintiff in error, "is a resident and citizen of the City of New Orleans, State of Louisiana, and on the 27th day of May, A. D. 1887, and for about the period of one month prior thereto was engaged in the business of soliciting trade by the use of samples for the house for which he worked as drummer in the City of Houston, Harris County, State of Texas, said house being Charles G. Schulze, of New Orleans, Louisiana, who was a manufacturer of rubber stamps and stencils, for the sale of which said Asher was then and there soliciting orders or trade. While engaged in the act of drumming for said Charles G. Schulze, and for the claimed offense of not having taken out the required license for so doing said business, the defendant, William G. Asher, was arrested by one George Ellis, Sheriff of said County of Harris, State of Texas, and carried before the Hon. James A. Breeding, a Justice of the Peace of Precinct No. 1 of said County of Harris, State of Texas, and fined for the offense of pursuing the occupation of drummer without a license. It is admitted that Charles G. Schulze is engaged in manufacturing in New Orleans, State of Louisiana, and in selling rubber stamps and stencils, and that it was a line of such articles for the sale of which the said defendant, William G. Asher, was drumming at the time of his arrest; that the relator, Asher, was soliciting said orders and was making said sales for his said nonresident employers in the County of Harris and in the State of Texas."

Being imprisoned for failure to pay the fine imposed upon him, Asher applied to the court of appeals for a writ of *habeas corpus* to be discharged on the ground that the law under which he was restrained of his liberty is unconstitutional and void, and contravenes the Con-

stitution of the United States, being repugnant to that clause thereof which gives to Congress the power to regulate commerce among the several States and the laws of Congress passed thereunder. The writ of *habeas corpus* was issued and, the matter being argued before the court of appeals, judgment was given against the petitioner and he was remanded to the custody of the sheriff. To review that judgment this writ of error is brought.

We cannot perceive any distinction between this case and that of *Robbins v. Shelby County Taxing District*, decided in October Term, 1886, and reported in 120 U. S. 489 [30: 694]. The Tennessee law in that case declared that "All drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods or merchandise therein by sample, shall be required to pay to the county trustee the sum of \$10 per week or \$25 per month for such privilege;" and it was made a misdemeanor, punishable by fine, to exercise such occupation without having first paid the tax or obtained the license required therefor. The plaintiff in error in that case was a citizen of Ohio, and was convicted for selling goods by sample for an Ohio firm without having paid the tax or obtained the required license. The law was in all substantial respects the same and the circumstances were substantially the same as in the case now presented. Indeed, this is con-

ceded by the Court of Appeals of Texas in its opinion. But it is strenuously contended by that court that the decision of this court in *Robbins v. Shelby County Taxing District* is contrary to sound principles of constitutional construction and in conflict with well adjudicated cases formerly decided by this court and not overruled. Even if it were true that the decision referred to was not in harmony with some of the previous decisions, we had supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not. And as to the constitutional principles involved, our views were quite fully and carefully, if not clearly and satisfactorily, expressed in the *Robbins Case*. We do not propose to enter upon a renewed discussion of the subject at this time. If any further illustration is desired of the unconstitutionality of local burdens imposed upon interstate commerce by way of taxing an occupation directly concerned therein, reference may be had to the still more recent case of *Leloup v. Port of Mobile*, 127 U. S. 640 [32: 811], which related to a general license tax on telegraph companies, and was decided by the unanimous concurrence of the court.

The judgment of the Court of Appeals of Texas is reversed, and the cause remanded, with instructions to discharge the plaintiff in error from the imprisonment complained of.

INTERSTATE COMMERCE COMMISSION.

James F. SLATER

v.

NORTHERN PACIFIC R. CO.

(No. 140.)

1. **A complaint made for the purpose of retaliation** for a fancied wrong—as, to get even with a carrier for the revocation of complainant's pass—does not commend itself to the Commission.
2. **A carrier which has conformed to the ruling of the Commission** should not be prosecuted for alleged violation of law in that respect, which occurred before such ruling was made and under a construction of the law then approved by the carrier's counsel.
3. **Free transportation issued in the form of an annual pass**, to a person not in the regular and stated service of the carrier nor receiving any wages or salary under a contract of employment, but requested by him as compensation for throwing in its way what business he conveniently could, *held* to be illegal.

(Complaint filed June 6; Answer filed June 27; Hearing at Dubuque, Iowa, July 27; Decided November 23, 1888.)

PROCEEDING upon a complaint alleging the illegal free transportation of a person not a railway employee. *Complaint not sustained.*

Walker, Commissioner:

A complaint filed by James F. Slater, of Highland Park, Illinois, alleged that the defendant, about July, 1887, issued free transportation to one Frederick Fischer, from St. Paul, Minnesota, to Tacoma, Washington Ter-

ritory, and return; that said Fischer was not a railway employee at the time, and that said transportation was used by him.

The answer admits that transportation was issued to said Fischer as alleged, but asserts that a justification therefor existed, consisting in the fact that it was furnished for the purpose of promoting the sale of its land and the settlement of the country along the line of its road; and further states that after the decision of the case of *W. U. Smith* against the same defendant by this Commission in November, 1887, the defendant changed its rules and regulations in that respect.

At the hearing, testimony was given on the part of defendant, in substance, as follows:

That the complainant, James F. Slater, in July, 1887, represented to the defendant that he had found respectable parties in Illinois whom he could interest in a plan for irrigation in the Yakima Valley, in Washington Territory, which was important for the sale of lands owned by the defendant in that section; that the gentlemen would first wish to make an examination of the country which it was proposed to irrigate and the sources of supply; that a conference was had in Chicago by the officials of defendant's land department with Mr. Slater and his friends, at which the irrigation project was discussed, and something also was said about the establishment of a wholesale grocery house at Tacoma; that free round-trip tickets to Tacoma were provided, which were used by Mr. Fischer and two other gentlemen, who, however, failed to stop in the Yakima Valley, but went directly through Tacoma to Seattle, where a wholesale grocery house was established by one or more of them.

That afterwards, in the fall of 1887, the complainant, Slater, wrote various letters to officials of the transportation department of the defendant, which were produced in evidence; and in compliance with requests therein made he was furnished by defendant with an annual pass, in which he was described as an "employee," being considered in the nature of an emigrant agent; that some time after this the land department of defendant's road learned that complainant Slater was traveling with an employee's annual, and protested against his being so employed by the Company; that the pass was thereupon immediately canceled; that Slater then wrote the defendant that he had a record of several violations of the Act to Regulate Commerce on its part, which he proposed to look after and which were good cases for investigation by the Interstate Commerce Commission. This letter bears date March 28, 1888, and his correspondence with the Commission in respect to the complaint, which was presently filed, commenced April 9, 1888.

Complainant did not appear at the hearing; he was afterwards furnished with a copy of the testimony on the part of the defendant and was allowed until September 25, 1888, in which to file testimony in reply if desired.

The free transportation furnished to Fischer, through the land department of the defendant company, was under rules and regulations then in force, but which were afterwards changed pursuant to the decision of the Commission in the case of *Smith v. Northern Pacific Railway Company*, 1 Inters. Com. Rep. 208, 1 Inters. Com. Rep. 611. The Company claims that the decision and order in that case have ever since been complied with, and no proof to the contrary has been brought in any manner to the attention of the Commission.

It seems to have been the impression of the complainant that to secure the imposition of a heavy fine upon defendant it was only necessary for him to furnish information to this Commission of some violation of the Act to Regulate Commerce. In one of his letters he says that he proposes to "see that justice is done, though it may take \$95,000—i. e., \$5,000 for each one of these passes," referring to the free tickets above described and others.

The Commission has no power to impose penalties for violations of the Law, the penal provisions of which are only enforceable through the ordinary machinery of the courts of the United States. In case of willful violation it might be the duty of the Commission to lay the facts before the United States Attorney of the proper district for action. But this case is not one which seems to require that course; on the contrary, the transportation in question was issued and used under a construction of the law which defendant's counsel had approved, but which afterwards, on a formal hearing, the Commission decided to be incorrect; whereupon the method pursued by the Company was immediately changed, and the course suggested by the Commission was promptly and cheerfully followed. It would be altogether wrong for the Commission to set on foot a prosecution under such circumstances.

Especially in a case where the motive of complainant is confessedly that of retaliation for a fancied wrong, it would be the height of injus-

tice for the Commission to take action in furtherance of such a purpose, unless the offense was so flagrant as to efface from view the circumstances under which the matter is brought to light. In the present case the correspondence clearly shows that the complaint was made for the purpose of punishing defendant for the withdrawal of complainant's "annual." The Commission does not desire to lend itself to the assistance of such a scheme; and under such circumstances it would be slow to act unless the conduct of defendant was such as to exhibit a willful and perverse disobedience of some provision of law. This defendant so far as appears is now endeavoring in good faith to conduct its operations in conformity to the statute as interpreted by the Commission; while it appears that the complainant was himself the moving spirit in the transactions of which he now complains. His complaint, therefore, does not appear to call for any further notice from the Commission.

The so called employee's annual, issued to Slater himself, requires a few words of comment. It appears that complainant Slater on October 12, 1887, addressed a letter to T. F. Oakes, the vice president and general manager of defendant, in which he used the following language:

"I will in all probability have charge of Marshall Field's 40,000 acre tract, and the colonizing of the same, because I can doubtless prove of service and benefit to the Spokane and Palouse Land Co., as well as to the N. P. R. R., as I propose to emigrate several hundred people to W. T. within the next twelve months. All I ask of the N. P. in return for throwing what business I conveniently can in their way is transportation in the shape of an 'annual.' I have already been the means of taking into W. T. and Oregon parties who have invested over \$530,000 (and who would not have went there had I not persuaded them to do so), and have more in view provided the desired arrangement is made. I have induced two parties to go out on the Sound and start manufacturing shingles for this, Chicago, and other eastern markets, so as to give freighting of same to your R. R. As showing whether I have any strength with my friends I refer to the fact of my having persuaded twenty-eight of them to go to W. T. and buy round-trip tickets over the N. P., thus assisting the Pass. Department to over \$2,500 they would not have received had it not been for me. I have some parties who were talking of going to Oregon to start in the business of shipping wheat direct to Liverpool from there; but I have, I think, got them so far persuaded that they can be induced to locate on the Sound instead, and thus prove of great benefit to the N. P. by purchasing grain in Walla-Walla and the Snake River country and sending it to the Sound instead of to Portland."

This was followed up by persistent application of like effect, and resulted in his obtaining a pass, which was issued to him as an alleged "employee," and which he used until it was revoked as above stated.

Whatever else Slater may have been he clearly was not an employee of the defendant; he did not undertake to perform any particular service, nor was he entitled to receive any

wages or salary under a contract of employment; all the compensation he asked was "transportation in the shape of an annual," and this was to be "in return for throwing what business I conveniently can in their way." That is, he was to assist the Company as much as he conveniently could, consistently with his own occupations, provided he might be allowed to ride free upon its trains.

Carriers can reward persons not in their stated and regular employment for occasional services, or for benefits indirectly received, in other and better ways than by furnishing them with free transportation. Some of the evils which resulted from former methods were referred to in the First Annual Report of this Commission [see 1 Inters. Com. Rep. 654], and others might be named. It may be said that a pass costs the carrier little or nothing, and that when the good will and occasional good words of a person who is able to influence the direction of traffic can be obtained so cheaply it is a hardship to prevent the carrier from making use of the opportunity; but the evils in the unrestricted employment of free passes by common carriers had grown so great and had become so apparent, both to the public and to the carriers themselves, that it was deemed by Congress to be absolutely necessary to eradicate the whole system from interstate commerce in order to put an end to the abuses which had grown beyond the limits of any other regulation or control. The Law was framed accordingly, prohibiting the giving of free transportation to passengers carried under substantially similar circumstances and conditions, as an unjust discrimination, under the general terms employed, with only the exceptions made in section 22 that "Nothing in this Act shall be construed to prevent railroads from giving free carriage to their own officers or employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees."

If any person who is in position to render to a common carrier a service or a favor, by kind words or by useful paragraphs, can be properly considered to be an "employee," the exception may easily become broader than the rule; that word is evidently here employed in its ordinary signification. The revocation of Slater's pass was demanded upon broader grounds than that suggested in the protest of the land department of the defendant; he should never have received it.

The complaint is held to be not sustained.

RE RELATIVE TANK AND BARREL RATES ON OIL.

1. In deciding a case against one or more carriers who are charged with making rates which are unjustly discriminating in a certain line of traffic, the decision made upon the facts of the particular case does not necessarily govern rates in other sections of the country where the facts bearing upon them may be altogether different.
 2. In cases against carriers who were charged with discriminating un-
- 2 INTER S.

justly in their rates as against those shipping petroleum and its products in barrels in favor of those who shipped in tank-cars, the evidence among other things showed that in the territory served by the defendants the shipment in barrels was most dangerous, and also that when shipment was in tanks there was greater likelihood of return loads. The difference in rates made by the carriers was considerable; the Commission equalized this, but still permitted a charge for the weight of the barrel.

In the same case it was incidentally made to appear that on the Pennsylvania system of roads some of the conditions affecting rates on this traffic were the reverse of those above stated, and the rates had therefore been made the same by quantity whether the shipment was in tanks or in barrels. On the decision above referred to being made the rates on barrel oil were raised by the managers of the Pennsylvania system so as to include a charge for the weight of the barrel. This was claimed to be done in order to come into conformity with the action of the Commission.

Held, that the action was unwarranted. A decision on facts does not establish a principle to govern where the facts are different, and no facts which had been laid before the Commission would have authorized a ruling raising the rates on the Pennsylvania roads on barrel oil, either absolutely or relatively.

(Filed November 23, 1888.)

MEMORANDUM.

By the Commission:

Some time in the month of September last it came to the knowledge of the Commission that a circular signed by John S. Wilson, General Freight Traffic Agent of the Pennsylvania Railroad Company, and by W. J. Brundred, General Agent of the Green Line, had been issued, dated August 18, 1888, to take effect August 28, 1888, and which is in the following words:

"The rates on refined oil and other products of petroleum, between points covered by current circular, will be adjusted in accordance with the directions of the Interstate Commerce Commission, so that the charge will be on the actual weight, including therein the weight of the barrel, when in barrels."

This circular was accompanied by rate sheets which showed an advance in the rates on oil in barrels to the extent of charging the weight of the barrel at the current rates charged upon the oil before. Previous to this time the rates had been the same upon quantity whether the oil was taken in tanks or in barrels. The rate on the transportation of the oil in tanks was left at this time undisturbed.

The Commission immediately called the attention of Mr. Wilson to this circular, and in a personal interview expressed surprise at its issue, and especially at what was said therein about directions of the Commission. He was asked what directions were referred to, and in

reply he mentioned the decision of the Commission in the case of *Rice* against the *Louisville & Nashville Railroad Company and others*,* which he claimed in effect amounted to the settlement of a general principle for the country, and therefore might well be treated as a direction of the Commission. It is to be observed of this decision that it had been made, promulgated and generally distributed six months before this circular, purporting to come into conformity with it, was issued.

It was pointed out to Mr. Wilson that the circular was misleading; that it was not true in fact; that the impression it gave was that the Commission had directed the advance in rates on barrel oil which had been made; and he was told that, from the information coming by letter and otherwise to the Commission, there was reason to believe that the statement contained in the circular had been more emphatically and directly made by the agents of the Pennsylvania Company in their business communications with the customers of the road. It was suggested to him therefore that the company should either withdraw this circular and restore rates, or in some way should make full and satisfactory explanations.

No change having resulted from this conference, the Chairman, by direction of the Commission, addressed a letter on October 10 to Mr. Roberts, the President of the Pennsylvania Railroad Company, covering some other matters, but referring to this circular, as follows:

"The other question concerns a general notice purporting to be issued by the Pennsylvania Railroad Company, Green Line, to take effect August 28, 1888, and signed by the General Freight Traffic Agent, and also by Mr. Brundred."

Then, after quoting the circular, the letter proceeds:

"The current circular, as I understand it, continues the rates previously existing and charged on oil transported in tanks, and the change made at this time consisted in advancing the charges on oil in barrels so as to include the weight of the barrel in the charge made by the hundred pounds, which had not previously been done.

"This circular seems to warrant an inference—and it is an inference which we think shippers are likely to draw—that the Interstate Commerce Commission has given your company some direction in obedience to which you are advancing the rates on barrel oil. An explanation will therefore be desirable as to the particular directions to your company which were in mind, or, if directions to others were intended by the circular, then as to the directions to others which your company understand would preclude a continuance of your previous rates on barrel oil. In making response you will of course add whatever you may deem important regarding the reasons for any advance in rates."

Responding to this letter on October 16 next, Mr. Roberts says:

"I note your inquiry in reference to the circular issued by the Pennsylvania Railroad Company (Green Line) taking effect August 28 last, and signed by the General Freight

Traffic Agent of the Pennsylvania Railroad Company, and by Mr. Brundred, agent of the Green Line. I beg to say that this circular letter was issued for the purpose of conforming to what we understood to be the ruling of your Commission in the case brought by *Mr. Rice* against the *Louisville & Nashville Railroad Company*.

"We understood you to say in this case that where oil was carried in tanks the same charge should be made per hundred as where oil was carried in barrels; but that, as the tank was merely a form of car, the railroad company should charge for the weight of the barrels as well as the oil. Our practice theretofore had been to charge simply for the oil when in barrels, and not for the packages; but in this, as I understand it, we stood alone, and upon your decision being promulgated the seaboard refiners insisted that we were bound to charge for packages as well as for the oil, and thus give them the benefit of their location nearer the market. Fearing that under your ruling, in case they should resort to the courts to enforce their views, we would be without an adequate defense to such action, the circular to which you refer was issued for the purpose of conforming to your decision. Inasmuch as our rates on tank oil were already as low as we thought they reasonably should be, we were, of course, compelled to advance our rates on barrel oil to carry into effect the principle of your decision.

"I thank you for the opportunity which you have given me by your letter to explain the action of our company in these matters. Should you think a personal conference would tend to a better understanding, it will give me great pleasure to meet your Commission at a mutually convenient time and place."

Responding to this letter, under the direction of the Commission, the Chairman said, under date of October 18, after referring to another subject:

"In regard to the other matter which was in part the subject of my former letter, what your attention was specially called to was the fact that in the circular you issued the change made in rates, and which consisted in an advance upon oil carried in barrels, purported to be done by direction of the Commission. Now, as the Commission has given no such direction, the form of the circular was, to say the least, decidedly objectionable, and suggested to shippers what was not true in point of fact. The Commission was not finding fault with your change in rates, and it would find no fault with your putting such construction as you thought was warranted upon any of its decisions; but facts stated should conform to the actual state of things, and we ought not to be reported as directing a thing which we might not perhaps have even assented to.

"You have assumed in your action to take what is in the nature of a long step toward establishing a uniform classification for oil in tanks and in barrels throughout the country. I know of nothing done by the Commission up to this time that would preclude it, if the duty of making a uniform classification in respect to that article of traffic were forced upon it, from equalizing *down* so far as concerns transportation in barrels in other portions of the

*Reported 1 Inters. Com. Rep. 722; 1 Inters. Com. Com. Rep. 503. [Ed.]

country, so as to establish the like equal rating everywhere that had prevailed in your system prior to your recent action. The proper rule to apply in the territory served by your roads had not been passed upon by the Commission at all. All it has done was to cut off by decisions it had made a considerable portion of the difference made by western and southern roads between barrel and tank shipments. On your system the rates had always been the same, and the testimony before us was very strong that they ought not to be different. If the question of equalization had been forced upon us, it would have been perfectly admissible for us to look the country over and determine, on a survey of the whole field, what change would result in least injury; for considerable injury from a change such as you have made would seem unavoidable. But whatever we may have thought as to the justice of your rates as now made, if we had been compelled to decide upon them, the impropriety of stating that an advance was made by our direction seems obvious. The Commission, I assure you, has no desire to be captious in regard to any such matter. It desires, on the other hand, to treat all the carriers of the country with the utmost fairness and be particularly careful of their rights at all times; but you will doubtless agree that in respect to fair treatment the obligation is reciprocal."

In the same letter the suggestion made by Mr. Roberts for a consultation was accepted, and Mr. Roberts, with the counsel of the company, appeared at the office of the Commission, where the whole subject was very fully discussed. It was agreed in that conference that the circular above referred to was, to say the least, in its use of the word "directions," misleading, and that it ought to be withdrawn with some proper explanation. Whether the former rates should be restored was to some extent the subject of conversation, and Mr. Roberts was understood to say that the motive in making the change was not a dissatisfaction with the former rates, but in order that the action of the company might be brought into line with what were understood to be the views of the Commission.

Following this conference another circular was issued by the Pennsylvania Railroad Company, bearing date November 15. This is also signed by the General Freight Agent of the company, and by Mr. Brundred, General Agent of the Green Line, and is in the following terms:

"It has been brought to the attention of this Department that the circular of August 28, 1888, authorizing the charge for the weight of barrels containing oil, is open to the construction that such charge was made in obedience to an order of the Interstate Commerce Commission, directed to this company, requiring it. This Department deems it proper to say that no such order was issued directly to this company, but the action referred to was taken for the purpose of conforming the practice of this company, to the principles decided by the Interstate Commerce Commission in the case of *Rice* against the *Louisville & Nashville Railroad Company*, as understood by this Department."

As this circular, like the other, is calculated

to give the impression that an advance in rates on barrel oil is necessary in order to come into conformity with the decision in the *Rice* Case, and the Pennsylvania Company is still understood to adhere to the advance and to the difference in rates which was established in August, and as the Commission has reason to think that in some other cases changes in rates have been made in sections of the country where the rates on oil have not at all been considered by the Commission—the changes being made for reasons similar to those stated in the circulars of this company—it is deemed necessary to review to some extent the whole subject, in order that there may be no longer any occasion for misapprehension.

In thus reviewing the subject the Commission desires to say plainly, and with explicitness, that when making a decision upon a question purely of fact in respect to traffic in one section of the country whereby it endeavors to do justice it does not understand that it is necessarily laying down a principle which must be applied in other sections of the country, where the peculiarities of the traffic may be so different as to require an altogether different ruling in order to accomplish the like just result. Every railroad manager understands perfectly that the peculiarities of traffic in different sections have always made different treatment to some extent essential to public as well as corporate interests; that classifications differing very radically have come into existence as a consequence, and that to force conformity at once would in many cases be extremely mischievous. The Commission has in all its action had this fact in mind, and if it has in any case refrained from expressly stating it when making a decision, it has been because it had not occurred to its members that a fact so well known needed to be declared for any purpose of information to the carriers, or even to the general public.

Now, the evidence presented to the Commission in the case referred to in the circulars was very clear and strong that the differences in the transportation of oil in different sections of the country which might properly be taken into consideration in making rates, were very considerable. In the Southwest the evidence tended to show that the greater heat of the climate was calculated to increase the risk of leakage in barrel shipments through the shrinkage of barrels; and because of the fact, and of others which were given, the transportation in barrels was much more hazardous than the transportation in tanks. It also showed that when the oil was carried in tanks the probability of return loads of cotton-seed oil or turpentine was an important consideration, such loading being much more probable than return loading when the transportation was in barrels; the cars in which the barrels were taken becoming so affected with the odor that sugar and most articles of general merchandise could not afterwards be taken in them without injury.

On the other hand, the evidence from the Pennsylvania system was that return loads would there be most likely to be obtained for the box cars—iron, coal, coke, etc., being available for this purpose—and that the risks

on that system were much the greatest when the shipments were made in tanks. Mr. Brundred, who signs the circulars above recited, was sworn in the case, and his evidence seemed to make it very clear that the practice of the Pennsylvania Railroad Company in making equal rates by the quantity for the transportation of oil in tanks and in barrels was a just and proper practice whether considered from the standpoint of that carrier's interest or from that of the shipper. He was a very competent witness, for he had been familiar with the business for twenty-two years, and his evidence in support of the practice on this system of roads was very strong; nor was there evidence from any other source tending to qualify it, or to show that the Pennsylvania Railroad Company would be justified in making rates on oil otherwise than as it had made them up to that time.

The decision made in the case in which the testimony of Mr. Brundred was given, accomplished a considerable reduction in the relative rates on barrel oil on lines which had been accustomed to charge much higher rates by the barrel on oil in barrels than on oil in tanks; and in order to preclude further discriminations as against the transportation of oil in barrels, that had been previously accomplished in that section of the country by giving gross tank-car rates when the tanks differed widely in capacity, the rule of making rates by the hundred pounds was prescribed for those lines accompanied by the statement that even this would put the shipper in barrels at some disadvantage, for he must pay freight on barrels as well as on oil.

Now, it did not occur to the Commission as at all necessary that in deciding that barrel rates in one section of the country ought to be reduced it was deciding, either directly or in effect, that barrel rates in another section of the country should be increased. It was not supposed to be necessary to state, for the information of parties familiar with the subject, that the decision was made under the guidance of the testimony which had been produced, and in order to control the action of the parties defendant and not that of carriers whose circumstances and experience as they were connected with this traffic might be altogether different. The Commission would not have been warranted in that case in laying down a uniform rule for the whole country in regard to barrel and tank-car rates, for two very conclusive reasons: first, that the carriers of the country generally were not before it, and had no opportunity to present the facts relating to their sections of the country, except as they had been summoned as expert witnesses for the parties then contesting; and second, such evidence as was produced tended strongly to show that a uniform rule, if applied to all sections, would in some at least operate unjustly.

Another decision not referred to in the correspondence above recited, but concerning the same general subject, was that of *Scotfield* against the *Lake Shore & Michigan Southern Railway Company*.^{*} The traffic there in question was the west bound traffic in refined pe-

troleum oil from Cleveland, and the evidence there as in the *Rice Case*, was that the peculiarities of the traffic, not only in different sections, but as it was carried in different directions, were very considerable; and the case was decided upon the facts as they were presented, and without purpose of making a decision of general application. Like the *Rice Case* this last was a case presenting questions to be determined upon the facts shown.

Had the Commission been under the necessity of passing upon the propriety of the action of the Pennsylvania Railroad Company in giving equal barrel rates whether the oil was in barrels or in tanks, it would, on the evidence before it in the *Rice Case* have felt compelled to say that upon the Pennsylvania system the practice was a proper and just one. And the Commission must repeat that had it at the time been required to pass upon the question of the classification of oil for all the roads of the country for the purpose of bringing the rating in all sections into harmony, it might, on a survey of the whole field, have deemed it on the whole more just and politic to class oil in barrels and in tanks together for barrel rating by quantity, and thus make the Pennsylvania practice universal, rather than to force the Pennsylvania system to adopt any practice prevailing in other sections; but it might also, with entire propriety, if it was thought that the public interest would thereby be best subserved, have adopted a compromise between the two methods so as to establish a difference in the rating of barrel shipments and of tank shipments which would be less than that which was prescribed by the decision for the southwestern roads.

But the Commission, as the carriers very well understand, has not favored any sudden forcing of uniformity in classification. While believing it to be desirable, it has also believed that it should be approached deliberately and so as not suddenly to disturb business and unsettle prices.

The Commission in this paper raises no question of the good faith of the Pennsylvania Railroad Company in its issuance of either circular, and what it says is upon a concession that the company desired to meet the views of the Commission. It is nevertheless obliged to say that the assumption on which the circulars have been issued is not well founded. The Commission has made no decision applicable to the Pennsylvania Railroad Company which would require an advance in barrel rates above tank rates, for the traffic in the section of country served by that road, and it has had before it no evidence which, in its opinion, would warrant such a decision. The last circular is not objectionable in point of form, but this, like the other, is open to the construction that something done or said by the Commission requires or justifies an advance in barrel rates. This is not in the case. The Commission has no evidence before it that the rates heretofore made by the Pennsylvania Railroad Company for the transportation of oil in barrels were not fair and just and as great as could properly have been charged.

SECOND ANNUAL REPORT*

OF THE

INTERSTATE COMMERCE COMMISSION.

Hon. WILLIAM F. VILAS,
Secretary of the Interior:

Sir: The undersigned, Commissioners appointed under the Act to Regulate Commerce, approved February 4, 1887, in submitting this their second annual report as required by the twenty-first section of said Act, have the honor to say:

From the best information now available, the railroad mileage of the country on the 30th day of June, 1888, is estimated at 152,781, of which 2,312 miles had been completed and brought into operation within the six months preceding that day. The railway construction in 1886 was 8,471 miles; in 1887 it was 12,688 miles. The number of corporations represented in the mileage is 1,251, but by reason of leases or other contract arrangements many corporations hold control of and operate one or more roads owned by other corporations, and the whole number making reports of operation at the date named was 665.

WHAT CARRIERS ARE SUBJECT TO THE ACT.

The carriers who are subject to the Act are those who are "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States or the District of Columbia to any other State of the United States or the District of Columbia," etc.

There are many railroads whose lines are entirely within the limits of a single State or Territory which are controlled or managed with complete independence; but it is doubtful if, with the exception of the municipal street and elevated roads and such roads as are purely adjuncts of mines or other local interests, there is one which does not to some extent engage in interstate traffic. All of them have traffic arrangements of some sort, under which they issue passenger tickets over other roads, or honor those which other carriers issue, or issue or accept through bills of lading, or in some other way participate in interstate business. To render the roads most useful to the stockholders and most convenient to the public this becomes a necessity. But when this is done by any road, the Commission understands that the Act to Regulate Commerce applies to the party operating it; that such party should respond to the call for an annual report, and in the management of its interstate business should conform to the principles which the Act prescribes.

There may, nevertheless, be some question as to the right of a state road which engages in interstate traffic to restrict its participation at pleasure, and thereby escape obligations which the Act imposes.

In the performance of its duties during the past year it has been made apparent to the Commission that the opinion is prevalent in many quarters that railroad companies whose lines are wholly within a single State and are managed independently are not subject to the

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Act to Regulate Commerce, except in so far as by entering into joint arrangements with other companies they engage in interstate traffic, and that even in such cases the regulation to which they are subject is limited to the traffic which is covered by the joint arrangements.

In numerous cases the officers of such companies expressed surprise when they were called upon to make the annual report contemplated by section 20, and were at first inclined to insist upon their legal right to exemption. But the right of Congress to require from any corporation or organization which to any extent is engaged in interstate commerce a report upon such commerce, and upon all matters respecting the conditions and the work connected therewith which it may be important to have known, in order that the commerce may be most intelligently and effectually regulated, would seem to be very clear. And if any report may be required it would seem equally clear that it may be made to cover, in the case of a carrier whose line is entirely within a State, all the particulars in respect to organization, capital, debt and working operations, which carriers whose lines are interstate are required to furnish.

State traffic and interstate traffic are so intimately and inseparably blended in the provisions which the carriers make therefor, in the carriage, the management, the handling, and the rates imposed upon the one are so likely to affect those charged upon the other, that for the proper regulation of either species of traffic as carried on by a carrier engaged in both, it is indispensable that a complete exhibit as to both shall be made. And it is but just to say here in behalf of all the carriers who were at first inclined to object to making a report that when its importance was presented to them in correspondence, and especially the desirability of making the railroad statistics throughout the entire country as complete as possible, not merely for the immediate objects of the Commission but for the purposes of permanent public record, a courteous response was in general made and report furnished or a promise of it given. The work of the statistician was nevertheless very much delayed by the necessary correspondence, and even yet it is not so complete as it would have been if all the companies had recognized from the first that the obligation to make report existed.

Another topic in this connection which has been the subject of thought concerns the responsibility of a carrier operating a state line when for any reason in participating in interstate traffic it elects to limit the participation to one or to a few species of traffic. The claim has been made by some carriers that the participation may be limited or extended at pleasure; that they may form traffic arrangements for some classes of business and decline to make them as to others; and that over their discretion in the matter there can be neither control nor supervision. The fact that traffic arrangements and joint rates must necessarily be the subject of negotiation and agreement between carriers, and that no authority has in terms been conferred by law for the making of joint rates for them against their will is supposed to be conclusive in favor of this view.

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The Commission has not believed this view to be correct. It has believed and still believes that when a carrier is engaged in interstate commerce to even a limited extent it must conduct such commerce under the requirements of the Act. It must not give undue or unreasonable preferences or advantages to any particular description of traffic; it must afford reasonable, proper and equal facilities for the interchange of traffic; it must not be guilty of unjust discrimination. Now, if one species of traffic were provided for by a common arrangement between two or more roads, and the same roads should decline or for any reason neglect to make corresponding arrangements in respect to traffic that would be competitive, the unjust discrimination would in some cases be very plain. Whenever it should appear a violation of law would be equally plain, and the party wronged would clearly, it is believed, be entitled to legal remedy. But when the proper remedy came to be considered it might possibly, on investigation, appear very plain that nothing would give effectual relief except a requirement that the carriers guilty of the wrong should carry the competing traffic at rates prescribed for them, but measured, nevertheless, by those which they themselves had established for the traffic they had undertaken to favor.

If this may not be done, the law against unjust discrimination might in a great many cases be rendered futile and favoritism be practiced by interstate carriers at discretion. But unjust discrimination might not be altogether limited to cases like those supposed; it might be practiced in refusing to make joint rates for a traffic not competitive to any that was actually provided for by the joint arrangements. The Act applies to the carriers as legal entities and prescribes for them the obligation of relative fairness; and when it is made to appear that they are guilty of subjecting "any particular species of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever," it intends that the wrong shall be corrected. It does not apparently intend that the carriers shall be at liberty to make provision for every branch of trade but one and leave that one to be crushed with a burden of successive and combined local rates. In all this there is no hardship whatever to the carriers. The rule prescribed by the statute is one of common justice, and the more fully it is complied with the greater will be the claim of the carriers upon the public favor. It is a rule that ought to be voluntarily applied, regardless of any requirement of law on the subject.

In one case decided by the Commission *it appeared that a railroad company chartered for the building of a short road wholly within one State had built and was still owning it, but had never provided itself with rolling stock, and never itself operated the road. Instead thereof the road was used and operated as a means of conducting interstate traffic from certain coal mines upon it by companies owning connecting interstate roads. Owners of other mines on the short road offered interstate traffic for carriage, and it was refused on the claim that the road was not subject to the Act to Regulate

*Heck v. East Tenn., Va. & Ga. R. Co. 1 Inter. Com. Rep. 775. [Ed.]

Commerce. The Commission, on complaint being made to it, held this claim to be unfounded. It was its opinion that the road thus used was one of the instrumentalities of interstate commerce, and the carriers operating it in respect to the traffic offered them were subject to the same responsibilities and duties that they would be if in ownership it constituted a part of their lines. This decision was promptly accepted and conformed to, and the cause of complaint was thereby removed.

Some further suggestions upon this general subject will be found in subsequent portions of this report.

EXPRESS COMPANIES.

In the first annual report of the Commission attention was called to the carriers who conduct the express business of the country.* It was then stated that of these carriers there are several classes. Some are partnerships or joint stock associations, while some are corporations either specially chartered or created under the authority of general incorporation Acts. All these have their several names as express companies; and as such they make bargains with the railroad companies for the transportation of their freight and of their agents at a compensation agreed upon. This compensation is likely to be a definite share in the gross receipts from the traffic; and each of the several express companies has a territory of its own, so that each railroad company carries the freight and the agents of one only.

It was further stated, however, that certain of the railroad companies had undertaken to do the express business on their own lines through their own agencies. The Baltimore & Ohio did this for a time, and then sold the business to one of the existing express companies. Some of the western railroads combine for the purpose, and for convenience create a nominal corporation to do the business over their several lines and divide the net proceeds. In organization and general methods this corporation resembles some of the fast freight lines of the country, the railroad companies being the nominal corporators, and the business done being in every sense railroad business, though for convenience carried on by the several companies through a common agency.

It was further pointed out that there is no recognized distinction between what shall be considered express freight and what not, except that which concerns the method of transportation. Express freight is commonly, though not always, taken in cars attached to passenger trains, and, however taken, it is expedited beyond what is possible with freight in general; any freight is taken express for which the owner consents to pay the charges. These charges are much greater than are made upon ordinary freight of like or similar kind.

The Commission then proceeded to state and to consider the question whether this express business was subject to regulation under the Act to Regulate Commerce. The objections made thereto by the several express companies on grounds of convenience were considered and pronounced to be of little force. The further and more important question, whether the lan-

guage of the Act by fair construction applied to them, was not found to be easy of solution. So far as the business was done by the railroad companies themselves, either directly by their managing officers or indirectly and through nominal corporations created for the purpose, the Commission believed it was subject to their regulation, but it did not think that the terms of the Act were sufficiently clear to warrant its asserting jurisdiction over the express companies which are independent of the railroads. In conclusion it was said:

The Commission is of opinion that the question is one which Congress ought to put beyond question by either expressly or by designation including the express companies or by excluding them. The railroad companies that see fit to do their own express business ought not, either as respects principles or methods, to be subjected, in the management of such business, to any different control or regulation from that which the independent express companies of the country are required to obey. If the latter are not within the contemplation of the Act to Regulate Commerce, all express business, by whomsoever carried on, should be excluded. Justice to the public, as well as to that business, demands that it be governed throughout the country by rules of general application, which shall not be dependent on mere forms or on the will of those who happen to be in the control of the railroads, and therefore have the power to determine by what agencies this important portion of the business of the roads shall be conducted.

The subject thus brought to the attention of Congress has not since then in any manner been taken in hand by the Commission. It has refrained from exercising such jurisdiction as it possessed for the reason that a limited and sectional regulation, when the great mass of the business was not touched by the rules established, would be at best of little value, and might seem unjustly to put the business regulated at relative disadvantage to that which did not submit to the like control. Nor has the subject in the mean time been acted upon by Congress.

In a general way it is known to every citizen that the express business of the country aggregates an enormous volume. What this aggregate is, however, is not known, and there are no statistics in any public office which purport to give it. The national census does not show it; it is not reported to Congress. By far the larger proportion of all this business is done upon the railroads of the country, and by the use of facilities which railroad companies supply. The State gives permission to build the roads; it employs the eminent domain to compel private citizens to submit to their being built across their lands, and it subjects the franchise to the condition that the persons and the property of the people shall be impartially and at reasonable rates transported on the roads when they are built. The express company takes advantage of the state grants and superimposes an additional burden upon the eminent domain for the benefit of a business which, though resembling the ordinary business of a carrier by rail, is yet so far distinct that it escapes the restrictions which are imposed upon such carrier as completely as if it were in no manner dependent upon the sovereign grants for the means whereby it may be carried on.

The founders of the express business probably never contemplated its present growth in volume or its expansion in subjects and methods. It began with the carriage of money and other valuable packages or parcels which could

*1 *Inters. Com. Rep.* 657. See also *Id.* 448 *et seq.*, 677. [Ed.]

not be conveniently or profitably sent as freight; and though freight was also taken express where special care or charge was needed, yet the business in the carriage of freight proper was for a long time of comparatively little importance, and the provision for it was meager compared to what it now is. The ordinary arrangements of the railroad company were supposed to be adequate to the demands of freight transportation, and the services of the express-man were not demanded in respect of it.

The whole character of the carrying business of the country has greatly changed since the express business had its origin. Time has become a far more important factor than it was then; many kinds of business have sprung up to which speedy delivery is of vital importance. Of these the business of dealing in fresh fruit and vegetables is perhaps most conspicuous; the fruits of the Gulf States are sold in every northern State as well as in Canada, and those of California find their way to the Atlantic seaboard. Fresh fish and oysters also find markets thousands of miles from where they are taken. But these must be handled with care and delivered promptly or they suffer depreciation and perhaps total loss. The merchant in the interior, who formerly replenished his stock twice in the year, keeping necessarily a considerable capital invested in goods that might not find a purchaser, now finds it to his advantage to order his goods day by day to meet the immediate demands of his customers, which he can only do by the aid of a delivery more prompt than that which the freight lines afford. These are only illustrations of the general truth that time, in the transportation business of the country, has become a factor of vastly more importance than formerly, and that the agency which makes speediest delivery is likely to be the one called into requisition, even though its charges may be much the greater.

It thus happens that, in respect to a very large proportion of the freight which is offered for transportation, the railroad company and the express company, though not antagonistic, still occupy the position of competitors. Thus, if garden vegetables are to be taken from an interior point to one of the seaboard cities, the railroad company offers to take it as ordinary freight at a rate named, say 25 cents a hundred pounds, and deliver it, by trains which average perhaps, 15 miles an hour, at its station in the city of destination, where the consignee can call and obtain it. The express company, on the other hand, offers to convey it for a compensation perhaps four times as great, by trains averaging 30 or 40 miles an hour, and to deliver it to the consignee at his place of business. The question which these offers present to the consignee is whether the time saved and the delivery at the consignee's place of business are of such value to the consignee as to constitute an inducement to the payment of the additional compensation demanded.

The peculiarity of this competition is that the railroad company receives the larger share of what is paid to the express company; and this share is so much greater than it would receive for the carriage of the same property as ordinary freight that it may be tempted to make its own offers of carriage less favorable than it ought in order to discourage their being

accepted. Thus, the shipper of fresh vegetables might perhaps send as ordinary freight by a train moving 25 miles an hour, when if it moved only 15 miles an hour he would feel compelled to send by express. Any special inconveniences that might attend either the loading or unloading of his freight might equally determine him against the use of the ordinary railroad facilities, and induce a resort to the agency by whose assistance these inconveniences would be avoided. When thus in the competition for carriage the interest of the railroad company is quite as likely to be against as in favor of its own offer being accepted it is hardly to be expected that its managers will at all times show the same anxiety to make the best possible freight arrangements as they would if their interests all lay in that direction. Nor would it be surprising if a suspicion should occasionally be encountered that the service as to some kinds of freight was made less satisfactory than it ought to be, with a willingness, if not a purpose, that the express business should be gainer thereby. In a case recently before the Commission, in which complaint was made of unsatisfactory service, it appeared that the express charges on the property carried were four times the charge which was made when it was taken as ordinary freight, and that one of the complaining parties had deemed it for his interest to send by express and pay this extra charge, though he would not have done so if as ordinary freight his property had been handled to his satisfaction. Of the justice of his complaint nothing will be said here; but it is easy to see that when thus the freight and the express business are mutually related, and the manner in which the one is handled must largely affect the volume and the profit of the other, the question whether the freight service is what it ought to be is one which cannot be determined without careful consideration of how the express business bears upon it; and the difficulty in solving it satisfactorily is increased by the fact that the carriage by express is not by law subject to the same rules which control the carriage as ordinary freight.

The feature of the express business which during the past year has been the subject of most frequent complaint has related to the refusal of several of the companies, when receiving freight from another for delivery by itself, to either advance the charges of the company from which the freight is received, or to collect them for such company from the consignee on delivery. The refusal while it continued is supposed to have rested on no better reason than unfriendly rivalry, and it subjected parties employing these agencies to a great many vexations which would be entirely avoided if the express companies were required, as the railroad companies are, to "afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of * * * property to and from their several lines and those connecting therewith."

ADMINISTRATIVE WORK OF THE COMMISSION.

The general administration of the Act, during the year has been steady and progressive,

and presents few features calling for special remark. In Appendix B is given a brief statement of the formal complaints passed upon by the Commission with the points decided, and Appendix C contains a further statement of the disposition, or the present situation of all formal complaints made during the year under the thirteenth section of the Act. The great majority of complaints, however, have been laid before the Commission informally, and have either presented matters over which the Commission has no jurisdiction, or they have been adjusted with its assistance by correspondence with the complainants and the carriers, or in some other manner disposed of by the parties themselves. In most cases where a complaint has appeared to be *prima facie* well founded, the carriers have shown a disposition to consider it in an accommodating spirit, and have not been inclined to insist upon formal complaints or formal adjudications.

The most frequent complaint made has been of rates supposed to be excessive. It is commonly found that the parties complaining advance the fact as proof of the excess that less proportionate rates are made by the same carrier on other parts of its line, or that lower rates are made by other carriers in the same or other sections of the country. This evidence by itself, and without a showing of circumstances under which the rates are made, is not of much value; but the fact that opinions on the reasonableness of rates are commonly formed upon comparisons of the kind mentioned, and that great apparent disparities are continually found to be productive of discontent, is forcible reason for every carrier to keep at least its own rates in due proportion just as completely as may be found practicable, and to eliminate, when it may be done, all circumstances which have forced the laying of exceptional burdens on any locality or any species of traffic. It is always of importance that rates shall appear to be fair, as well as be fair in fact.

In one case decided by the Commission,* the principle was laid down that carriers in making rates cannot arrange them from an exclusive regard to their own interest, but that they must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice which the Act prescribes. The case was one of the transportation of railroad ties. Heretofore it is believed not to have been unusual for railroad companies to class and rate this species of property high in order to prevent its transportation to a distance, thereby keeping the ties obtainable near their own lines, for their own use, and excluding such competition by other roads as would tend to advance the market value. The Commission held this to be unwarrantable, and declared it to be the duty of the carriers to make the classification and rating of this species of property correspond to that of other property of the same general character and of corresponding value.

The principle which required this ruling is not restricted to particular states of fact; it is one of general application, and should be applied by the carriers wherever the reasons on

which it is based are found to exist. The obligation to do this has not always been kept in mind. It is believed that railroad companies in some cases have practiced the giving for season or mileage tickets, to the keepers of seaside resorts, rates which were exceptionally low, while declining to give corresponding rates to other points on their lines. The ground on which this is done is understood to be that though the number of such tickets sold may be small, the occupations of those who purchase them and the inducements to amusement and recreation which they supply, naturally attract to their resorts many other persons who pay the regular and customary rates, and the carrier therefore consults its interest in accommodating the owners of such resorts with a specially favorable ticket. But this is not believed to be a sufficient reason for the discrimination. A large shipper of freight might on the same grounds and with as much legal justification be given exceptionally low rates because of the business his influence brings to the carrier. The Act does not contemplate that influence shall either directly or indirectly be paid for by giving advantages in transportation; and a discrimination that is unjust is not rendered legal by the carrier finding a profit in it.

The Commission is confident that during the year very considerable advance has been made in the direction of putting rates upon a better proportionate basis than they have been on heretofore, and to any extent in which this has been accomplished the public is benefited. Comparatively little fault is now found with the general principles on which freight rates are claimed to be adjusted; it is from the misapplication of those principles that inequalities and injustice most commonly result.

Early in the present year the Commission became satisfied that underbilling of freight was being somewhat extensively practiced. This was not confined to any particular road or group of roads, but was prevalent even on lines which at the time were protesting most emphatically their conformity to the requirements of the law. Officers and managers of the roads condemned the practice, but nevertheless traffic was admitted upon their lines on which the billing was short, when they could have known and ought to have known the facts. The Commission made careful investigation of the whole subject, and published its conclusions.[†]

One difficulty in dealing with this device, whereby particular shippers obtained unjust advantages, was encountered in the fact that in each particular case the carriers assert that they did not know of its existence; that they were imposed upon by the shipper or were unwittingly led into error by the fraud or ignorance of an agent; and proof to the contrary was difficult to obtain. Nevertheless, in most cases some degree of negligence not easily excused was apparent. The Commission considered at some length the excuses offered, and the result of its action is believed to have been that the carriers became more active and vigilant in holding their agents to their duty, and in many cases by concurrent action established precautions for the detection of such frauds by

*Reynolds v. Western N. Y. & Pa. R. Co. 1 Inters. Com. Rep. 685. [Ed.]

shippers as had theretofore at times been perpetrated with impunity. These precautions rendered future excuses on their part less plausible, and the frauds, it is believed, have in consequence become very much less common than formerly. But they are undoubtedly still occasionally committed, sometimes with the connivance of agents and sometimes through deceptions which the shippers practice upon them. The Commission thought then and still thinks that the Act ought to be so amended as to impose a penalty upon shippers who, by false billing, false classification, false weighing or false report of weight, or by other devices, knowingly and willfully obtain transportation for their property at less than the regular rates.

Only two complaints were made during the year of the giving by carriers of free transportation of persons as an unlawful discrimination; neither of these was found to possess any merit, and the complaints were dismissed upon hearing.* The Commission has every reason to believe that free transportation of persons not entitled to it under the exceptions contained in the Act is now rare, except when given in consideration of real or pretended services, or as commissions are paid, or when ostensibly limited to state transportation. Passes are undoubtedly given to a considerable extent which are made good between points all of which are in the same State, the party giving them understanding that the Act is not violated thereby.

It is probable that in some cases this understanding is erroneous. When the pass is issued for use in respect to interstate traffic, so that the giving of it is in effect the giving of a preference or advantage to the recipient over others not thus favored, it is believed that the limitation of use within a single State is unimportant to the question of legality. A rebate given on interstate traffic, but measured by the transportation within a particular State, would be no less illegal than if allowed regardless of such a limitation, and such a case seems strictly analogous to a pass given to influence interstate traffic but limited in like manner. The important fact is that something of value is given, and the effect of giving it is such an unjust discrimination as the statute condemns. And it may be doubted whether the limited pass is not illegal in any case not coming within the exceptions of the statute, where it is given to be used or is actually used for free transportation on part of an interstate journey.

The decisions made by the Commission within the year, when against the carriers, have been accepted and conformed to with reasonable promptitude except in two instances. The first of these was the case of the *Kentucky & Indiana Bridge Company* against the *Louisville & Nashville Railroad Company*,† which involved some very important questions of law as well as of fact, and was also, as the Commission understood, only one part of a controversy some branches of which were not subject to the authority of the Commission and had already been made to some extent the subject of judicial cognizance. It was entirely proper, therefore, that the whole controversy should

be referred to the proper judicial tribunal, and this is understood to have been done. The other case is still the subject of consideration by the Commission.

THE LONG AND SHORT HAUL PROVISION.

Since the issue of the first annual report of the Commission very much has been done in the direction of bringing railroad rates into conformity with the general rule of the 4th section of the Act, which makes it unlawful for the carrier "to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer distance." In the section of the country north of the Potomac and the Ohio and east of the Missouri, the cases in which the greater charge is made for the shorter transportation are few and their circumstances are such that complaint is not often made that they operate oppressively.

In July of the present year, however, the Chicago, Saint Paul & Kansas City Railroad Company,‡ a company having a line from Chicago to Saint Paul and Minneapolis, and which theretofore had not claimed any privilege under the Act of making the greater charge on the shorter hauls, announced to the Commission its purpose to reduce very largely its rates between the termini of its road without reducing intermediate rates, the effect of which would be that from either terminus to a number of intermediate stations the rates upon any consignment would be greater than they would be on the same property if carried through to the other terminus.

The company laid down two propositions as justifying its action: first, its rates to intermediate stations were perfectly just and reasonable, and therefore there was no injustice in maintaining them; and, second, the rates between its terminal points were forced down by the unfair competition of another line, which had previously promulgated the like reduced rates and thus compelled its competitors to meet them. The reduced rates, it was insisted, were altogether below what was reasonable, but the action of the other company made them all that it was possible to obtain, and established conditions and circumstances so dissimilar to those prevailing at intermediate stations as to justify the action taken and bring it within the protection of the statute. The Commission immediately ordered an investigation and gave very full hearing to all parties interested at a convenient point in the territory affected by the rates.

On the hearing it was made to appear that the facts regarding the reduction of rates between the terminal points were as had been claimed; a competing company had reduced them to a point much below what they had commonly been on all the roads, and the evidence tended very strongly to show that this made them unreasonably low. The road which was being investigated claimed that it had no alternative but to meet them. There was no such pressure of competition at the intermediate

*Griffie v. Burlington & Mo. Riv. R. Co. *ante*, 194; Slater v. North. Pac. R. Co. *ante*, 243. [Ed.]

†*Ante*, 102. [Ed.]

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‡*Re Chicago, St. P. & K. C. R. Co. ante*, 55, 137. [Ed.]

stations as was felt at the terminals, and the circumstances and conditions governing the making of rates were, therefore, it was said, altogether different at the terminal stations to what they were elsewhere. The company could make them what they ought to be at the intermediate stations, but was compelled to accept what the competitor would allow it to get at the termini.

The reasoning seemed strong and was certainly plausible. But the question involved was a question of the construction of the Act; its answer was to be arrived at on consideration of what was probably the legislative intent. It was seen that the circumstances and conditions relied upon as entitling the carrier to make the exceptional rates were not circumstances growing out of natural causes, they were not the outcome of competition by water routes; there was no peculiarity of the line which would make the rates at the termini and at other stations relatively just; the only dissimilarity in the circumstances and conditions which attended the making of the rates at the different points was that at the termini there was sharp railroad competition and at the intermediate stations there was not.

But this was a state of things that, at the pleasure of the railroad companies acting generally, or even of single companies disposed to act in hostility, might be made to exist at any point of railroad connection in the country; and if the greater charge on the shorter haul was admissible in the case under investigation the rule of the fourth section would be of no practical value whatever. Any railroad company might by its action absolve a competitor from its obligation, and be itself absolved in return. The Legislature never intended this consequence. It did not intend, as the Commission believed, that the carriers subject to the law should at pleasure thus make the rule of the statute ineffectual.

The carrier under investigation conformed to this conclusion, and graded its rates accordingly, and the objectionable rates made by the carrier complained of were also soon discontinued.

The transcontinental rates have received a large share of the attention of the Commission during the year.

Among the cases which were mentioned in the former report as then pending were those of the Lincoln, Nebraska, Board of Trade against the Burlington & Missouri River Railroad Company and others, and Plummer, Perry & Co. against the Union Pacific Railway Company and the Southern Pacific Company. In these cases it was claimed that the 4th section of the Act to Regulate Commerce had been violated in charging from Pacific coast points to Lincoln more for the transportation of freights than was charged to Omaha. The cases were fully heard at Lincoln, where a large amount of evidence was taken. They were found to present peculiar and difficult questions growing out of conditions which could not be here stated in a paragraph, if it were important to state them now, which it is not.

The cases were taken under advisement, but before decision was announced the railroad

companies forming the through lines changed their tariffs so as to give to Lincoln the same rates from the Pacific coast that were given to Omaha. As this was all that could be claimed in respect to rates for the future, the Commission abstained from any expression of opinion and gave leave to withdraw the petition.* Money claims were made against the defendants for prior violation of the Law, but as the opinion of the Commission upon them would not be binding upon the parties, the Commission followed its usual course in such cases and refrained from expressing it.

The result thus obtained was largely determined by the action of the Commission in the case of Martin against the Southern Pacific Company and others, known as the *Denver Case*. This case presented the question whether the transcontinental roads could properly exact a greater charge for transportation from the Pacific coast to Denver than to Kansas City, some 600 miles further east. It was fully heard and was treated as involving the entire subject of relative rates as between the shorter and longer hauls on all the transcontinental lines.

At the time of the hearing the carriers relied upon competition by the Canadian Pacific Railroad Company, a foreign corporation, as the justification for the rates made. It appeared that about the time when the Act to Regulate Commerce took effect, the Canadian line, then recently opened from Vancouver Sound to various points of connection with lines in the Eastern States, entered upon an active competition for through business in both directions between all Pacific coast points and all parts of the United States on or east of the Missouri River. Its policy was to make rates upon leading articles a little below the rates made by transcontinental lines in this country. This was designed to compel the recognition by the latter of a general principle which it asserted, that rates upon a circuitous line between like terminals should be lower than rates upon more direct lines, in order to enable the longer route to obtain some portion of the traffic; or, in other words, that natural disadvantages, operating to the prejudice of a route competing for the business in question, should be compensated by the privilege of offering to the public a lower rate.

In pursuance of this plan it arranged with a steamer line leaving San Francisco weekly for Vancouver to take shipments of freight upon through rates to various points in the Eastern States; this competition was so managed as to make itself felt successively upon different articles, consigned to various points, and was so persistently followed up that it seriously affected all through transcontinental business in both directions. Through rates were reduced on April 27, 1887, and again on May 25, 1887, and at the time of the hearing of the *Denver Case*, in December, 1887, remained at figures which were extremely low in consideration of the length or haul and the expensive operation of the roads concerned in the traffic. Intermediate and local rates meanwhile remained as originally established on April 5, 1887.

The pressure of this situation in respect to the through business brought about an ar-

*See *Lincoln Board of Trade v. Union Pac. R. Co.* ante, 101. [Ed.]

rangement among the lines in January, 1888, by which the Canadian Pacific became a member of the transcontinental association of roads and agreed with the other lines upon through rates considerably higher than the low rates which previously prevailed. It was understood that the Canadian Pacific should be allowed certain differentials, or, in other words, that the charges by that line should be less by from 5 to 10 per cent on the various classes than the rates charged upon the lines situated in the United States. And, no differentials being provided for at Missouri River points, the Canadian Road was understood as retiring from competition in respect to that business. This plan of agreed rates with differentials in favor of the longer Canadian route still remains in operation.

One practical effect of the arrangement thus consummated was to raise local rates at points near the terminals of the different roads, by precisely the same amount that was added to the new through rates. When the hearing in Nebraska took place, in March, 1888, the whole subject as it then stood was carefully investigated, and a decision in the *Denver Case* was announced in May,* to the effect that traffic from the Pacific coast to Missouri River points did not then appear to be subject to any actual competition or controlling force by carriers not subject to the provisions of the Law, and that there was no fact apparent which could justify the greater charge for the shorter haul in the case presented.

This decision was accepted by the carriers as requiring the adoption of a new system of making rates upon the transcontinental lines. The subject was entered upon, and on September 1, 1888, an entirely new system of tariffs was prepared and put in operation, affecting rates to and from all points upon nearly 40,000 miles of road, operated by eighteen different companies.

The changes made were very radical, and were in the direction of conformity to the 4th section of the Law. They resulted in many reductions at intermediate points, in part compensated by some increase upon through business. As at first adjusted serious inconsistencies and discriminations were discerned in the schedules, which attracted public attention, and were investigated by the Commission.† Many changes were made and more are in contemplation; suggestions made by the Commission to the representatives of the lines have been promptly acceded to. The ocean competition is still recognized by the roads to some extent as controlling through rates upon overland traffic, and is relied upon as a justification for somewhat higher rates to points this side of the Pacific coast terminals than are made to points situated directly on the Pacific coast; it is claimed that freight is taken to the latter points at low rates by clipper ships to be there consumed or sent forward to points in the vicinity at local charges. With this exception, and some others of minor importance, the rule of the short haul provision of the Law has been put in force upon the transcontinental roads, where its operation and effect can be observed

under what now appear to be favorable conditions.

In the Southern and Southwestern States the Commission has had reason to think the carriers were moving more slowly in bringing their tariffs into conformity with the general statutory rule than in other sections. The Commission recognizes the existence of peculiar difficulties in those States, growing out of the fact that water competition is felt at so many points, at some of which it is of controlling force; but this would not excuse the failure to keep the rule of the statute in view, or to press towards it as rapidly as was found to be practicable. Not being satisfied that this duty has been sufficiently apprehended and observed by the carriers, the Commission has ordered an investigation to be made of the whole subject on the 18th instant, at its rooms in Washington, when it is intended to make thorough examination of the existing rate sheets, and to give all parties concerned an opportunity to be heard.

It is not improbable that the carriers by land, in competing with carriers by water, have sometimes pressed the competition beyond what was reasonable and beyond what the law would justify. Rate sheets in some cases indicate that carriers by rail consider themselves justified in making any rate, no matter how low, that will take business away from a water carrier. When, however, the question is one of justification for making the greater charge on the shorter haul, the reasonableness of the lesser charge is in issue as much as that of the greater, and the justification ought to involve considerations affecting the public good.

But it can hardly be for the public good that carriers by water should be subjected to unreasonable and excessive competition; they ought, as much as the carriers by rail, to be allowed to charge remunerative rates; and the carrier by rail does not therefore make out a complete case, when called upon to justify extraordinary differences between his rates at a point of water competition and at other points, when he shows that at the former he made the very low rates because otherwise he would not have obtained the business. It may be that when the case is examined in the light of the public interest it will be manifest that he ought not to have had it; that in taking it he had pressed the competition to an extreme which, while it harmed the carrier by boat, was harmful also to points on the railroad by reason of the great disparity in rates which it created, and also because of its producing so little revenue that the burden upon other traffic was increased in consequence.

Undoubtedly the public good is best subserved when all the carriers which the needs of the country require are suffered to do business at reasonable compensation, and when their rates as between all their patrons are relatively as nearly equal and just as under the circumstances they can be made. These are facts which are sometimes overlooked in the making up of railroad rate sheets when water competition is to be taken into account and its legitimate influence allowed for.

A pending case, not yet fully submitted, presents the question of justification of rates from local stations on the New York, Philadelphia & Norfolk Railroad for the transport-

**Martin v. Southern Pac. Co. ante*, 1. [Ed.]

†*See Re Tariffs of the Transcontinental Lines, ante*, 203. [Ed.]

tation of freights to New York and Philadelphia, which are greater than are made from Norfolk to the same destinations. The contention of the railroad companies is that at Norfolk it does no more than to meet the rates made by the steamers, and that if required to equalize its rates as between Norfolk and other stations it would be forced to raise the rates at Norfolk, since the lowering of them at other points would be ruinous. But to raise the rates at Norfolk would be to go out of the business at that point.

A railroad company disposed to deal fairly with steamboat owners in the competition for business is exposed to some disadvantages growing out of the fact that its competitor is not required to publish his rates or to maintain them. If the regular lines of boats were required by law to do this, it would tend to put the competition between carriers by boat and carriers by rail on a better footing, and would, as we believe, be in the end advantageous to both. A fair and open competition is always better than one in which one party or the other is constantly tempted to push his own measures to an extreme because he suspects his competitor is doing the same thing and has no means of knowing what the actual facts are.

THE FILING AND PUBLICATION OF TARIFFS.

The provisions of section 6 of the Act, which require that all local and joint interstate tariffs, classifications and rate sheets be filed in the office of the Commission, have been enforced from the outset, and they have been found of the utmost value. It is difficult to see how any proper understanding of the traffic arrangements in use could otherwise have been had; it enables the Commission to keep abreast of all changes and to exercise, to some extent at least, the supervision authorized by the twelfth section of the Act. The documents received, varying in size from single sheets to large volumes, are delivered to the officer in charge of the subject of Rates and Transportation, where they are receipted for; a general examination of their contents is made, and they are then distributed in file cases appropriated to the different transportation lines, indexes being kept so far as necessary. The system employed makes it possible for the Commission to ascertain at any time and with very little difficulty the legal rate in force for the transportation of passengers or of any article of freight between any points throughout the land.

The organization of this division embraces an auditor, an assistant auditor, a stenographer, ten clerks, and a messenger. One thousand and twenty-one separate files are kept, among which all schedules and documents relating to rates are distributed as rapidly as received. The receipt of about 500 tariffs is acknowledged daily, making about 160,000 per year. The total number received since the organization of the Commission is about 270,000.

In addition to this, contracts, agreements and traffic arrangements are also required to be filed with the Commission, and are arranged and indexed in a way to permit of their immediate production and examination at any time.

Much still remains to be done in order to assure a complete and adequate supervision of the transportation schedules furnished by the carriers. No uniformity in form has yet been

reached, nor has any general system been adopted under which they are prepared. Amendments to the Act, now pending in Congress, are designed to enable the Commission to enforce the adoption of better and more systematic methods, which are greatly needed, as well as to secure more complete publication of such schedules as are required to be kept for public inspection in every depot or station upon every road.

Certain circulars and orders issued to carriers in relation to the filing of tariffs and similar subjects are contained in Appendix D. The same appendix also contains the Rules of Practice in cases and proceedings before the Commission, together with a statement showing in detail the expenditures of the Commission for the period ending June 30, 1888, including the number of persons employed and the amount of compensation to each.

THE OPERATION OF THE LAW.

To what extent, if at all, the administration of the Act has been harmful to the carriers is a subject upon which the views of railroad managers have from time to time been publicly expressed, sometimes to the effect that the damage has been very considerable. The Commission is possessed of no evidence showing that the general result has been otherwise than beneficial. In so far as the Act puts an end to the practices before indulged in, which operated to the public detriment—such as the improper granting of free transportation, the giving of special rates and rebates, and the making of unjust discriminations—the question whether the revenue of the carriers was injuriously affected may well be considered immaterial, since the prohibition was demanded on grounds of common justice and public morality, and ought to have been declared, even though the profit from such practices were unquestionable.

But the Commission believes that such prohibition tended to benefit the revenues of the carriers and not to deplete them. It made all traffic more generally and more evenly remunerative, and at the same time to some extent relieved very much traffic from the weight of burdens which were before relatively unjust. The requirement of notice of a proposed advance in rates was also one of obvious justice, and the Commission does not often hear complaint of it. The loss most frequently brought forward as a subject of complaint is that which results from the rule of the fourth section, which had for its object the doing away with the practice of making the greater charge for the shorter transportation on the same line in the same direction. But as the Act expressly makes exception of cases in which the circumstances and conditions are dissimilar, it is not conceded that the complaints of the Act on this ground are well founded. If the circumstances and conditions of the longer and the shorter haul are substantially similar, the greater charge on the shorter haul cannot be just, and the carriers ought not to desire the privilege of making it.

Unquestionably the railroad business of the country has suffered many and very severe losses during the past year. But these have not been due to the Act to Regulate Commerce.

One of the most serious of these came from a strike of engineers on the Chicago, Burlington & Quincy Railroad. This strike was so important, not only to the parties concerned, but to the whole public, that the Commission had intended to make it the subject of investigation for the purpose not only of sifting the facts and of presenting a reliable history, but also for the purpose of such lessons as the facts might teach. As this became impracticable, it is only necessary here to say that the losses of the railroad company resulting from the strike was simply enormous, while those of the brotherhood by which the strike was ordered and sustained, were, perhaps, in proportion, equally great. The strike began February 27, 1888, and was for several months a seriously disturbing factor in transportation in the whole region reached by the system of roads aimed at. It was also the cause of some subsidiary or sympathetic strikes; and as the main strike has never been declared at an end, the injurious consequences have perhaps not wholly ceased up to this day.

Serious impairment of net revenue has in several cases resulted from the construction and opening of new lines of road, involving great outlay, and at first producing comparatively little income. In some instances, such new lines have paralleled existing roads which were adequate to handle the existing traffic. In such cases they have not only imposed new burdens upon the systems responsible for their construction, but have resulted in the diminution of receipts upon competing lines.

More serious consequences have resulted from rate wars. During a considerable portion of the year rates have been unsettled in the Northwest, and from time to time the relations between the carriers, always sharply competitive, have resulted in destructive warfare. This cannot, however, with any justice or to any extent be claimed to have resulted from the Act, or from its administration. In so far as the Commission has had occasion to deal with questions at issue in that section of the country the effect of its decisions has been towards an improvement in the relations between the carriers instead of towards the originating or intensifying of controversies.

The same may be said of the serious contention in respect to rates, which, at the time of the preparation of this report, is in progress between the trunk line roads. As is commonly the case in rate wars, the existing difficulties had their origin in suspicions on the part of the carriers respectively that their competitors were not observing the open public rates, and the reductions were made professedly for the purpose of recovering the proportions of freight which those entering into it claimed was their due, but which they were not getting because of the secret or unlawful practices of others.

Efforts of the Commission to obtain from the parties evidence of the practices they suspected have been wholly ineffectual, and the war of rates has proceeded without the possibility of any external authority interposing effectually to bring it to an end.

The legal right of the carriers to reduce their general scale of rates to any extent under the law as it now stands is believed to be unquestionable; they have proceeded to do so to a

destructive extent, and whether with any ultimate benefit to themselves it is at least very questionable.

What should be distinctly understood in the matter is that the immediate losses in such cases are not in any proper sense due to the Act to Regulate Commerce. They are, on the other hand, due to violations of the Act; and if those engaged in reducing rates because of supposed improper practices by their competitors were able and were disposed to produce evidence of the practices the existence of which they charge, the enforcement of the Law based upon such evidence would tend to the common benefit of all concerned.

RATES UNREASONABLY LOW.

In one case which came before the Commission within the year complaint was made of certain rates made by a railroad company as being unreasonably and destructively low.* The carrier making them was competitor to several others for the freight passing between large cities several hundred miles apart, and the others averred that if compelled to meet these rates, and to continue them, they would in time be forced into bankruptcy. The only alternative would be the putting up the rates to intermediate points so as to make the greater charges on the shorter hauls; and this the law would not permit. Under such circumstances the very low rates which were complained of were alleged to be neither just nor reasonable, and therefore it was claimed they were forbidden under the Act to Regulate Commerce, and the Commission was asked to so decide. At the same time evidence was given which it was claimed tended to show that the carrier making the obnoxious rates was not obtaining from its business a revenue adequate to its necessities; but whether the evidence was convincing the Commission did not have occasion to say.

If it is important to the public that a railroad once constructed should be maintained, the ability to make charges that will render its maintenance possible is also of public importance. When, therefore, the rate sheets are such that reasonable returns are not probable, a public injury is threatened, and the injury is accomplished when the natural result of bankruptcy is realized. It is of little moment that in the mean time the public reap an apparent benefit from the very low rates; the apparent benefit is almost always illusory, for the unremunerative rate sheets are seldom evenly balanced; they favor particular towns or particular interests, or they go spasmodically up and down, and thus unsettle prices; they are commonly made quite as much to injure competitors as to benefit the party making them, and it will generally be found that reasonable rates adjusted equitably over the whole field of service would have been as much better to the community as to the carrier itself. This, however, may not at the time be apparent; the public perceives what seems to be a benefit from low rates, and the attendant evils, which are not so obvious, may possibly not be perceived at all.

The fact which the public mind does not readily grasp in such cases is that the very low rates may be made by the carrier with full knowledge that they are not remunerative.

**Re Chicago, St. P. & K. C. R. Co. ante, 137. [Ed.]*

Even in the plainest cases the truth is not always generally accepted; the rates are very properly taken as *prima facie* evidence of their adequacy, and to the public the evidence seems conclusive. And why should it not when the only legitimate business purpose in building railroads and operating them afterwards is to make money thereby?

Unfortunately the purpose to make money from railroads is not a purpose in every case to make money by legitimate operation.

A railroad may be built by those who calculate to make their profit out of the building and who expect the road, when built and paid for in money or available securities, to pass into the hands of others with whose profits or losses the constructors will have no concern. It is unquestionable that many roads have been built for which there was no legitimate demand at all adequate to their cost. The promoters may clearly perceive this and yet contemplate a profit to themselves; but the profit must then be looked for in the transfer of inevitable losses to the shoulders of others. If this is not accomplished before the road is put in operation, the most feasible method of accomplishing it afterwards may be to make the road as injurious as possible to other roads, until some party having a valuable property to protect will take the obnoxious road in order to stop its destructive operations. Before the road is disposed of it is made use of with some such purpose in view; its rates are devised not in the expectation that legitimate revenue for its needs will be realized, but that competitors may feel its power to do mischief.

The public does not therefore misjudge when it assumes that the object the promoters have in view in building the road is to make money thereby, but it is altogether astray as to the particular means whereby the object is expected to be accomplished. Many very costly roads have been built from which the builders have realized large fortunes, but which, nevertheless, in the hands of stockholders, are worthless as a source of profit. The contractors may have obtained their pay; but the foreclosure of mortgages given to secure the debt for construction has cut off the original stock, and eventually they become mere adjuncts to other roads which they might otherwise injure; as the New York, West Shore & Buffalo has become an adjunct to the New York Central, and the New York, Chicago & Saint Louis to the Lake Shore.

In estimating the public benefit from a road thus built it is necessary to begin by charging to the debit side the capital sunk in it and the damage, if any, which it has inflicted upon other roads. The benefits may be considerable. Every road supplies some local communities which would otherwise be without railroad facilities and gives to other points the benefits of competition; but the debit side is likely to be greatest until the time comes when if it had not been sooner built the gradual increase in population and business would have created a demand for it. But so soon as the management has a legitimate revenue in view its rates must be so graded as to produce it, and they are very likely to be then made higher than would have been necessary had the

road been demanded by business needs at the time of construction.

A road built in good faith and in the expectation of legitimate profits from its business is susceptible of being afterwards used for stock jobbing purposes; and when it is so used its rates, instead of being calculated with a view to the permanent interest of the road, may be arranged with a view to make the results operate most effectually for the time being upon the judgments or the imaginations of the stock board. To this end the interest of stockholders may be sacrificed just as remorselessly as the interest of rival roads or of the general public. Roads from which no fairly earned dividend could reasonably be expected have thus for many years been made the subject of stock speculation, and the manipulation of rates to that end has been productive of infinite mischief.

The chief evil has not been that the public has been misled as to what are reasonable rates; but the stock speculators controlling the roads have stood before the public eye as representatives of the whole class of railroad managers, and the devious ways of a few have been looked upon as characteristic of all. Declaring a dividend which has not been earned is among the devices to which persons who are at once managers of roads and stock jobbers resort. The persons likely to be most seriously wronged in such a case are those who are deceived into buying the stock for more than its value; and they are doubly wronged; first in the purchase, and afterwards in the road being charged with the burden of making up from subsequent earnings what has improperly been taken from the company's treasury. But every stockholder not a party to the transaction and cognizant of the facts is wronged, with the sole exception of those who receive the dividend and who also dispose of their stock.

In all business corporations the stockholders are changing continually. By the rules of common right and justice the stockholders who are such at the usual time for deciding upon dividends are entitled to what has been earned during the period which the decision upon the question of dividends will cover, and they are entitled to no more. To pay a dividend not earned is to give money to some who have no just claim to it, taking it directly or indirectly from the property of others. But even if there were to be no change in stockholders, the very parties who received the unearned dividend would be wronged, since the power of the road to earn dividends in the future would almost necessarily be diminished. No effectual means of prevention has yet been suggested other than legislation to make such acts criminal, or the establishment of some public supervision of accounts and the sanction of the dividend by some public authority.

The reports which interstate carriers are required to make to the Commission may have a conservative influence, since they will increase the difficulty of making a show of profits when profits have not been realized; but accounts are easily manipulated so as to be made to tell deceptive tales, and nothing but an investigation that goes back of the report to the original accounts will enable the deception to

be uncovered. But in existing legislation we find nothing which seems to contemplate that special investigation will be entered upon with no other purpose than to prevent wrongs to the corporation itself or its stockholders.

The cases mentioned are far from being the only ones in which persons having control of railroads may deliberately make insufficient rates in the expectation of profits to be indirectly and improperly derived therefrom. Every case of rate war may be regarded as one of this character. Present profits are sacrificed on a calculation that by crippling a rival or forcing an agreement or compromise on some matter of contention the loss will in time be more than made up. In the great majority of such cases the losses are found in the end to exceed the gains, and the difficulty of getting back to reasonable rates after the war is ended is sometimes very serious. Then there are a great many cases in which very low rates may be given to build up particular places or interests when corresponding rates could not be made universal. Though rates which are unjustly discriminating are forbidden by law, the line between what is admissible and what is illegal is not so distinct but that serious errors may be and often are committed, perhaps without any definite purpose to disobey the law. In such cases, rates made even through error of judgment too low, are likely to be balanced by others made proportionately too high.

The statute, in its requirement of reasonable and just rates, has had in view the protection of the public from extortion and from unfair discriminations. It does not assume that railroad companies will need protection against their rates being made unreasonably low, and it has not conferred upon the Commission any power to order an increase of rates which it can see are not remunerative. In general, therefore, it may be said that railroad managers possess the power to destroy the interests not only of their rivals, but of their own stockholders, if they will recklessly make rates that lead to bankruptcy.

In some cases, however, the exercise of the authority of the Commission to prevent acts forbidden by the statute may indirectly have a conservative influence in respect to rates. This may be the case when discrimination between localities or between different kinds of business is complained of. A railroad company ever so much inclined to give ruinously low rates to one locality or to one species of traffic, will hesitate to do so when it understands that it will be done at the peril of having its rates to other localities or upon other kinds of traffic cut down proportionally. The liability to have this done is perhaps not as thoroughly understood as it should be. A railroad company can have no right to carry grain or dressed meats at nominal rates, and at the same time maintain highly remunerative rates on other articles of corresponding value, bulk and ease of carriage. The law cannot justify dealing with one species of the traffic by itself and waging a war of rates in respect of it, while at the same time keeping up rates upon other articles.

The tendency of the unreasonably low rates on the one species of traffic is in the direction of unreasonably high rates on others, and those

who are charged the high rates, even though the charges are not at the same time increased, have a right to demand that the burdens of transportation be more equally distributed. A few years since one or more of the trunk lines were carrying immigrants from New York to Chicago for \$1 each. When all commissions are deducted it is doubtful if they are obtaining very much more now. What legal right a carrier can have when making a charge like that to one class of passengers, to charge another \$18 is not very obvious. If the one charge is admissible on business rules, the other must be extortionate. The question whether the larger rate is not reasonable "in and of itself" is not the question which such a case presents. The true question is one of unjust discrimination. And the fact can not be ignored that the losses suffered from the unprofitable traffic must somehow be made up, and all paying traffic may in some degree be assumed to share them.

The importance of steady rates may be shown by placing in juxtaposition expressions of views on the subject made by persons speaking from altogether different standpoints. The president of a leading railroad line, in a recent public utterance, speaks of "the enormous importance of reasonable public and stable rates to the whole business of the country. Credit and prosperity in every business are dependent upon the credit of railroad securities, and those securities have now reached such an enormous volume that they furnish the real basis of our whole financial structure." A business man of Kansas City, not connected with railroads, and desirous of bringing them under further control, writes to the Commission:

The frequent and violent changes in railway rates which have taken place during the past few years, and which seem likely to be unabated, seem to me to call for new legislation in the way of amendment of the Interstate Commerce Bill. These changes are ruinous to all business men, as well as the railways, and are the cause of great discontent among shippers everywhere, and especially to the farmers. What is needed is a fixed permanent rate, which shall be reasonable, and which can be counted upon by any one engaging in business.

Such views are being continually expressed, and they well illustrate the opinions which prevail generally in business circles.

Steadiness of rates, then, is an object to be kept in view in the public interest. In a recent passenger rate war between roads extending east from Saint Louis joint rates were in some instances reduced several times in the course of a single day, until they were made absurdly low—the reduction being sometimes made without even waiting for the consent of connecting roads, so that parties who had purchased tickets would have found them not honored before they reached their destination, and been subjected to great annoyance before redress could be obtained had the connecting roads declined, as they might have done, to accept the tickets and share the losses. When the general passenger agents had sufficiently subdued their belligerent mood, the rates were suddenly advanced, with the inevitable result that parties who had calculated on the low rates and been enticed from their homes or seduced into taking any action in reliance upon them, found themselves compelled to pay more than they had reason to expect; they doubtless felt something

the same sense of being wronged that the people of a neutral territory may be expected to feel when it is overrun by the armies of belligerents.

Very low rates may possibly be injurious to the public interest even when they are relatively just and are steadily maintained. This may be so irrespective of the fact that it is always for the interest of a country that the capital invested in any great and necessary industry should be reasonably remunerative. Independent of any returns to stockholders it is important that rates be remunerative, because of the effect that insufficient revenue may have upon the service performed for the public.

No State, in the exercise of its controlling authority, would ever deliberately prescribe for a railroad company a tariff of charges which would fall below a reasonable compensation for the service performed. Abundant reason for abstaining would be found in the fact that it would not be for the interest of the citizens that it should do so. The people want good railroad service, and they ought to have it at fair rates; but to give them this it is needful that the road be kept in good condition and well equipped; that the trains be sufficiently manned and well handled; that competent servants be employed and fairly paid, and that the company avail itself of all new appliances which are calculated to make the service more speedy, more convenient, or more safe.

But good service and unreasonably low rates are antagonistic ideas; if the latter are insisted upon the former is not to be expected. Many times in railroad history it has been found on inquiring into the cause of some great railroad calamity that it was due to the fact that some bridge had become weak, some tunnel was insufficiently guarded, some machinery defective, or some employé incompetent or wanting in vigilance because of overwork. If the road was prosperous the management would thus be shown to be inexcusable, perhaps criminal; but if the road was not prosperous, and for some reason the management had been forced to make such rates as would not give the necessary revenue for a safer service, the blame for such a calamity may be fairly subject to apportionment. The public can never be in the wrong in demanding good service when fair rates are conceded; and an enlightened public sentiment will never object to fair rates when it is understood that good service is conditional upon them.

But the public sentiment will never be enlightened as to what are fair rates, and disposed steadily to assent to their maintenance, so long as railroad managers in their absurd and destructive wars are perpetually and in the most emphatic manner, by cutting fair rates, informing the public that something less—perhaps greatly less—can be afforded.

This general subject of reasonable rates is one that addresses itself to shareholders in railroad corporations quite as forcibly as to the official boards or managers. It has been observed in some instances that shareholders have awakened to the fact that their revenues have been seriously injured by disastrous rate wars, which often originate from trifling causes, but once entered upon and indorsed by the respon-

sible management of the line are persevered in because the officials are too proud to recede, or feel that they can not afford to assume the responsibility involved in apparent surrender. In other cases the president or directors of corporations have learned to appreciate the danger involved in committing the rate making power to subordinates whose training and experience have not generally fitted them to deal with matters that involve wide questions of policy, and who being unable to grasp facts or principles outside their range of vision, determine important matters under influences often no higher than the small personal prejudices and rivalries which the business engenders. If boards of direction were frequently to exercise their authority of supervision the influence would no doubt be wholesome; but it would be even more so if stockholders' meetings were to manifest unmistakably their purpose that their interests should not be recklessly and needlessly sacrificed.

A rate war, under the present Law, is a much more serious matter than formerly; but apparently this is a fact only to be learned by severe individual experience. Rates between terminals can not now be lawfully reduced without at the same time requiring large reductions at intermediate points, affecting purely local traffic. A reduction once made must remain operative until the notice required by law for its restoration can be given. Reductions often affect many other points than those at first in contemplation, and rates on many other commodities are drawn into the current. As is said elsewhere, the rates after a short duration are accepted by the public as the measure of future right, and even of comparisons at widely different points. Localities insist upon protection, and all manner of business interests are affected unfavorably. Values of accumulated products are depressed at immovable points. Cut rates must open to the public, and not distributed to individual shippers as before.

In view of these considerations, and others that might be mentioned, the question often becomes of high moment whether, as a broad proposition, it is wiser to meet the reduced rates of a competitor, or to let the business go. Yet the decision of this question is left by important lines in the hands of subordinates who apparently have no other notion upon the subject beyond the rule that every cut rate must be promptly "met," and who are ready to proceed upon the idea, which is a further inheritance from former systems, that any methods of competition whatsoever which are deemed to yield unfair advantage, are to be assailed and reformed by cutting rates upon traffic generally, or upon such classes thereof as have been the occasion of the unfriendly controversy.

The difficulties of the whole subject are freely admitted, but the manner in which they are now met can not fail to be unqualifiedly condemned. Nothing seems more surprising than the fact that a railroad manager who will neither take steps by law to put a stop to a secret cutting of rates, which he publicly charges, nor furnish evidence upon which others may do so, will nevertheless sacrifice for his shareholders millions of revenue to pun-

ish it. This is grasping the blade to strike down an adversary with the hilt. The average citizen can hardly fail to see, if the railroad manager does not, that the employment of a weapon which may injure the user even more than the adversary is not wise warfare. Rate cutting is such a weapon.

UNITY OF RAILROAD INTERESTS.

One of the chief perplexities encountered in dealing with complaints against railroad companies arises from the fact that to the public mind the railroad interest of the country seems to be in some sense a unity, so that when there is cause for complaint in the system anywhere, the whole interest is chargeable with some degree of moral if not legal responsibility.

In the guarded exercise of the power of Congress to regulate commerce, the authority to regulate it on the railroads of the country as if they were all under the same ownership and had the same charter rights and liabilities has never by any Act of legislation been asserted. The several carriers have always been treated and still are treated under the Act to Regulate Commerce as individual and independent entities, each being responsible on its own behalf but not for others; and no attempt has been made by legislation to impose liabilities or to disturb rights contrary to the provisions of the state charters or state laws.

On the other hand, it is perfectly reasonable to expect that the carriers of the country will, in so far as it is found practicable to do so, make such joint and general arrangements among their number that the public, when availing themselves of their services, shall find an arrangement with one adequate for the purposes of any single transaction. The dealer in the most distant part of the country having occasion to make a consignment from thence to the seaboard, should, if practicable, be enabled to make his arrangement with the local agent for the whole transportation, with the understanding that the initial carrier will then see that the implied obligations which attend the undertaking of carriage are observed throughout. This, unquestionably, is what is required by general public convenience, and this requirement should, as far as possible, be met. For the most part, it may be said to be now met by the leading carriers of the country, when the consignment does not pass off their roads upon side lines which are not under their control. But it is not so universally met by the shorter and weaker lines; nor would it be so easily met by them if the disposition to do so were general.

One difficulty in the way of making such arrangements universal is connected with the necessity of having some means of enforcing among the carriers themselves the obligations, moral or legal, that would grow out of them. If one carrier is to place itself in a position to be responsible for what may be done by another, it will be deemed necessary to have some means of promptly indemnifying itself when it is made to respond for the other's nonfeasances or misfeasances. And when it is considered how vast is the number of transactions which every important road must have with others, some of which before they are concluded reach out to distant parts of the country, and may

involve liabilities that could not be foreseen, it must be evident that a means of indemnification sufficiently prompt and effectual would hardly be found in the right to bring a suit at law. The strength and even the solvency of a carrier might be impaired by the requirements of such a responsibility unless it had the means of prompt reimbursement.

But the voluntary establishment of such extensive responsibility would require such mutual arrangements between the carriers as would establish a common authority which should be vested with power to make traffic arrangements, to fix rates and provide for their steady maintenance, to compel the performance of mutual duties among the members, and to enforce promptly and efficiently such sanctions to their mutual understandings as might be agreed upon. Something faintly resembling this as heretofore has been done through the railroad associations, but the only effectual sanction which they have as yet contrived whereby the observance of good faith in their mutual dealings could be enforced was through the device of pooling their freight or earnings. Even this was imperfect, because the arrangement could always be withdrawn from at pleasure, but pooling is now out of their power, being forbidden by law. With pooling prohibited the tendency among the railroads seems likely to be in the direction of consolidation as the only means of effectual protection against mutual jealousies and destructive rate wars. The need of protection would be still greater with greater extension of liability.

But anything equivalent to consolidation of all the roads of the country under a single head, or even those of a considerable section, whether by merger or by the formation of a confederation which should have powers of legal control, or by the creation of what is now technically denominated a trust, could hardly be supposed possible even if the parties were at liberty to form it at pleasure. If the parties could come into harmony on the subject an arrangement of the sort would be so overshadowing, so powerful in its control over the business interests of the country, and so susceptible of being used for mischievous purposes in many ways that public policy could not for a moment sanction it, at least unless by statute it were held in close legal restraints and under effectual public supervision and control. The voluntary arrangements of the kind in other lines of business are already sufficiently threatening to the public interest, and the most ardent advocate of the concentration of railroad authority can not reasonably expect that anything of the sort to control the transportation of the country will be provided for by legislation. Without legislation to favor it little can be done beyond the formation of consulting and advisory associations and the work of these is not only necessarily defective, but it is also limited to circumscribed territory.

In the absence of any such concentration of authority the carriers by rail have it in their power to do very much towards establishing better relations with the public at large and towards performing better service for the public by first establishing better relations among themselves. The need of this is very imperative. So long as they are legally independent

of each other it is quite possible for each of them to keep strictly within its legal obligations and still, by failing to extend the accommodations within its power, to cause great and needless inconvenience to the public. The obligation to avoid doing this, and on the other hand, to do the exact opposite, will be obvious to any one who has in mind the purposes for which railroads are constructed.

The first requisite to the establishment of better relations among the carriers by rail would seem to be a recognition on their part of the fact that they seem to the public to constitute a *class*, with to some extent at least common interests, and likely to be controlled by the same motives. They offer to the public certain conveniences, and if the offer is accepted, they unite as far as may be necessary in complying with it. In the great majority of cases in which the service of more than one is required in a particular transaction the party requiring it comes personally into relations with one only; and however numerous may be those who unite in performing the service, he does not even in thought distinguish the parts performed by each severally, but in his mind he is one party to a transaction to which all the carriers who have served him constitute together the other party. Then, all the carriers of the country seem to be making jointly a like offer of common service to all who will apply for it; they seem to be working together for a common object, and they share between them the results of such transactions as under their joint offers they may be called on to participate in.

It is not surprising, therefore, that to the public there should seem to be something in the nature of mutual responsibility resting upon the whole class and extending to the conduct of its members severally while engaged in the performance of services in which they thus co-operate. If this comes to be clearly seen and so far appreciated by the carriers as to be made the basis of practical action, we may reasonably hope that many things which are now done, and which are in various ways mischievous, will be abstained from, because it will then be seen how insignificant in general are the benefits, and how great and wide spread are the evils that must arise therefrom.

In all cutting of rates the party beginning it makes charges or insinuations against its competitors. The public is either told that the rate which is cut was too high, and then the competitor is charged with intentional extortion, or the competitor is accused of some underhanded or dishonorable conduct which renders the cut necessary in order to teach a lesson or force proper terms for future relations. Cases have been observed of a carrier cutting rates very largely, and proclaiming to the public that the reduced rates were all that could be justly demanded, when at the same time it was apparent to all persons having expert knowledge that persistence in such rates would lead directly to bankruptcy.

In such cases there are ulterior objects in view which the cutting is expected to accomplish; but meantime the public is being misled as to what are just rates, and what is perhaps even more damaging to the carriers, it is being

practically told by the parties participating that the members of their class are not deserving of the confidence commonly extended to each other by business men, but may be expected to deal unfairly whenever anything can apparently be gained by doing so. If the cases are not common, they are certainly not unknown, in which the agents of one railroad company make active efforts to poison the minds of the public against the management of another—insinuating against it wrongs and illegalities which exist only in the imagination or perhaps the invention of the party making the charges, and thus embarrassing the business of the other in every way in which it can be done with impunity.

In so far as conduct of the nature indicated is designed merely to secure business that otherwise would be given to a competitor, it probably does not go beyond the practices to be met with in other employments; but in no other employment could practices of the kind, for the reasons hereinbefore stated, be so harmful to the parties by or upon whom they are practiced. In other employments competition and separate action are facts as prominent before the public eye as co operation and apparent joint interest are in this; and the public does not charge the parties following them with joint responsibility; but when business methods are abandoned and resort is had to destructive warfare to punish a competitor, or to secure any coveted advantage, the carriers go quite beyond what is common in other employments, which indeed do not offer the opportunity for destructive acts of like nature.

In considering whether there is any reasonable or even plausible excuse for them, we may freely concede all that is said by railroad managers regarding the difficulty of supporting their mutual arrangements in the absence of any power to prescribe an effective sanction for their enforcement. Nevertheless an impartial observer is compelled to say that the methods now so frequently resorted to for the remedy of supposed grievances or for the punishment of supposed wrongs are methods which do not belong to the present age. They correspond to the methods whereby in a barbarous age a rude redress by force is sought for individual injuries. To make the adversary feel and fear the power to inflict injury is often the first and principal thought, and a rate is cut when in a ruder age it would have been a throat. The motive in each case is the same; to obtain a right, or extort a privilege, or punish a wrong; and the hostile act may be resorted to irrespective of any question whether there are not legal remedies which are adequate for all purposes of substantial justice.

It is a pertinent question in this connection, Who is hurt by this species of private warfare? The carrier aimed at primarily, perhaps, but the injury never stops there. The attacking party is almost inevitably injured, and the injury may even go to the extent of the destruction of the interests of holders of its stocks or securities. If it stops short of destruction, it may nevertheless impair the capacity of the road for usefulness, and in either event what is done is matter of serious public moment. But the injury goes beyond the belligerents; it is likely to affect in a direct

way many others, while indirectly injuring the whole class.

What beyond this is specially important is that such action strengthens and perpetuates a feeling of distrust and hostility, which is and for a number of years has been the chief obstacle to the profitable management of railroads. In sections of the country where the antagonism to railroads has been strongest nothing is more evident than that, for their own interest, what is needed above all things is that the management of the roads shall be such as to convince the public that in respect to railroad service it is to have fair treatment and the application of just business principles. But the public is not likely to be convinced of this so long as the carriers in their dealings with each other, as well as in their givings out to the public, are assuming the opposite to be the case. What a railroad manager says against another is taken as an admission against the whole class, and the whole class must bear the consequences. Like all admissions, too, apparently against the interest of the party making it, it is supposed to express less than the truth.

But the evils arising from the want of friendly business relations between the railroads fall largely upon the public also. This is inevitable so long as each road has an independent existence, and its traffic arrangements with other roads are matters of choice and contract. The difference between performing the legal duty grudgingly, though to the letter of the bond, or on the other hand performing it in an accommodating spirit and with the purpose to make the service as valuable as possible, may in some cases be the difference between a general annoyance and a great public convenience. A short road may sometimes make itself little better than a public nuisance by simply abstaining from all accommodation that could not by law be forced from it. It would not be likely to do this unless for some purpose of extortion from other roads, but the existence of the power to annoy and embarrass is a fact of large importance.

The public has an interest in being protected against the probable exercise of any such power. But its interest goes further than this; it goes to the establishment of such relations among the managers of roads as will lead to the extension of their traffic arrangements with mutual responsibility just as far as may be possible, so that the public may have in the service performed all the benefits and conveniences that might be expected to follow from general federation. There is nothing in the existence of such arrangements which is at all inconsistent with earnest competition. They are of general convenience to the carriers, as well as to the public, and their voluntary extension may be looked for until in the strife between the roads the limits of competition are passed and warfare is entered upon. But in order to form them great mutual concessions are often indispensable, and such concessions are likely to be made when relations are friendly, but are not to be looked for when hostile relations have been inaugurated.

It is not uncommon that railroad managers protest with great earnestness that gross injustice is done when all managers are classed to-

gether in public censure, so that the one who most scrupulously performs his duty is made to suffer for the misconduct of others. The hardship of such a case is very obvious. Nevertheless in dealing with any subject it is necessary to look the actual condition in the face; to take facts as they are, not as they ought to be. Injustice no doubt results in many cases under existing conditions, and the question demanding practical solution is how the evils of which the injustice is a consequence may in the future be prevented, or at least be reduced in number and in damaging effect. With this question confronting him, it seems a dictate of obvious prudence that every person occupying a responsible position in railroad service, and who desires so to perform his duty as to render his service on the one hand profitable to the owners of the road and on the other hand as useful as may be to the public, should have in mind at all times, not merely what his legal obligations are, but also in what light he and all others in the same service are regarded by the public. If they are looked upon as a class having among themselves mutual responsibilities and duties, but charged also as a class with responsibilities to the public; and if this condition of things is so far favored by circumstances that it is likely to continue, he can hardly, as a reasonable man, doubt that he will best subserve the interests he directly represents when in all his action he keeps steadily in view the importance of securing and maintaining, as far as possible, the most friendly relations between the whole class and the general public, and of preventing or removing all causes of annoyance or friction in the performance of public service by any member of the class. To this end it becomes important that while making his own service as valuable as may be, he shall also contribute, so far as proper accommodations may go, to the value of the service rendered to the public by others, even though the others may be competitors and rivals.

The purpose of the Act to Regulate Commerce may be summed up in a single phrase: It is to bring the railroads of the country under the control of law representing an enlightened public opinion. The practical instruction upon which this opinion is to be formed will come largely from the management of the roads. If that management is conspicuously just and accommodating, the opinion based upon it will not only be properly enlightened, but it will be such as to insure to the roads a treatment from the public and from all official authority that will directly tend to the advancement of their best interests.

While the Commission is not at this time prepared to recommend general legislation towards the establishment and promotion of relations between the carriers that shall better subserve the public interest than those which are now common, it must, nevertheless, look forward to the possibility of something of that nature becoming at some time imperative, unless a great improvement in the existing condition of things is voluntarily inaugurated.

THE LAW IN ITS EFFECT UPON CITIES.

A leading purpose of the Act to Regulate Commerce was to restrain carriers in the serv-

vice performed by them for the public from giving preferences, through favoritism or otherwise, whereby those least able to protect themselves, whether persons or localities or interests, would be placed at disadvantage unjustly. This general purpose was conceded to be wise as well as just, but some of the consequences necessarily flowing from the enforcement of provisions to that end were probably not anticipated by some parties who not only favored the Law but concurred in the principle of relative equality.

Population under the influence of modern civilization tends to rapid aggregation in cities. This tendency is particularly noticeable in new countries. At first the population is mainly rural and agricultural, but as business becomes diversified and the people by manufactures come to supply their own needs, the convenience of aggregation for the purposes not only of production but for the exchange of commodities becomes manifest; and centers of trade spring up at which all kinds of business, except the purely agricultural, can be more profitably conducted by being brought together. The advantages of these centers are likely to bear some relation to size; and as in animal life the weaker are seen to become the prey of the stronger, so in the industrial and social, the weaker towns if not destroyed as centers of trade, are at least greatly weakened through the superior power which the stronger possess to command the sources of healthy and vigorous commercial action.

The tendency to the increase in urban population has been greatly accelerated by the modern improvements in means of locomotion. Railroads in a certain sense may be said to annihilate time and space. They diminish the need for local markets by rendering the better markets that may be more distant easily and cheaply accessible. Their own largest interests are in the largest towns, and in various ways they favor concentration by increasing its advantages and diminishing the considerations that operate against it. The same consequences follow to some extent from improvement in locomotive facilities by other modes. How rapid the tendency has been in our own country may be seen from a comparison of the population of cities at various periods.

When the census of 1790 was taken the population of towns having 8,000 inhabitants or more aggregated but three and three tenths of the whole population of the country; in 1800 it had increased to three and nine tenths; in 1810 to four and nine tenths, at which it remained stationary for a decade; in 1830 it was six and seven tenths; in 1840, eight and five tenths; in 1850, twelve and five tenths; in 1860, sixteen and one tenth; in 1870, twenty and nine tenths; in 1880, twenty-two and five tenths. At the present time one fourth of all the population of the United States is gathered in towns of 8,000 people and upwards. The increase in percentage is a very striking fact, and if it is to reach a maximum at any time, it has very certainly not reached it as yet.

What was the natural and inevitable tendency has been greatly emphasized by the fact that the carriers of the country, in making up their rate sheets to regulate the charges for the trans-

portation of persons and property, have given to the cities special and very important advantages over the country stations. Some of these advantages have been given to large dealers, found principally in the cities, and given because of the extent of their patronage. But the large towns, as a whole, have been specially favored in rates over the country places, for the reason that the competition was felt mainly at such towns; and under the stress of competition the carriers have felt compelled to make rates which, except upon compulsion, they would not consent to make anywhere.

Pressure of competition has been most severe upon the carriers by rail whose lines touched the great rivers or other navigable waters of the country. Cheaper carriage is possible by water than by land, and a railroad directly competing with a steamboat line must make low rates or abandon the traffic to the boats. But the exceptionally low rates were by no means restricted to such towns as were possessed of navigable facilities; the interior cities were also favored, though the competition they enjoyed was exclusively between the carriers by rail. Nor could it always be said that low rates were forced upon the roads by the stress of competition; they were very often determined by agreement between the carriers controlling the business, and who possessed the same power to exact reasonable rates from the large towns as from the small. Always, however, in the large towns there were influences which were powerful in producing low rates, and the carriers even when they wished to do so did not find it easy to resist them. But very often the interest of a carrier was so far identified with that of a town as to make the giving to it of exceptionally low rates a matter of choice.

While this state of things continued it was almost impossible that in any section of the country possessing already a number of established centers of trade, any smaller town, not yet of sufficient strength to command like favors, should escape a condition of subordination and dependence. Towns must either depend for their growth upon some very special and exceptional natural advantages, or they must have manufactures, or they must contrive to become the centers of a large jobbing trade. But for the success of his business either the merchant or the manufacturer must have the like favorable rates for the transportation of that which he buys and sells as are given to his competitor; this is indispensable. Any attempt of a small town to grow into rivalry with a large town, beginning with considerable differences in railroad rates against it, must be necessarily unsuccessful.

The specially favorable rates which in one form or another were given to large dealers were not always given as a matter of personal favoritism; perhaps they were quite as often given to enable proprietors to protect their business as against the rivalry of like business located on other roads and supposed to be obtaining similar concessions. Every town thought it must have its leading enterprises protected against the inroads which competitors might make through railroad favors, and there grew up a feeling in the large towns that the trade of the territory which they had customarily

supplied belonged to them of right, and that any readjustment of freight rates should not fail to preserve their dominion over it.

It was not at first clearly perceived by every one that the provisions of the Act to Regulate Commerce which prescribed rules of impartial accommodation as between persons, occupations and localities, were really intended to go so far as to place in respect to such accommodations the smallest and most obscure hamlet in the country in the scale of right against the largest and most powerful city, entitling each to the same favorable regard from the carriers which served them. The large towns not unnaturally accepted the provision against discrimination as between localities as one that protected them against their competitors; they did not readily appreciate the fact that it also protected as against them a single patron of a road at a local station, and entitled him to favorable consideration irrespective of any question of competition; that the purpose was that there should be no unreasonable discrimination as between country and city, any more than between large towns.

Indeed, under all the circumstances, the prohibition, so far as it applied to localities, was likely to be specially beneficial to country places; and the prohibition of the greater charge upon the shorter haul on the same line in the same direction, except when the circumstances and conditions were dissimilar, was also calculated to be chiefly beneficial to the smaller towns, since the large towns almost always received such benefit as resulted from the making of the lesser charge. How great the differences were, and how depressing they must necessarily have been upon small towns, some idea may be had from an examination of tariff sheets which showed that a carrier sometimes charged for the transportation of property from one terminus of its line to stations short of the other fully three times as much as it charged by the same tariff sheets for the carriage of like property from the same starting point past the same stations to the other terminus.

It may be assumed that the railroad managers who made these rate sheets did not in general do so under the influence of any desire to favor the considerable town at the expense of all others, provided they could, with proper regard to the interests of their roads, establish relatively equal rates as between all stations. When they made rates which thus violated the principles of relative justice, their action was always defended as being a necessary result of the logic of the situation which they would have been glad to escape from had any means of escape been open to them. But whether willingly done, or, on the other hand, done under stress of compulsion by those who would have preferred to do otherwise, the consequences were unmistakable. The small towns bore the heaviest proportionate burdens; and unless on general grounds it was desirable that the cities be specially fostered and favored, the effect must from a social point of view be undesirable for the country. It was impossible that it should be made to seem right to the common mind that such distinctions should exist; the sense of justice received a shock when one was told that the small dealer in the country town was made to pay three times as much for the car-

riage of his goods as the city merchant paid upon the like quantity, for even a greater distance; and a well founded feeling of discontent arises among any people when it can see things done under the protection of its laws which seem to be plainly and unmistakably unjust.

It will probably not be claimed by any one that it is desirable to give by law or through the use of public conveniences an artificial stimulus to the building up of cities at the expense of the country. In great cities great social and political evils always concentrate, grow and strengthen; and the larger the cities are the more difficult it is to bring these evils under legal or moral restraints. This fact is so generally recognized that the feeling may be said to be practically universal that the interest of any country is best consulted when public measures and the employment of public conveniences favor the diffusion of population and the profitable employment of industrial energy everywhere, rather than the concentration of population in few localities.

When in consequence of the carriers' establishing such rates as the principles of the Act to Regulate Commerce require, some of the towns of the country found that, to some extent, business they had formerly enjoyed was slipping away from them, their commercial or other business organizations called upon the Commission for protection under circumstances that made their cases present grounds of strong apparent equity; for it was found that while the Law which requires rates to be made relatively just and fair was, in its application to localities, intended specially for the benefit of the small towns which were formerly discriminated against, yet when it came to be given effect it had the result that some one or more large towns in any particular section of the country would apparently receive the principal benefits while other large towns, competitors to it, would to some extent be injured. This result would follow from the fact that the making of more favorable rates to small towns would enable them to have a choice of markets not possessed before, and perhaps invite them to pass by one trading town which had formerly monopolized their trade to a more distant and larger town where the opportunity for choice in buying and to obtain customers in selling would be greater. Whenever this was the case the larger market seemed to be reaping the principal benefit of the favorable rates to the smaller towns; and the complaint was then made by the towns which suffered from the loss of business that the rates, instead of operating justly, discriminated unfairly in favor of the larger town to the prejudice of those which had the right to compete with it.

The first complaint presenting this view was made by merchants of Danville, Va., who claimed that the rates of the Richmond & Danville Railroad Company discriminated against their town and in favor of Richmond.* The rates, as expressed on the rate sheets, did not appear to be unequal or unfair; they seemed to be made with due regard to relative distances, but they allowed no controlling force to the fact that Danville was an important center of trade for a considerable surrounding country,

*See *Crews v. Richmond & Danville R. Co.* 1 Inters. Com. Rep. 703. [Ed.]

and were so made as to be as favorable to the small stations on the line of the road as they were to the cities. The consequence was that a merchant in a small town on the far side of Danville from Richmond, desiring to procure supplies which Danville merchants were accustomed to procure from Richmond and then resell along the line of the road, found himself able, instead of purchasing in Danville, to buy in Richmond, and by shipping the goods to his place of business direct and without unloading at the intermediate city to put them in stock at less cost for transportation than he could have procured them for had they been first sent to Danville and then to the final destination as a second shipment. He would also, by thus dealing, save the profits which the dealer in Danville had formerly received from his business.

It was inevitable that this advantage should, to some extent, be availed of; and the consequent loss of business to Danville was thought by the complaining party to amount to demonstration that the rates which occasioned the loss gave to Richmond an unfair advantage. The proper remedy was supposed to be for the Commission to hold that the aggregate rates from Richmond to Danville and from thence to the final destination should not exceed the rate which was made from Richmond to the same point as a through rate. No other rule, it was said, could possibly operate with justice.

A similar claim was afterwards advanced on behalf of a commercial organization in Omaha*, which claimed protection against rates which operated prejudicially to the dealers in their city, and in favor of dealers in Chicago. The same idea has been at the basis of complaints made on behalf of dealers in Detroit† and in other localities; but in every case it was apparent that the rates complained of were rates intended to be made in conformity to the spirit of the Act, and without any purpose of benefiting or injuring other towns than those to which they were given. And it might also be seen that these peculiar incidental benefits could not be monopolized by a few commercial centers, nor could any one of them gather benefits without reaping losses also. If the dealers in small towns beyond Omaha are now enabled to pass by that city and make purchases in Chicago, which they were accustomed to make in Omaha, so they may pass by Chicago, also, and make them, perhaps, to like advantage in Philadelphia, New York, or Boston. They can now reach out in all directions as they could not before, and even for family supplies there may be a choice of markets, which formerly was not available.

Such a state of facts as was shown in the instances mentioned does not present a case calling for the protection of commercial centers as against each other; what should be done obviously is to leave just and equal rates to have their natural effect under the influence of legitimate competition. The law can not be blamed for incidental consequences when its rules are just and justly applied. It could not be denied

that the rates given to the smaller towns in the cases mentioned were just to them, and the large towns could not, with any propriety, demand that, for their own benefit, rates unjust to the smaller towns should be imposed. All they could claim was that rates should be relatively just when all stations were considered. The carriers could not go further in aid of the competition of cities than to make them so.

In some cases in which it was complained that excessive rates were charged, the evidence offered to make out the excess consisted largely in showing that the rates formerly paid, after deducting the rebates which were allowed, were much below the rates now exacted. Evidence to this effect would come almost exclusively from large dealers, and it did not usually show that the public in general at the same locality had formerly been given more favorable rates than they now had. But the evidence was incomplete for the purpose designed because it did not take a comprehensive view of the whole field, but was confined to a single place. Proof that a railroad company is now on an average, when all its stations are considered, charging higher rates than formerly, may be taken as a strong *prima facie* showing that present rates are excessive; but their being higher at a single locality may be a result of an equalization of rates as between localities, which necessarily advances those which formerly were proportionally too low, and reduces in like degree those which formerly were proportionally too high. If the rates are now found to be made on correct principles, and are relatively fair as between localities, it can not be a just ground for complaint that some town which formerly was greatly and unjustly favored, finds its rates advanced. Not unlikely it may turn out on investigation into the circumstances of such a case that the advance was necessary to enable a carrier to make the proper concessions to other localities.

To what is above said regarding the effect upon large towns of a strict enforcement of the long and short haul clause of the Act, a partial exception must be made of towns and cities upon the transcontinental lines. All the interior towns, large and small, will receive benefits therefrom; the incidental injurious effects will fall mainly upon the terminal cities.

UNIFORM CLASSIFICATION.

In the first annual report of the Commission attention was called to the fact that rates for railroad transportation are to some extent adjusted on principles analogous to those on which taxes are laid; the articles or the interests that can least afford to bear such burdens are given the benefit of low rates which the carriers can not afford to give to all, and higher proportional rates are levied upon the articles and interests which would feel the burdens less. This method of adjusting rates has been and is of very high value to the country; indeed, it may be said to be indispensable.

The business of a railroad company as a carrier of freight is to exchange for the people the products of different sections and countries; and this exchange, as to many commodities in a country so large as ours, or indeed in any considerable country, would be restricted to comparatively small sections if articles which

*See *Martin v. Chicago, B. & Q. R. Co.* ante, 32. [Ed.]

†See *Detroit Board of Trade v. Grand Trunk R. Co.* ante, 199. [Ed.]

are at once bulky and cheap and articles which in small compass comprise very great value were alike charged rates for transportation which disregarded the value as an element of estimation, or took it into account only so far as reasonable insurance against loss or injury might render prudent. Railroad managers very soon discovered that they could not measure their rates exclusively by the standard of cost of carriage of the several kinds of traffic, separately considered; but it was wise for themselves and best for the country that the cost of carriage be considered in the aggregate and that the rates which are to be the compensation for the service performed be then apportioned on special consideration of the value of the service to the kinds of traffic severally. Such an apportionment would seldom be burdensome to articles of high value, but it would relieve cheaper articles from burdens which, if apportioned strictly to the cost to the carriers of their transportation, would render carriage for considerable distances out of the question.

But a practice based upon any such general principle will almost inevitably in its application be subject to many exceptions. Every railroad serves a certain territory, and every part of the country has to some extent interests to be served which are special and peculiar to it, and these it will naturally desire to have specially considered by local, official, and corporate authorities, whether the business in hand be the imposition of taxes or the adjustment of rates for transportation; and as many other circumstances besides cost of transportation and value must always be taken into account, such as bulk or weight of articles, convenience of handling, special liability to injury and necessity for speedy delivery, and the field of production or of consumption, so that there can never be any fixed or definite rule for the measurement of the charge to be made upon any particular traffic, it is always possible for the railroad manager in making rates to yield something to the special interests of his section, and still keep in view the general principles upon which he will professedly act.

As rates are apportioned by means of classification of articles which are expected to be offered for carriage, a pressure from sectional and local interests has been continuously brought to bear upon the authorities making the classifications to have them so made that those interests may be favored which the roads to use the classification will more particularly serve. For the most part the classifications have been made by the carriers themselves; in a few instances they have been made by state commissions, but under influences corresponding to those which have influenced the carriers in the same work. The carriers, it may be assumed, have primarily consulted their own interests, but they have also at the same time consulted the local feeling and the local interests, and have commonly found that their own interests were best subserved in doing so.

The consequence has been that a great number of classifications have been in force in different parts of the country, some of them covering large and some small sections, some made for several but more made for single roads. In very many cases there were two or more classifications in force on a road—one for the traffic

in one direction, another for that in the other, a third, perhaps, for the traffic coming from or going to a particular section of the country, and so on. The existence of so many was a great public evil, and it necessarily resulted in constant embarrassment in the interchange of traffic between the roads. The owners of the freights were more annoyed than the carriers themselves, for they were perpetually subject to the liability to be called upon to pay charges for transportation which were greatly in excess of any which they had anticipated. Unexpected charges were likely to breed controversies and cause delays in transportation and delivery; and in the minds of those unfamiliar with the subject of classification there were often suspicions, based on appearances which afforded color for them, that the carriers were guilty of intentional wrong and unjustifiable exactions.

The first important step in the direction of reform was taken by what are known as the trunk line roads, and resulted in an agreement upon what was designated by them the Official Classification, which was put in force contemporaneously with the taking effect of the Act to Regulate Commerce. The condition of things in the territory of the trunk lines and the effect of the action taken have been thus stated in proceedings before the Commission:

At the date of the passage of the Act under which this Commission was organized, one hundred and thirty-one railroad companies within the territory roughly defined by a line drawn from Chicago to Saint Louis, including both those cities, and taking in the territory east of the Mississippi and north of the Ohio and Potomac Rivers, and including all the New England States, each had, or largely had, a separate classification. In addition to those classifications that grew up out of local conditions, and were thought to be accommodating to the particular roads and shippers, there were also five confederations of railroad companies having each its classification. The present classification has taken the place of the following, which were formerly in use:

First. The local classification of each railroad company.

Second. The through west-bound classification, generally known as the trunk-line west-bound classification, upon the through traffic originating at seaboard cities or points east of the western termini of the trunk lines, and destined to their western termini—Buffalo, Erie, Pittsburgh, Parkersburgh, etc.—and to a number of competitive points, trade centers, or railroad junctions beyond.

Third. The east-bound classification, which alone applied to east-bound traffic originating in the territory east of Chicago and the Mississippi River, west of the western termini of the trunk lines, and north of the Ohio River, on traffic destined to the western termini of the trunk lines and points east thereof.

Fourth. Traffic between competitive interior points in the Middle States (New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, and West Virginia), interchanged between the several trunk lines and connecting roads, was governed by the joint merchandise freight classification, which also applied to the local traffic of certain roads.

Fifth. The Middle and Western States' classification applied to traffic between competitive interior points west of the western termini of the trunk lines, east of the Mississippi River and north of the Ohio River.

Sixth. Traffic between certain points in the Western States east of the Mississippi River, and certain southern competitive points was governed by the east and south-bound classification.

The present classification takes the place of all these widely different classifications as well as the many local classifications which were more or less in conflict with each other; if they had been continued it would have been impossible to carry out either the letter or spirit of the Interstate Commerce Law.

The conditions and requirements under which the present classification is based are therefore of an entirely different character to those upon which the trunk line west-bound classification from New York was based prior to April 1, 1887. That was confined to one kind of traffic in one direction, destined to comparatively few competitive points west of the western termini of the trunk lines, while the present classification applies to all the traffic in every direction between all stations of the roads, both local and through. The companies using the present classification operate about 47,000 miles of railway, more than one third of the entire railway mileage of the United States; and over these roads are transported 232,000,000 tons, or about 50 per cent of the total tonnage carried over the railroads in the United States.

These railroad companies embraced within the territory referred to, desiring to accommodate the traffic passing over these lines to their understanding of the legislation, met together, the principal roads being represented at this meeting, and on February 13, 1887, a committee was appointed to recommend a uniform classification in place of the then existing ones. This committee consisted of representatives of eastern and western roads familiar with the requirements of each section of the country and the different interests involved. The committee finished its labors March 1, 1887, and submitted the result thereof to the eastern and western roads at a meeting held in New York, and with some modifications and amendments the report of the committee was adopted, and put into effect on April 1, 1887, which resulted in the making of the common joint classification which first went into effect—Official Classification No. 1.

The former condition of things is further shown in an interesting extract from a letter written to the Commission by the chairman of a railroad freight association, which is given in Appendix E, containing several papers and documents relating to the general subject of classification.

The Official Classification was not at first entirely satisfactory to the parties agreeing upon it, and it has from time to time been somewhat changed, but not radically. It did not, however, entirely displace all others, but many roads which adopted it made use also of others to some extent, and still do so. A list of the roads which have adopted and are now using it is also given in Appendix E, with figures indicating that some of them use others also. The whole number of roads using it appears to be 131, of which 87 use it exclusively, 35 use one other, and 9 use two others.

This action of the trunk line roads is very far from being all that has been recently taken in the direction of uniformity in classification. There has been steady and constant movement in that direction, the most important of which has been the enlargement of the territory of the western classification. The roads making use of that classification had been steadily increasing, and on June 11, 1888, were sixty-nine in number. Since that date the roads forming the Texas Association have adopted the same classification; the transcontinental lines also employ it. The result is that practically all the railways operating west of a line drawn from New Orleans through Chicago, following Lake Michigan and the connecting waters to Marquette, are using one uniform classification, except that locally in some of the States railway commissions have adopted a classification of their own making.

The principal classifications now in force are the Official, the Western, and the Southern Railway & Steamship Association Classifications. The territory embraced by them severally may be roughly indicated as follows: The 2 INTER S.

first, the territory east of Chicago and north of the Ohio River; the second, the territory west, north, and southwest from Chicago; and the third, the territory south of the Ohio and east of the Mississippi. It must be understood, however, that neither of them is exclusively made use of in the territory indicated. Commodity rates are given to a considerable extent in Pacific coast territory, especially upon through transcontinental business, and individual roads in all sections use classifications of their own when circumstances seem to require it.

Efforts in the direction of uniformity have continuously been made during the last year. The most important of these was through a conference of representatives of roads east and west of Chicago, whose sessions began in September, 1887, and extended to July 20, 1888. This conference it was hoped might result in merging the Official and Western Classifications. That result was not accomplished, for reasons stated in a report adopted by the conference, and which is given in Appendix E. But unification on a larger scale is still kept in view, and a meeting has now been called by representatives of the existing classifications, to be held at Chicago in the present month, under which it may be assumed the subject will be taken up under auspices more favorable than ever before. The call, with other valuable information on the subject, is appended.

It has seemed to many persons that to unify classifications must be a very simple task. What is classification, it may be asked, but the arrangement of the several articles of commerce under different heads, as pupils in a school may be arranged in classes for recitations, or as a farmer may send his stock for pasturage to different fields? But those most familiar with the subject of classification will be least inclined to look upon the making of a uniform classification as a very simple affair. It is very far from being a simple affair. It is, on the contrary, as difficult a task as under the ordinary operations of government is likely to be devolved on any person or any body of men. In its nature it corresponds closely to the making of the customs tariff for the country; but the necessity for going into particulars may be greater, for classification must reach every article of ordinary commerce, and it must be framed on the understanding that for every one some burden is to be provided, though among them all there may be apportionment of burdens on some principle adjusted to the general good. And when it is understood that the classifications now in force have come into existence, to a very large extent, as an outgrowth of local and sectional feelings and interests, it will readily be perceived that the difficulty in prescribing uniformity is very much greater than it would be if the work could be taken up now unembarrassed by what has heretofore been done, and by the adjustment of business interests to classifications now in force. In fact, the difficulties are now so great that many intelligent persons in railroad service do not believe satisfactory unification is now possible. This is not, however, a universal belief; many practical railroad men hold a different view, and are now working to that end.

The Commission believes that all action taken on the subject should lead towards uniformity, but that to force it at once would be undesirable. In all consideration of the subject it must be borne in mind that the carriers are not the parties whom unification would most affect. Some carriers might gain and some perhaps at first lose thereby, but the most of them would be able so to adjust their rates that the losses would be inconsiderable, and would also be temporary. But the business interests of the country would have no similar power of self-protection. Unifying the classification means necessarily the placing of the same article in the same class for the purposes of rating in all sections of the country, with the effect as to some of them of lowering the rates greatly in some sections while advancing them in perhaps the like proportion in others—so that in the same business, while one dealer might be greatly benefited, another might be ruined; and what would affect injuriously a single dealer would in like manner affect all in the same line of business in the same section of country and to some degree the country at large as well.

The carriers could not possibly protect against such a consequence; for while the rates would not necessarily be the same in different sections, the rates which any road imposed on one class would be identical, so that the power to adjust transportation charges with a view to local or sectional interests which now exists and is supposed to be of value would be taken away. And the relative change which would be effected in making uniform classification operative as to any particular business would be far more injurious, because of its affecting individuals and sections differently, than would any absolute increase in rates which affected alike and to the same extent all the traffic subjected to it.

The very first step to be taken by any one who should attempt uniform classification would be to make a study of the reasons from which the existing classifications have sprung. This study would need to be made in the territory which the classification covers. All existing classifications have resulted from many compromises. Pacific coast and Texas interests have compromised with those of the interior in the recent extension of the Western Classification, and they would probably be forced to compromise further if the Official and the Western Classifications were merged. But no one intrusted with the task of merging them would be excusable for making the attempt without better information to act upon than could be obtainable from a few witnesses summoned to Washington to give it.

Even in the territory whose interests may be supposed to be homogeneous, the Commission has encountered serious and earnest antagonism when classification was in question. One of the chief impediments to the merging of the Official and the Western Classifications has had regard to car-load classes. The carriers east of Chicago and their patrons desire that there shall be very few; the carriers west of Chicago and their patrons very generally think it for their interest that there shall be a considerably greater number. The feeling on the subject

was very well illustrated at a session held by the Commission in one of the Western States last year. Eastern merchants were moving to have car-load classification materially restricted. Several state commissions by concerted arrangement came to the meeting to express their strong and very earnest opposition. It was their belief that the measure proposed, if it should be adopted, would be greatly injurious to the interests of the States they represented.

Without any previous knowledge on the subject an opposition of the sort could hardly have been anticipated; but such facts can not fail to impress the mind that to the proper performance of the task of unification it is indispensable that a somewhat extensive knowledge be first acquired not only of local interests, but also of the relation of those interests to interests of similar nature elsewhere. Nobody can acquire this knowledge from the public press, or from the reports of a few persons, however intelligent, who may be summoned to give information. He will need to feel the pulse, so to speak, of the several sections of the country; to make himself acquainted with their various interests, so that he may be able to judge how far any changes will affect them severally. In studying the effect he will be very sure to find that even locally the interests of the farmer, the manufacturer, the jobber and the retail dealer are not identical, and that what would benefit one might harm the other.

The final adjustment of a uniform classification must necessarily be the arrangement of a great number of compromises. It may happen, therefore, that those who are now most earnest in desiring one will be most opposed to any that can be agreed upon. The Commission has received letters on the subject from intelligent business men, but who, having never investigated it, are evidently in error as to what can be expected as a result of what they ask for. Some of the writers appear to think that unification will be little more than extending the classification of their section, with which they are familiar, to the whole country, and will be surprised to learn that it can not be made without adopting features from other classifications which their sections have always objected to. But others desire uniform classification because they expect by means of it to get rid of the principle of considering the value of the service in making rates, and to have the cost of the service to the carrier made the measure of charge, or to have some other practice done away with that does not in its application work to their advantage. A manufacturer of doors and blinds, perhaps, looks to have his product classified with undressed lumber; and the manufacturer of patent medicines, who knows that his boxes can be carried as cheaply as the boxes containing merchandise selling for one tenth or one twentieth the sum, expects them to be so classified that they will be rated accordingly. But to any one familiar with the subject the impossibility of meeting such views will be obvious; it would not be for the general public interest that they should be met. This statement sufficiently suggests not the probability merely but the certainty that uniform classification will result in many disappointments.

The reasons above given are reasons for ap-

proaching uniform classification with some caution. There are other reasons for urging the carriers in the direction of unification, and not taking it out of their hands so long as they seem to be moving in that direction in good faith and with reasonable diligence. They have knowledge of the local interests which are represented in existing classifications, and their practical experience gives them special fitness for the task. Moreover, this course will have the further advantage that if complaints are made of the classifications the Commission will come to their consideration with minds unembarrassed and uncommitted by previous action of their own.

But it should be further understood that a uniform classification once made can not immediately be put into effect. Considerable time to prepare for it is absolutely essential.

First, it should be stated that the putting it into effect involves the sweeping out of existence of every rate sheet in the country and the making of new rate sheets by every railroad company. This requires an enormous expenditure in printing, which of course must in some manner be made up from the rates imposed. But the cost of preparing the rate sheets would be vastly greater than this. To determine what the rates ought to be on the several classes would be a labor of infinite difficulty.

Suppose a railroad manager, with the new classification put into his hands, were to address himself to the task of determining what rates he ought now to charge in order that his company may collect the same revenue it has been accustomed to receive. First, he will perceive that the class rates should not be the same as formerly; the number of classes is probably different, but whether different or not, the position of articles in the classes is so different that the imposition of the same rates as formerly may either increase the revenue very greatly or may largely diminish it. In order to determine how this is likely to be it would be necessary to make careful study of the classification in the light of the past and probable future traffic of the road; not the traffic in bulk, but the traffic in each particular article, bringing together for further study the aggregate of articles now ranged in one class, and so going through with the classes successively. And when it is remembered that at the conclusion of his task very many of the patrons of the road will find their rates increased—on some perhaps largely increased—and that very many complaints are to be expected under any circumstances, the importance of avoiding the giving of just grounds for complaint will be so obvious and so great as to demand special care in that direction. All these are reasons rendering it almost imperative that considerable time be allowed for the making of this adjustment of rates after the classification shall have been completed.

But, second, the allowance of time for the adjustment is even less important to the rate maker than to the patrons of the road. If the rate maker errs in making the rates under such circumstances, the error is likely to be one which favors his road at the expense of its patrons; and when that is the case, though it may be corrected after some delay, business in-

terests, which under any circumstances would suffer somewhat in the change, must then, for a time, be exposed to injury that with greater care and more deliberation might have been avoided. But any sudden change in railroad rates means a like change in values. A prospective change, publicly notified, the business man may prepare for with perhaps little or no injury to his business; but those whom a sudden change affects have no means of warding off injurious consequences.

The Commission sums up its conclusions on this subject by saying:

1. Uniformity in classification, as fast and as far as it can be accomplished without serious mischiefs, is desirable.

2. There is gratifying progress in the direction of unification, and it has been very marked within the last year.

3. So long as the carriers appear to be laboring towards unification with reasonable diligence and in good faith, it is better that they should be encouraged and stimulated to continue their efforts than that the work should be taken out of their hands.

4. In view of the mischiefs that would flow from sudden changes, ample time should be given for the purpose. Uniform classification can only be wisely and safely made by careful study and deliberate action; and the adjustment of rates to it needs corresponding caution and deliberation.

IMMIGRANT TRANSPORTATION.

The transportation of immigrants from the Atlantic seaboard cities, where they land on our shores, to various interior and Pacific slope points, is a branch of the jurisdiction of Congress over interstate commerce covered by the Act creating this Commission, which seems to be worthy of attention.

The number of immigrants that annually arrive and are transported over our various railroad lines is so large, the competition of the different lines for the business of carrying them is so eager, the impositions upon the immigrants by various persons seeking to make a profit out of them are so numerous, and the demoralization in the railroad rates by payment of commissions, rate cutting and otherwise, is so constant, that some better regulations for receiving immigrants upon landing from vessels, and in procuring transportation to their destinations, would seem to be reasonable and fairly warranted.

It is not understood whether the same conditions exist at all the seaboard cities where immigrants arrive. The conditions that call for improvement are most apparent at the Port of New York, where much the greater number of immigrants arrive. The Commission has on two occasions within the past year made investigations into the methods of conducting the immigrant business at that port.

The magnitude of the business is shown by the statistics for the year ending June 30, 1888. The whole number of arrivals at the four principal seaboard cities during that time was 533,918, of which the arrivals at Boston were 44,873, at New York 418,423, at Philadelphia 37,325, and at Baltimore 33,297. Of this number the proportion of children under fifteen

years of age was at Boston and New York each about one sixth, at Philadelphia about one fourth, and at Baltimore a little over one tenth. The whole number carried westward over the roads known as the trunk-lines during that period was 180,642, of which the number carried from Boston was 8,542, from New York 130,547, from Philadelphia 20,648, and from Baltimore 20,904. The destinations of those so carried were to all parts of the United States and some to Canada. The largest number carried west from New York was to the State of Illinois, being 26,988, to Pennsylvania 23,384, to New York State 12,027, to Michigan 10,739, to Minnesota 10,334, to Wisconsin 6,840, and smaller numbers to other States and Territories.

The only legislation applicable to the care and transportation of immigrants after landing at New York City is that enacted on various occasions by the State of New York. This legislation, through a series of years, has in the main apparently been directed by humane and just motives, and is perhaps as well adapted for the purposes desired as is possible within the sphere of state jurisdiction. An Act of Congress passed in 1882 provided for the levy, in the nature of a tax, of the sum of fifty cents upon each and every person not a citizen of the United States who shall come by vessel from a foreign port to any port of the United States, the money collected to be paid into the Treasury of the United States as an immigrant fund, and to be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration, and for the care and relief of immigrants. Only so much could be expended at any port as the sum collected at the same port.

The Secretary of the Treasury was authorized to enter into contracts with state boards to carry into effect the purposes of the Act.

Under the Act the Secretary of the Treasury entered into a contract with the Commissioners of Emigration of the State of New York, by the terms of which the commissioners undertook to receive all immigrants arriving at that port, at Castle Garden, or some other suitable place under their control, and to provide means for their accommodation, including interpreters, and to provide suitably for the infirm and disabled for not exceeding a year.

Under these statutes and contracts the Emigration Commissioners for the State of New York receive the immigrants at Castle Garden, where a certain inspection and registration takes place. By arrangements with the commissioners the various railroad lines entering New York City are represented in the Garden, either by a joint agent or by their respective agents, and the immigrants after obtaining their tickets are conveyed with their baggage mostly by barges to the points where they enter cars for transportation.

The investigation by the Commission* covered the conditions of transportation, the rates of fare, the character of the cars as to accommodations and comforts, and the time consumed in the journeys made. The result of these inquiries was that generally fair care and attention are given to the immigrants by the

various lines, but that by all of them the immigrants are carried as a distinct class, in cars inferior to ordinary passenger cars, and by a few of the lines in very much inferior cars; that slower time is made on the journey, and often tedious delays occur. The rates of fare charged are lower than ordinary passenger fare.

The salient facts as regards the immigrant business of the country as conducted at the City of New York may be stated as follows:

Officially it is under the supervision and control of a state board of immigration, made up of appointees of the Governor and of the heads of certain charitable organizations whose functions in part are to protect the immigrants and to afford impartial privileges to the transportation lines reaching New York in respect to their carriage to their respective points of destination. Some few years ago a legislative Act of the State provided for a single commissioner, but the change intended has not yet been effected. The power of the state commissioners to give full effect to the supervision necessary to the business is limited by circumstances which it is difficult if not impossible for such a commission fully to cope with.

In the first place, Castle Garden, where the immigrants are landed, is altogether inadequate in capacity for the reception, proper care and protection of the great number who are now received there. Moreover, the location is unsuitable for the purpose. It can be easily surrounded, and in fact is generally surrounded, by a multitude of more or less unscrupulous persons, eager to reach and share the small stores of money the immigrants bring with them, and who resort to various devices to get practical control of them for the purpose. The ignorance of the immigrants in general, of our language, of the country, of its customs and its routes of travel, makes them easy victims; such of them as can be enticed away from Castle Garden are subjected to impositions and extortions before they leave the city, and their transportation is sold to carriers, who buy it under the name of paying commissions.

With the co-operation and unanimous concurrence of the transportation companies these abuses might be in the main, and perhaps wholly, prevented; by their rivalries and mutual hostilities they are aggravated.

The customary charge for the transportation of immigrants to the interior is indicated by the charge from New York to Chicago, which, when the carriers have acted in harmony, has been about \$13. This charge, as compared to that made to first class passengers, must, in view of the greatly inferior accommodations heretofore furnished for immigrants, be deemed excessive. But independent of such a comparison, the action of the carriers will fairly sanction a reduction, if steady rates can be established and improper expenses connected with the business cut off. Receipts have not only been largely reduced by the payment of commissions which go to support demoralizing practices, but the carriers have at times reduced their rates to such figures as clearly indicate that they were named for some other purpose than that of revenue from this business. At this time, when the nominal rates are very low and the commissions paid are understood to be large, the trunk line carriers, though they

*See *Savery v. N. Y. Cent. & H. R. R. Co. ante*, 210. [Ed.]

are transporting many immigrants, are probably receiving no net revenue whatever therefrom. It is freely admitted in railroad circles that the condition of things as regards this business is a great public scandal.

In view of all the circumstances the Commission recommends:

That some place of greater capacity than Castle Garden be provided for the reception of immigrants, located somewhere upon New York Harbor, an island being preferable to the main land for the purpose, but it being indispensable, whatever the place selected, that it be appropriated exclusively to this purpose, and that persons not legitimately connected with the transportation of immigrants be kept away;

That all regular lines of interior transportation be allowed to have agents at the place so provided, who may sell tickets under regulations prescribed to secure equal privileges to all, and prevent abuses;

That the payment of commissions for the routing of immigrants, and for procuring the shipment of immigrants from foreign countries, be declared illegal and made punishable;

That the Commission be authorized to prescribe fares for the transportation of this class of passengers, which may be revised from time to time, and which as fixed at any time shall be the regular fares not to be departed from by the carriers;

Steady rates producing reasonable revenue, and the cutting off of the existing drains therefrom into the pockets of parties whose participation in the business is harmful and demoralizing are believed to be indispensable to the due protection of this class of people; and the duty of the General Government to them will not be fully performed until these things are provided for.

These objects can not be fully accomplished except by the Federal Government taking complete control of the whole subject.

PAYMENT OF COMMISSIONS.

One of the open questions which operates as a disturbing element in the present aspect of railroad affairs is that which relates to the payment of commissions by common carriers.*

Commissions are paid by many roads upon income received from both freight and passenger traffic. Upon some roads commissions are only paid upon passenger traffic. Some roads pay no commissions.

The purpose for which commissions are paid is unquestionably the expectation of thereby securing an increase of business to a line. The persons to whom commissions are paid in passenger service are usually men in the employ of other railroad companies. It is generally accepted among railroad managers that the sale of railroad tickets should not be in the hands of outside parties. In cities and important towns ticket offices are frequently found upon important and convenient streets and in hotel lobbies, which are maintained either by individual roads or by agreement among several roads. It is understood that the employees in this class of offices are usually compensated by regular salaries.

In some places tickets are to be found on sale in the hands of men whose whole time is not devoted to this business, and who may be compensated by an agreed commission paid upon the amount of business transacted through the agency, which is often situated at a great distance from the road making the payment, and in a town or city from which through business is routed over another road by the line which controls the railroad ticket office. This arrangement, however, is comparatively rare, for the reason that railway tickets are almost universally interchanged at the present time. When it exists it presents merely a form of determining the amount of wages to be paid to a distant agent, which might easily be adjusted upon some other basis.

Commissions are not supposed to be paid to that class of the community known as ticket brokers or "scalpers." These parties are not recognized by the carriers as engaged in legitimate business, and are not furnished with tickets from official sources. They deal in unused coupons of through tickets originally sold running over several lines, in the unused portion of excursion tickets, in tickets bought at low rates during rate wars, and in tickets found in the hands of the public under various forms, unused. So many complaints have been made respecting the unfair devices of this class of the community in the way of diverting tickets from the use for which they were designed, and sometimes even of altering and defacing them, that their business is discouraged by railroad managers. Generally speaking, therefore, it may be said that the persons to whom commissions are paid are almost always employees and agents of other companies.

Upon freight traffic it has been alleged that commissions are sometimes allowed to shippers, or to their clerks or friends, as a method of securing business. Such an allowance would be in direct violation of the provisions of the Act to Regulate Commerce, because it would effect an unjust discrimination between shippers. No actual case of this kind has as yet been brought to the attention of the Commission, but it is obvious that a system which allows accounts of this class to be audited and paid necessarily opens the door for serious abuses.

The method upon which commissions are adjusted upon passenger traffic is not altogether uniform, but is supposed to be substantially this: ticket agents at points remote from the line which desires to pay the commissions are furnished with blanks reading as follows:

Dear Sir: I herewith hand you my account of tickets sold over your road at this office on which you pay a commission, for the month of —.

The blank is to be filled out by the agent, with a statement of the various tickets upon which commissions are claimed, showing whose issue, the destination, the distanced traveled on the road in question, the number, the rate, the amount of commission, etc., and a receipt signed by the agent is appended. This constitutes his voucher, and upon its being allowed by the auditor the agent will receive a check or draft for the amount.

Of course commissions are not paid by any road upon all its passenger traffic, but the custom until recently was generally prevalent of allowing them to ticket agents at distant points

*See *Chicago & A. R. Co. v. Pa. Co.*, 1 Inters. Com. Rep. 357. [Ed.]
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upon coupon tickets sold by them calling for transportation over any important competitive portion of most leading roads. For example: tickets sold in the Eastern States for transportation from Chicago to Saint Paul and beyond would entitle the local agent who sold the through ticket to a certain amount of compensation or commission therefor. Frequently he would be entitled to several commissions upon the same ticket, where the passenger was routed over several lines consecutively.

No established rate of commission upon the sale of passenger tickets has ever been fixed, some roads having one rate and some another, or the same road having different rates at different points and at different times. The payment is not usually computed in the form of a percentage, but as an agreed sum. For example: the first class passenger fare from Chicago to Saint Paul is \$11.50; the commission upon an eastern ticket with a coupon, Chicago to Saint Paul, might be \$1, \$1.50, \$2, \$3, or \$4, as the general ticket agent of the road in question should see fit to offer or allow, although associations of roads at times undertake to fix the amount by agreement. It is understood that the last named sum has at times been paid upon such tickets, and that upon trans-continental tickets commissions have even been allowed to the amount of \$10 to \$14, or more. Moneys received from this source have formed a very substantial part of the income of ticket agents in all the Eastern States upon business at the West, and also of those in the West upon business at the East.

The drain from this cause upon the net earnings of the roads has been very large. It is difficult to obtain authentic statistics upon this subject, for the reason that the whole system has grown up in secrecy, and its very existence has hardly been known to the public at large. There can be no doubt but that moneys paid in the manner above described as commissions, are paid simply for the purpose of obtaining business, and should be shown in railroad accounts as charges against railroad earnings, in the same manner as it has been customary for such accounts to show money expended for advertising, for maintaining joint agencies, and for wages paid ticket agents upon their own lines.

A custom, however, has grown up under which it has been usual to conceal this class of expenditure from the knowledge of the public and of railroad stockholders as well. This has been done by the simple process of deducting all moneys paid out by way of commissions before stating gross earnings in the annual balance sheet. In other words the money so expended is treated as though the company never had it, and by this manipulation of the account the fact of its expenditure is not disclosed.

In preparing blanks for the annual reports to be made by the carriers to this Commission, as required by section 20 of the Act to Regulate Commerce, this subject was considered. An appropriate heading in the blank sent out called for a statement of the amount paid by each carrier during the year as commissions, chargeable to passenger and freight traffic respectively, and the oath by which the report was to be verified embraced a statement that

"no deductions were made before stating the gross earnings or receipts herein set forth." The result of this has been that in the reports for the year ending June 30, 1888, many roads show for the first time the expenditure of commissions. The returns in this respect, however, are not complete, for the reason that the blanks not being issued until near the close of the fiscal year, the accounts had not been kept in correspondence with the requirements, and accurate information could not be readily furnished within the time allowed. In some cases the clause above stated has been erased from the oath, and no entries made in the blank calling for a statement of commissions paid.

These matters can and will be rectified hereafter, but the returns for the present year, so far as received, do not enable the Commission to state even approximately the amount expended for this purpose. Forty-nine roads report the payment of commissions, aggregating \$1,078,128.83, and those reported by only eight companies amount to \$812,884.07. There can be no doubt but that the payments made on this account in past years by the various roads in the United States have amounted to many millions of dollars annually, and that payments of several hundred thousands of dollars by single roads have not been at all unusual.

The value of an outlay of this kind to the roads which make it is doubtful. The traffic it burdens is naturally competitive traffic; in other words, commissions are paid upon tickets between points where two or more lines compete for the business. For example, between Chicago and Saint Paul six lines are offered, their trains giving like accommodations and making substantially the same time. A traveler at an eastern point has his choice of tickets over each of these six lines. The ticket agent will receive a commission on whichever ticket he sells.

If, by agreement among the competing lines, a common standard of commission is made, the ticket agent has no interest whatever to sell the ticket over one line rather than another, and in that case the roads evidently are in the same position as if no commissions whatever were to be paid by either. If one of the lines pays a higher commission than another, either secretly or by a known arrangement, the ticket agent naturally will prefer to sell a ticket over that line. Lines which pay the highest commissions are usually the least desirable lines for the traveling public, which use this method in order to obtain traffic which otherwise they would not naturally receive. The most roundabout line, or the one with the least natural advantages, by offering ticket agents at some remote points a higher commission than their competitors allow, may be able to secure a certain amount of traffic which otherwise would not fall to it. In this case, however, the business is obtained at the expense of the ignorant purchaser of the ticket, who is routed over a line which he would not have chosen had all the facts and circumstances been understood.

The situation, then, is this: if all lines competing for a certain traffic pay the same commissions the payment is of no use to any of them; while if they pay different commissions the one paying the highest rate may secure

business which it otherwise would lose, but very likely at the expense of the comfort and convenience of the traveler. If the facilities of two lines are equal and one pays higher commissions than the other, the advance must and will be met by its competitor as soon as known, to the mutual loss of both.

Certain other considerations are usually presented as reasons for the maintenance of this system. It is said that the salaries paid ticket agents are very small, and that it is quite right that they should be permitted to increase their emoluments by payments of this kind received from distant lines. The obvious answer to this is that if their wages are too small, they should be increased by the line in whose service they are engaged. This could be done very considerably upon many lines without any loss of revenue, provided the payment of commissions to employees of other lines was discontinued. There is no reason why any road should expect to have any part of its salary account made up by contributions from other roads, and especially to have this made up by a method which has been said to give to station agents at important points an income greater than that of their own general manager. Such payments are obviously not proper compensation for service rendered.

It is also sometimes claimed that if commissions are allowed to agents at remote points it thereby becomes their interest to post themselves upon routes and facilities, and generally to obtain such information as will be of assistance to them in their relations with the traveling public. In reply to this it may be said that their direct employment, which is at once an employment in the service of the carrier and in the interest of the public, imposes upon them this very duty; and a person who pays no heed to it except when hired specially to do so is unfit for the position of agent. Moreover, if the payment of a higher commission upon a less desirable route is made, then the ticket agent has direct inducement to lead the traveling public astray; while if all the competing roads pay the same commission, so that no inducement is offered to the ticket agent to vary from the absolute truth in his representation concerning routes and facilities, then neither of them is the gainer. It is hardly conceivable that railroad companies would find it for their interest to expend large sums for the education of station agents at remote points of the United States without the expectation of some practical equivalent in return.

It is no doubt true that certain western lines which have made the advocacy of commission payments a prominent feature of their policy, and which have distributed large sums in this manner among ticket agents at the East, have thus established a connection between themselves and the agents receiving their bounty, which results in more or less advantage to them, and which has stimulated the agents in question to more fully post themselves in respect to all possible arguments that a runner could use in seeking to direct traffic over their routes to the exclusion of others. The indirect advantage thus obtained is perhaps the best argument that can be advanced in support of the practice. Its fallacy lies in the fact that such an advantage is not legitimate. As between the ticket agent

and the public, there should be no inducement tending to put the former in the position of a drummer for business in behalf of a particular route; his true position is that of a servant of a common carrier, taking the money of the people as an equivalent for a public service; and as between the ticket agent and his immediate employer, there certainly should be no temptation tending to induce the latter to favor one remote connection rather than its equally remote competitor. The Act to Regulate Commerce, as well as the most obvious requirements of fair dealing as between distant carriers, demand that equal facilities shall be afforded for the interchange of traffic and for the forwarding of passengers to and from their several lines. To permit an agent to entertain a preference based on his personal interest necessarily tends to the discrimination and preference between connecting lines, which the Law, as well as ordinary commercial integrity, condemns.

Probably the best light in which the system could be presented would be in the form of a universal arrangement by which all agents of foreign roads selling tickets for the carriage of passengers between points of competition should receive a fixed percentage of the value of the coupon. This might be called compensation in the form of wages measured by the results accomplished. And it would to some extent encourage distant agents to prepare themselves to give information to the public. But in that form the system would not be wanted. It would put every line upon an equal footing and would do no good to any of them, while it would put the compensation received by station agents upon a most grossly unequal footing, by which some of them could soon retire in opulence. And it would practically lead to the cessation on the part of most roads of paying their station agents at all in large cities and towns, since the revenue to be derived from foreign roads would make the positions eagerly sought for without any pay from the direct employer, and perhaps even at a premium. In other words, the pay of this class of railroad employees would be largely provided by other lines than those for whom the service is rendered and which are responsible for their conduct. The demoralizing effect of such a state of affairs is obvious. A man works for the man who pays him.

On the other hand the evils of the system are much more clearly apparent than its advantages. They may be summarized as follows:

The direct effect is the payment of large sums of money from corporate earnings, for which the stockholders and the public receive no adequate return. The sums so paid are in the aggregate appalling, while the aggregate receipts are not at all increased. No travel is originated by the system, as is sometimes true in respect to excursion trains and rates. It only operates to direct, and often to divert, traffic which seeks to be transported. Considered in its totality, the money so paid out is the money of railroad stockholders, but it is collected from the public; and the collection is just so much in the aggregate more than the public can properly be called upon to pay for railroad service. The rates which the public pay are made to provide for this drain on the corporate treasury.

In the report of the Senate Committee on In-

terstate Commerce, whose investigations preceded the adoption of the present Law, the following charge was made and found sustained, to wit:

That the management of the railroad business is extravagant and wasteful, and that a needless tax is imposed upon the shipping and traveling public by the unnecessary expenditure of large sums in the maintenance of a costly force of agents engaged in a reckless strife for competitive business.

That investigation did not embrace the subject of the payment of commissions; it does not appear that the fact was then in any way developed, or was even known, that a needless tax was imposed upon the traveling public by the unnecessary expenditure of large sums in the subsidizing of agents of other lines at distant points in carrying on a reckless strife for competitive business; yet the application of the language used by the committee is apparent; and the fact is obvious that the management of railroad lines which permit it is extravagant and wasteful, and that the traveling public bears the burden of the extravagance.

The indirect effects are even more dangerous to the public. The blank above mentioned, upon which commissions are receipted for and collected, contains the following certificate which the agent is required to sign:

I certify that no portion of the commissions to be paid on this statement has been used in cutting rates, directly or indirectly, and I agree that no portion thereof shall be so used.

What does this certificate obviously suggest but that the natural tendency of the offer of a commission is to enable the agent to cut the rate by dividing his commission with the passenger? Supposing that there are two routes available from Chicago to Omaha, one of which pays a commission of \$2 to agents in the East, is it not money in the pocket of the agent to sell the ticket for \$1 less than the standard rate in order to obtain the other dollar for himself? Or even to sell a hundred such tickets to a scalper at \$1.75 less than the regular rate, the shave to be again divided with his customers? What then becomes of the Law which forbids a common carrier to receive from any person a greater or less compensation than from another for a like service? It is not known whether this form of certificate is or is not in general use, nor how effectual it proves in practice to prevent the violation of the Law which the offer of commissions so pointedly invites; but a course of business which requires a certificate that in transactions under it one of the parties shall not so conduct as to involve the other in a breach of law, is certainly in itself to be condemned.

The tendency of the system is also directly in the line of fostering other irregularities and evils.

The class of persons called "scalpers" are mentioned above as persons not recognized by the carriers as having a legitimate employment. It is matter of common observation, however, that this class is numerous. In all considerable cities they have fine offices, and all appearances indicate that their business is both considerable and profitable. Their income comes directly or indirectly from railroad companies. It comes from the purchase at one price and the sale at a higher of tickets which the companies have once sold, but which, in the hands

of the purchasers, have been availed of for railroad service in part only or perhaps not at all. So long as a railroad company recognizes such a ticket as valuable for any purpose there would seem to be reasons of sound policy requiring their redemption by the company itself at its regular offices.

A fair rule to this end would take away very much of the income on which scalping offices are now supported and tend greatly to reduce their number. It is believed, however, that railroad managers themselves are not always in hostile relations to scalpers, but that in times of rate war, and sometimes also when competition has not reached the point of open belligerency, they avail themselves of the services of this class of persons.

This subject is thought to be of sufficient importance to justify the Commission in bringing it to the attention of Congress and of the public.

CONCLUSIVE BILLS OF LADING.

Among the subjects that have been brought to the attention of the Commission as requiring legislation is that of conclusive bills of lading. Complaints are often made that when grain, seeds or other articles commonly forwarded in bulk are received by the carriers and forwarded as being of a certain quantity or weight, it is not infrequent that at the point of destination a deficiency is reported, and the consignor having no means of fixing the responsibility upon any particular carrier when the freight has passed, as is commonly the case, over several roads, is compelled to bear the loss.

This, it is said, is unjust. The carrier which receives the grain or other article should satisfy itself at the time as to the quantity or weight, and the bill of lading, issued for it to the consignor, instead of expressing that the quantity, is said to be or supposed to be so much, should be absolute and unconditional, and the recitals should attend the property throughout and be available on behalf of the consignee at the point of destination.

Legislation of the sort proposed, so far as it is designed for the benefit of the consignor or consignee only, would be chiefly important in the case of grain.

The objections to such legislation from the standpoint of the carriers spring mainly from two causes:

The first cause is that grain received by one carrier will commonly, as has been above stated, pass over several lines before it reaches its destination. If it were to be delivered to the consignee by the same carrier who received it, the objections to such carrier being bound absolutely by the statement of weight or quantity given on its receipt would be much more easily met. The carrier ought, it would seem, to ascertain the exact fact at the outset, and it ought then to be responsible for the conduct of its agents until delivery was completed. But when delivery is to be made at a distant point, and the handling may for a considerable time be in the hands of agents of other carriers of whose carefulness or integrity the initial carrier will know nothing, and over whom it can have neither supervision nor control, there may well be hesitation about assuming a position which will make the initial carrier the guarantor of

the integrity and the accuracy of every agent or other carrier who may be concerned in either the transportation of the grain or in its delivery.

The risks even then might not be very great on the main lines of the country, which carry grain for the most part between the great cities, where everything can be done under a supervision with which all are satisfied; but grain from the West is largely shipped into New England and into the Southern States for delivery at small stations in car-load lots, and also sometimes in quantities less than a carload, and any supervision of the delivery, except such as the local agent will give, is practically out of the question. And as the consignee, if the bill of lading were made conclusive, would be less likely to be vigilant in watching delivery than he feels it for his interest to be now, it is not unlikely that the cases of supposed shortage would be more numerous than ever.

In view of this fact, one question that naturally presents itself is whether one effect of such legislation might not be to make it for the interest of carriers to restrict the bills of lading given by them to their own lines instead of joining in through traffic arrangements. If that were done, each carrier in succession would ascertain what it received, and must at its peril deliver it to the next carrier in line, but the responsibility would not go further. No provision of the Act to Regulate Commerce compels carriers generally to enter into joint arrangements or to become mutually responsible for each other's conduct; but the traffic arrangements now accomplish this to a very large extent, and they are of great public convenience and utility. Whatever should be calculated to diminish the number of such arrangements ought to be supported by very strong and conclusive reasons to warrant its adoption.

The second reason for objection connects itself with the expense.

When the initial point of shipment is Chicago or any other great center of grain traffic it may be assumed that the carrier will be prepared with all necessary means of determining the weight or quantity. But the means of expeditious weighing or measuring of large quantities are expensive, and few roads could afford to have them at all stations where the merchandise might be offered for reception. To require the accurate determination to be always made would be to add sensibly to the cost of the carrier's service, and this increased cost it would be claimed the owner who was to have the benefit of it ought to pay. In the case of grain received from another road, the necessity for reweighing would be the same as when received from wagons.

When the carrier is only seeking to arrive at the quantity for the purpose of computing its charges, precise accuracy is not very important, and the weight of grain in a car will be taken to be the gross weight of car and all, with the weight stenciled on the car as its weight deducted; but a little variance in the weight of the car which would be insignificant in computing charges would be so important when counted as grain to be paid for that the carrier could not afford to take the risk of it. The grain, it might be assumed, would therefore commonly be transferred from the car bring-

ing it in, for the purpose of accurate weighing.

Even in the large cities, where the means of properly determining weight or quantity may now be supposed to be complete, legislation of the sort proposed would almost necessarily add something to the cost of the carrier's service. Large quantities of grain are now delivered upon the cars from elevators, some of which are public and under official supervision, and some not. The carriers, it is believed, have been accustomed to receive the weights given them at both the public and private elevators as accurate; but with the increased responsibility they would be likely to decline to do this in the case of private elevators, and to require the weighing to be done under their own supervision. This would perhaps lead to the appointment by railroad associations of a force of weighers and gaugers to take charge of work of this description for all the roads.

These facts are mentioned in this place in order that they may not be overlooked in any consideration that may be given to this subject with a view to legislating upon it. The matter of additional cost is specially important because the necessity for vigilance on the part of the carrier will be made more imperative by the fact that the temptation on the part of the consignor to deceive and mislead will be greatly increased when he knows that the bill of lading he succeeds in obtaining, though perhaps by artifice and deception, will be conclusive in his favor.

It may be mentioned, also, that the burden of making provision for accurate weighing at initial stations will be likely to be more severely felt by the smaller and weaker roads than by the main lines.

When the matter of additional cost in giving better service to the public is spoken of it is not uncommon to hear the remark made that whatever cost is necessary to be incurred in order to give the best service, the railroad company ought to bear. This is undoubtedly true. But if the person making it means to be understood that the railroad company should bear any additional cost that may be necessarily incurred in order to improve its service, and should not increase the charges to its patrons, the remark could not be true unless the charges previously made were greater than they should have been. A railroad company has no fund from which to pay cost of service except such as the returns from the service bring it. The principle applicable in the case is that the company may justly be required to give the public the best practicable service, because it is supposed to levy upon the business such charges as will meet the cost of the best service.

A further objection to making bills of lading conclusive—that it will offer a premium for frauds—is alluded to below.

But a pressure to have these bills made conclusive of the receipt of the property, and that it corresponds to all the particulars specified therein, comes also from bankers and brokers who are accustomed to make advances upon them. It is a common practice for shippers of leading products of the country, particularly cotton and tobacco, to obtain from their bankers advances on their bills of lading, and where the property is of such a character that it is

readily convertible into money the convenience is very great.

The owner may expect to obtain advances to something near the value, and he is relieved from the necessity of asking accommodations from others in the way of indorsements in aid of his personal credit. But the bill of lading, under the law as it now is, does not conclusively settle, in favor of the party advancing money upon it, the fact that the carrier has received the property specified; but the carrier may prove when the property is demanded, that its agent, by collusion with the party named as consignor, gave the bill without the receipt of any property whatever, or that intentionally or by mistake he overstated the quantity or the weight, or gave false particulars calculated to make the apparent value of the property greater than it was in fact. Such proof is understood to reduce the responsibility of the carrier to what it would have been had the bill of lading been entirely truthful; but the consequence may be that the party who has advanced money in reliance upon it may lose his advances.

This it is claimed is unjust. The carrier it is said should be responsible to the full extent for the acts of its agent, and all parties whose interests may in any way be affected by a reliance upon them should be protected as completely as if no mistake and no fraud had been committed. On the other hand, it is answered on the part of the carriers that to make the bill of lading conclusive would be to offer a premium not only for deception to be practiced on the part of dishonest parties upon agents, whereby an untruthful bill of lading may be obtained, when the agent is honest and intends to be careful, but also for collusion between dishonest parties and agents whom they may corrupt. The number of persons whom carriers must employ is so great that the possibility of finding among them one or more who may be thus corrupted is always imminent; and the carriers insist that while the rule of absolute conclusion in such cases would be seriously damaging to them, it would be bad also on grounds of public policy because of the temptation it would offer for the corruption of agents in their service.

The question involved is whether it is important and desirable to extend the principle of negotiability so as to include bills of lading among the instruments which are fully protected in the hands of an innocent holder. For reasons which are deemed important in commercial transactions, bills of exchange and promissory notes, payable to bearer or to order and properly indorsed, in the hands of any *bona fide* holder for value who receives them before they are dishonored, are not affected by any equities that might have existed in behalf of the parties chargeable thereon while they remained in the hands of the parties to whom they were given. This quality of negotiability is, no doubt, an important and valuable one, at least so far as bills of exchange are concerned; but as to promissory notes doubts are sometimes expressed whether the evils do not overbalance the advantages.

It is well known that for many years parties have made a business of selling pretended or worthless patent rights or other things of

shadowy value, and of obtaining therefor the notes of credulous persons, which, though invalid in the hands of the takers, become conclusive as soon as a third party acquires them, that the makers have received full value. The frauds in these and similar cases have been very extensive. The carriers also claim that the Law as it now is sufficiently protects the party advancing money on a bill of lading. He makes the advancement in reliance upon the good faith and integrity of the party presenting it, and he may resort to that party for indemnification in case anything is wrong or defective. It is further claimed that under the Law as it now is no difficulty is experienced in obtaining loans on bills of lading, and therefore no reasons of public urgency demand legislation on the subject.

This subject is alluded to in this place because of its relation to what precedes, but the Commission makes no recommendation regarding it.

Akin to this subject of conclusive bills of lading is that of protecting the bills given in respect to charges when the charges are specified therein.

Complaint has in several instances been made to the Commission that where carriers had received property on definite statements of what the charges would be, and had specified the charges in the bills of lading, the amount which the consignee was compelled to pay was a sum in excess of that specified. Investigation disclosed the fact that a number of reasons had in different cases been operative to cause the discrepancy. Sometimes the amount charged was greater than it was expected to be, because of some misunderstanding on the part of the agent of the carrier receiving the property as to what were the rates on a connecting road, or because some joint rate was raised without previous notice of the purpose, or was suddenly withdrawn from. But sometimes the addition made to the rate stated might be due to the correction of an error in the original weighing, measurement, or marking of the freight carried, so that the payment finally exacted was only what was properly and legally chargeable. More often than from any other cause increase of charges specified has come from exercise of the power the carriers claim to change at pleasure the relations they enter into with other carriers for through rates.

The consequence when this is done may be that one carrier may have given bills of lading which others, when the property comes to them will, so far as the charges mentioned are concerned, refuse to honor. The loss must then fall either upon the owner of the property or on the carrier giving the bill.

Most of the cases brought to the attention of the Commission were cases of consignments made in Southwestern States to northern Atlantic seaports, and which must pass over a number of roads. It was ascertained, however, that the initial carriers recognized their obligation to protect the bills given by them, so that the unexpected increase in charge, though it might subject the consignee to the necessity of paying it in the first instance, was not a loss to him or to the consignor but to the initial carrier. Even this necessity of advance-

ing a sum unexpectedly was complained of as a hardship, and it was thought it should be guarded against by some order of the Commission which should require delivery of the property to the consignee on payment of the charges specified; but the Commission has not thought it had the power to compel any carrier to deliver up property on the payment of less for its own service than it had a right legally to receive, nor that it could require a carrier in one part of the country to look to a carrier at a distance for its charges instead of to the lien on the property in its hands. The most that can reasonably be required in such a case is that the initial carrier shall promptly settle claims for excessive charges, and this in the cases investigated the carriers showed no disinclination to do. Some of them insert in the bills of lading issued by them the following clause:

It is understood that all connections recognize this bill of lading and will settle freight accordingly.

The traffic manager of the Louisville & Nashville Railroad Company, an important line extending from the Ohio River to the Gulf, states the policy and practice of his company as follows:

(1) In case the delivering line does not protect the rate stated in the bill of lading, this company will at once settle overcharges on presentation of the bill of lading and expense bills showing what has been paid at the point of destination.

(2) This company protects bills of lading issued by any company covering freight deliverable at any point on its road, and undertakes to do so at once and without delay.

(3) This company also protects bills of lading issued by what are known as fast freight lines when shipments are delivered at any point on its road.

(4) In cases where fast freight lines issue bills of lading for cotton or other commodities shipped from points on the line of its road, this company will protect the rates named in such bills of lading; and in case overcharges occur will refund on presentation of bills of lading and expense bills showing what has been paid at point of destination. In other words, this company, so far as it is in its power, undertakes to promptly protect rates of freight stated in bills of lading.

This is a liberal practice and do doubt a wise one. It is substantially pursued by other lines in the same territory. It goes beyond any existing requirement of positive law, and the carriers following it will very likely be subjected to occasional vexations and perhaps losses from the carelessness or improper conduct of agents of other carriers. But they will gain the favor of patrons by their course, and in many ways will be incidentally benefited.

THE GOVERNMENT-AIDED RAILROAD AND TELEGRAPH LINES.

By Act of Congress approved August 7, 1888, entitled "An Act Supplementary to the Act of July First, Eighteen Hundred and Sixty-two, Entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Lines from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes,' and Also of the Act of July Second, Eighteen Hundred and Sixty-Four, and other Acts Amendatory of said First-Named Act," certain powers and duties in relation to those lines were devolved upon this Commission. A copy of the Act appears

in Appendix F, relating to the government-aided railroad and telegraph lines.*

The first section of the Act provides that all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which by law are required to construct, maintain or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employees, maintain and operate for railroad, governmental, commercial, and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the Acts making the grants of government aid.

The second section provides that whenever any telegraph company which shall have accepted the provisions of title 65 of the Revised Statutes shall extend its line to any station or office of a telegraph line belonging to any one of the railroad or telegraph companies referred to in the first section, the telegraph company so extending its line shall have the right to connect with the telegraph line of the railroad or telegraph company referred to in the first section to which it is extended, at the place where their lines may meet, for the prompt and convenient interchange of telegraph business between such companies; and the railroad and telegraph companies referred to in the first section are required to allow such connection to be made and to so operate their respective telegraph lines as to afford equal facilities to all without discrimination, and to receive, deliver and exchange business with connecting telegraph lines on equal terms, affording equal facilities without discrimination for or against any one of such connecting lines; and such exchange of business to be on terms just and equitable.

The third section provides that if any railroad or telegraph company referred to in the first section, or company operating such railroad or telegraph line, shall refuse or fail, in whole or in part, to maintain and operate a telegraph line as required by law, for the use of the government or the public, for commercial and other purposes, without discrimination, or shall refuse or fail to make or continue such arrangements for the interchange of business with any connecting telegraph company, then complaint may be made to the Interstate Commerce Commission, whose duty it shall be, under such rules and regulations as the Commission may prescribe, to ascertain the facts, and determine and order what arrangement is proper to be made in the particular case, the railroad or telegraph company concerned to abide by and perform such order; and the order may be enforced by *mandamus* in the courts of the United States. The Commission is also authorized to institute any inquiry upon its own motion in the same manner and to the same effect as if complaint had been made.

By the fourth section the Attorney-General of the United States, in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines

*See *Re Act of Congress of August 7, 1888, ante*, 208. [Ed.]

required to be constructed by and lawfully belonging to the railroad and telegraph companies referred to in the first section, and to have the same possessed, used and operated in conformity with the provisions of this Act and of previous Acts, is required, by proper proceedings, to prevent any unlawful interference with the rights and equities of the United States under any law of Congress relating to such railroad and telegraph lines; and to have legally ascertained and finally adjudicated all alleged rights of all persons and corporations claiming in any manner any control or interest of any kind in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, or any of them, and to have all contracts and provisions of contracts set aside and annulled which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies.

By the fifth section any officer or agent of said railroad or telegraph companies, or any company operating the railroads and telegraph lines of said companies, for any failure to operate their telegraph lines, as required by law, and to afford to the government and the public equal facilities, or to secure to connecting telegraph lines equal advantages and facilities in the interchange of business, without discrimination, or for refusal to abide by and perform and to carry out, within a reasonable time, the orders of the Interstate Commerce Commission, shall for every such refusal or failure be guilty of a misdemeanor, and, on conviction, be fined a sum not exceeding \$1,000, and may be imprisoned not less than six months; and the aggrieved party is also given a right of action for damages against the company whose officer or agent may be guilty of such failure or refusal.

The sixth section makes it the duty of every one of the railroad and telegraph companies referred to in the first section, within sixty days after the passage of the Act, to file with the Interstate Commerce Commission copies of all the contracts and agreements between it and every other person or corporation in reference to the ownership, possession, maintenance, control, use or operation of any telegraph lines or property over or upon its rights of way, and also to make a report describing with sufficient certainty the telegraph lines and the property belonging to them, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim, and the manner in which the same are being then used and operated. The said companies are further required annually to report to the Interstate Commerce Commission, with reasonable fullness and certainty, the nature, extent, value and condition of the telegraph lines and property belonging to them, the gross earnings and all expenses of maintenance, use and operation thereof, and their relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports to be prescribed by the Interstate Commerce Commission; and any refusal or failure by any of said railway or telegraph lines to make such

reports, or any reports which may be called for by said Commission, or refusal to submit its books and records for inspection, it is provided, shall operate as a forfeiture in each case of a sum not less than \$1,000 nor more than \$5,000, to be prosecuted for by the Attorney-General of the United States.

Upon the expiration of the sixty days within which the railroad and telegraph companies were required to file with this Commission all contracts and agreements in reference to the ownership, possession, maintenance, control, use or operation of any telegraph lines or property upon their rights of way, and a report describing their telegraph lines and property, and the manner in which they were being used and operated, the Commission notified the various railroad and telegraph companies referred to, by circular,* a copy of which also appears in Appendix F, of their duties under the Act, and called upon them to transmit, with as little delay as possible, the contracts and reports required to be filed with the Commission.

Since the reception of the notice, the Commission has received from some of the railroad companies copies of their contracts with telegraph companies, and has been informed by others that the contracts and reports will be transmitted as soon as the copies can be made and the reports prepared.

Until the documents required by the Act shall be received it will not be possible for the Commission to make any complete or satisfactory report to Congress upon these subjects. The Commission has ascertained, as accurately as possible, the names of the various railroads aided by government subsidies of any kind, and the names of the railroads that have been so aided to assist in building telegraph lines. A list of these several roads is given in Appendix F. References are also given in the same appendix to the legislation of Congress in respect to the duties of railroad companies receiving government subsidies to construct, maintain, and operate in the manner required by law telegraph lines for the uses of the Government and the public.

Title 65 of the United States Revised Statutes, referred to in the Act of August 7 last, gives to telegraph companies organized under state laws rights of way over any portion of the public domain of the United States and over and along any of the military or post roads of the United States, and over, under or across any navigable streams of water of the United States; but the lines must be so constructed and maintained as not to obstruct navigation or interfere with ordinary travel on military or post roads.

The same title also gives the right to take and use from the public lands through which their lines may pass the necessary stone, timber and other materials for its uses, and to preempt and use certain portions of the unoccupied public lands subject to preemption through which their lines extend, not exceeding 40 acres for each station, the stations not to be within 15 miles of each other.

The jurisdiction of this Commission, under the Act of August 7 last, extends to the hearing of complaints for a neglect or refusal of tele-

*See *Re Act of Congress of August 7, 1888, ante*, 208. [Ed.]

graph companies subject to the Acts of Congress to maintain and operate telegraph lines as provided by law for the uses of the Government and the public for commercial and other purposes, without discrimination, or like neglect or refusal to make or continue such arrangements for the interchange of business with any connecting telegraph company, and to determine and order what arrangement is proper to be made in any particular case; and the Commission may also institute any inquiry upon its own motion in the same manner as if complaint had been made. The Commission is also required to report to the Attorney-General all cases of neglect or refusal by any of the railroads or telegraph companies referred to in the Act to make an annual report, or any report that may be called for by the Commission, or any refusal to submit its books and records for inspection, to be proceeded against according to law.

No formal complaints have as yet been made under this statute, nor has the Commission been called upon to take any official action in respect to any of the railroads or telegraph companies specified in the Act.

The Commission is not in possession of sufficient data to make any further or more extended report upon this subject. The forms to be prepared by the Commission for the annual reports of the telegraph companies are under consideration and are expected to be completed seasonably for the purpose of returns to embrace the current fiscal year.

ANNUAL REPORTS FROM CARRIERS.

The 20th section of the Act to Regulate Commerce provides:

Sec. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require, and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

The care with which this section is framed and the prominence given to the subject of railroad statistics in the report of the Senate Select Committee on Interstate Commerce indicated very clearly to the Commission the importance of careful and thorough work in executing its

provisions. Allusion was made to the subject in the first annual report of the Commission, at page 29.* At that time the foundation had been laid for the system which has now been fully developed and put in operation.

In view of the infinite diversity that has heretofore prevailed in the matter of railroad statistics the task of framing a form of universal application was found exceedingly difficult. At the same time it was obvious that the formulation of a system in which it might be possible for all the carriers in the country to unite was most important. This fact involved the consideration of the requirements of many different interests. A general basis was found in the provisions of that portion of the Act above quoted. The obligations imposed by state legislation upon the various state railroad commissions which have been organized from time to time in different parts of the country were also important. A Bureau of the Department of the Interior had for some years been engaged in the collection of statistical information in great detail from a large number of important roads which received aid from the United States in the form of land grants and subsidies. The carriers themselves were accustomed to collate and present annually, for the use of their directors and stockholders, information in more or less detail concerning the workings of their respective lines.

Some of the information which it has been the custom of intelligently managed corporations to tabulate and make public is of especial value to their own officials and subordinates in securing the economical working of their lines, and in adjusting transportation charges; and the importance of statistics of this character is many times increased by an opportunity for comparison between results obtained upon different lines in the same or in different sections of the country. The report of the Senate Select Committee, above referred to, also recognized the importance of reliable and accurate information for the use of investors in railroad securities—a class of the community whose almost sole dependence in the past has been the unofficial though painstaking annual compilation by private enterprise of a manual the great circulation of which demonstrates the necessity for its existence.

The first step, therefore, was to obtain by correspondence the largest possible number of blanks and forms as prepared by the various railroad commissions above referred to, and as in use by railroad accountants throughout the land. The statistics obtainable in other countries were also examined so far as possible, and the best attainable publications upon the subject were consulted.

In October, 1887, a circular was issued to all carriers, as well as to the various state commissions and other persons supposed to be interested in the general question, directing attention to the subject and announcing that it would be considered at a public session of the Commission, to be held in Washington on October 26, at which time all persons were invited to appear and be heard, or to furnish any written or printed suggestions that might occur to them. This circular elicited considerable correspondence, and a large number of state and

* 1 Inters. Com. Rep. 607. [Ed.]

railroad officials were in attendance at the time announced. A free interchange of views was had in respect to the general scope of the reports to be required, and, more particularly, in respect to the date which should be taken as a common period for their compilation. Upon this subject a great diversity of opinion was manifested, arising from existing methods under which it had been customary to close the books in different States and on different lines at different periods throughout the year. The conclusion reached by this Commission upon this point was announced in the following language:

It is essential that a uniform date be adopted for the annual closing of the books and striking of the balances of all the carriers throughout the country. A careful consideration of this subject has led the Commission to the belief that the date most useful in itself, and most likely to be generally accepted, is the 30th day of June. It is not possible to state all the reasons which have led to this result, but among the more important are the following: That date is the end of the fiscal year of the United States. The books of all the departments of Government and its accounting officers are settled as of June 30. These reports are required for transmission to Congress, which meets annually on December 1. If they are filed with the Commission by September 1 (or possibly 15) the remaining time will be necessary to enable useful work to be done in the way of compilation and of deductions, to be properly laid before Congress at the opening of its session, with as much of freshness in the information so obtained as seems reasonably practicable.

The same thing is true of the reports to the various State Legislatures. Some change in the legislation of some of the States will probably be required to effect the adoption of a uniform date; but it is obvious that the date proposed will involve less change than any other that can be named. More of the state reports are now made as of June 30 than at any other period, although some are required to December 31 and some to September 30. By far the greater number of the State Legislatures meet in January, and the considerations above stated as adding to the value of a June 30 report for the information of Congress apply as well to the State Legislatures. It is, moreover, the belief of the Commission that the date stated will involve less change in corporate methods of bookkeeping than any other, and that the result will be generally satisfactory for the purposes of the corporations themselves. At present the whole matter is confused and burdensome. It seems best that this Commission should take the initiative and endeavor to bring about order and uniformity. It is not proposed to act arbitrarily or unreasonably in so doing, but to find the most feasible and convenient standing ground for all.

The preparation of a form was then entered upon, and a proposed or experimental set of blanks was printed in January, 1888, which was distributed to state boards, railroad accountants, and other persons interested. In that connection it was explained that these blanks were circulated for examination and criticism in order to obtain the fullest possible comparison of views before a form should be definitely adopted; it was also explained that no very radical departure from existing methods was proposed; that the forms required by state commissions were made the basis of the draught; that a very substantial benefit would result from the passage of the Act if the plan which the Commission should finally adopt might be made the basis of a form to be brought into general use for all reports, and therefore that a prominent object had been to prepare blanks which should contain all the more important information usually to be found in railroad reports, and at the same time be susceptible of expansion in detail to meet

the requirements of state statutes and of exacting accountants and boards of directors. Some further explanations were made and the subject was thrown open for suggestions from any and all persons interested.

Much correspondence was elicited in response to this invitation; and on March 28, 1888, a meeting of railway accounting officers was held in Washington to consider said proposed form of annual report. This meeting was attended by the representatives of more than 70,000 miles of railroad, and the blanks under consideration were taken up and discussed in detail. Many suggestions were made which were obvious improvements and were incorporated in the final form. Conferences were had with state and railroad officials in New York City and elsewhere, and the vast amount of matter accumulated was carefully examined and digested. The form ultimately determined upon was the result of great consideration and a sincere effort to harmonize all the requirements of the situation so far as practicable. The necessary blanks were printed and distributed to the carriers in the month of June.

It was known that considerable time would be required after the termination of the fiscal year for the closing of accounts and the compilation of statistical matter, in order to enable the carriers to satisfactorily respond to the requirements of the blanks; it was believed that a period of two months and a half would perhaps be adequate for that purpose, and September 15 was named as the date for filing the returns. Many carriers, however, found themselves compelled to ask for further time. In view of the radical changes in the system of accounting necessary on the part of many roads, and of the fact that many topics were embraced upon which current records had not been kept during the year by the carriers, of the further fact that each carrier has had its own methods of bookkeeping and its own time for striking its annual balances, and in view of the magnitude of the work involved in many ways, the Commission felt disposed to treat the subject of the time of filing the first reports liberally, believing that after the procedure under the Law shall get fairly under way future reports will be prepared with very much less difficulty. The time of filing the reports for this year has therefore been extended. In many cases a full compliance with all the details of the blanks has not in every instance been insisted upon, especially where the existing records of the carriers have not been so kept as to afford the necessary information.

The names of the carriers from which reports have been received for the year ending June 30, 1888, are shown in Appendix H, as well as those which have not as yet filed returns. It is proper to add that many of the companies in the latter category state that their reports are nearly complete and will be soon sent forward.

After fixing the date on which the reports should be made the next important question under the Law was in relation to what carriers should be called upon to make reports. Many of the shorter roads, situated wholly within the boundaries of a single State, were inclined to entertain the view that they were not sub-

ject to this section of the Interstate Commerce Law. Other carriers similarly situated, including some very important lines, entered heartily into the plan of a universal system of reporting. The position taken by the Commission upon this question was announced in a circular issued June 1, as follows:

The Act applies to all common carriers engaged in such transportation of passengers or property as is described in its first section. Very many railroads which are located wholly within one State are, nevertheless, very largely engaged in interstate commerce. In fact, under the present methods of conducting joint traffic, nearly every road, however short its line, unites in making through rates, under which it issues and receives tickets or bills of lading, in connection with roads in other States, upon which passengers and freight are transported across state boundaries; the revenues of every such road are derived, to a greater or less extent, from the traffic which is regulated by the provisions of the Interstate Commerce Law.

The information which this Law authorizes the Commission to require is very general in its nature and scope. It is apparent that it was the purpose of Congress to inaugurate an annual collection of statistics, which should faithfully present the entire transactions of every railroad in the United States for the preceding year, and that the information so obtained should be authoritative and trustworthy.

Such returns, when arranged upon a uniform system and presented under official sanction, cannot fail to be of great interest and value to all carriers, as well as to Congress and the public.

As to many of the matters enumerated, the value will be greatly lessened if the statistics are incomplete. If the efforts of this Commission shall be seconded by the railroad companies and by the various state railroad commissioners, it is entirely feasible to speedily bring all railroad accounts throughout the United States upon a uniform basis, and to present them annually to the country and to the world in a manner worthy of the importance of the subject.

The blank about to be issued is believed to be the closest approach to a universally satisfactory system which has yet been made in this country. It is also confidently believed that there is no information asked which the carriers cannot readily furnish and will not cheerfully give, and it is hoped that every detail of inquiry has a permanent value.

The Commission, therefore, without ruling definitely upon the question of what railroad companies may or may not be required by the Act to file the returns in question, will furnish blanks to every railroad company in the United States, whatever its situation or relative importance, in the belief that every carrier will cheerfully and promptly contribute its share towards the attainment of a complete and trustworthy annual exhibit of the entire railroad system of our country.

The form issued is published in Appendix G, together with the answers returned by one carrier, which may be taken as representative of all. For this purpose the return of the Northern Pacific Railroad Company has been selected. It is manifestly impossible at the present time to reproduce all of the returns on file; but by reference to the return of this company the extent and value of the information accumulated can be better understood, and the reasons operative in the preparation of the form, in some important particulars, can be more clearly explained.

The first great difficulty met in devising a universal blank was found in the fact that a large proportion of the companies upon which franchises as common carriers have been bestowed by the various States and Territories, and by the General Government, are not now in their own corporate capacity actually conducting transportation. The tendency has been and is to consolidate and combine the control

of large systems in a single management. This has been effected at times by consolidation or by purchase, but more usually by leases, or through proprietary control resulting from the acquisition of the title to stocks, bonds and other securities. The Act requires that the annual reports filed shall show in detail the amount of capital stock issued, with the dividends thereon, the number of stockholders, the funded and floating debts and interest paid thereon, the cost and value of the carrier's property, franchise and equipment, and other matters; and it clearly contemplates obtaining a complete exhibit of the financial condition and operations of the entire railroad system of the country.

It therefore became necessary at the outset to establish a general division of carriers between those actually operating transportation lines and those not so engaged. This distinction lies at the foundation of the blanks, the operating carriers being required to make a complete report in their own behalf of their financial situation and of all the operations which they conduct, while the leased and proprietary carriers are required to make a financial report only, showing their organization and capitalization, together with the income received by way of rentals or otherwise, and the disposition made thereof. The blanks are so framed that they can be applied to either class of corporation.

It was a matter of great difficulty to obtain an accurate list of the railroad corporations of the land, divided as above required; the situation was complicated by the fact that in many cases roads have been built and immediately leased to other roads, which in turn have been leased with all their subordinate roads to a third, and at times the process has been carried even further than this; moreover there is a class of operating companies which control and manage many very important systems, which of themselves are not owners of any road whatever, but have taken leases or otherwise acquired the possession of lines of road legally belonging still to the subsidiary corporations, frequently different forms of title appearing under the same general management; many roads also are carried on by receivers, or by trustees for bondholders into whose hands the stockholders have surrendered their present control; in other cases corporations organized originally for other purposes have been granted powers for the operation of railroads in connection with other business, so that their capitalization does not represent railroad property solely but frequently is founded upon large ownership of coal or other mines, of canals and even of banks; many cases are found in which large grants of the public domain have been bestowed upon carriers, which treat the proceeds of the sale of the lands as part of their general assets, and which issue securities based upon their ownership of real estate generally as well as of railroad property. In the formulation of the blanks it was necessary to keep all of these diversified and incongruous conditions in view and endeavor to provide for all the varied circumstances which might be found to exist.

The plan of report was intended to be sufficiently comprehensive and particular to satisfy fully all the requirements of the statute in re-

spect to every common carrier to which it applies, notwithstanding the differences that exist among them. To what extent the result aimed at has been attained, the returns made will furnish the best evidence. It is presumed that some modifications may be found desirable under the light of experience obtained from the results of this first attempt to establish a system of universal application.

The information called for has been divided into the following topics, which are presented upon different pages of the form:

1. History.
2. Organization.
3. Officers.
4. Property operated.
5. Capital stock.
6. Funded debt.
7. Floating debt and current liabilities.
8. Permanent improvements for the year.
9. Cost of road and equipment.
10. Income account.
11. Income account (for roads under lease only).
12. Earnings from operations.
13. Bonds owned.
14. Stock owned; miscellaneous income.
15. Operating expenses.
16. Operating expenses—continued.
17. Rentals paid.
18. General balance sheet.
19. Financial operations for the year.
20. Important changes during the year.
21. Contracts, agreements, etc.
22. Security for funded debt (page 6).
23. Employees and salaries.
24. Passenger, freight and train mileage.
25. Freight traffic movement (company's material excluded).
26. Description of equipment.
27. Mileage of road operated. Renewals of rails and ties.
28. Consumption of fuel by locomotives. Accidents.
29. Characteristics of road.
30. Characteristics of road—continued.
31. Oath.

The various interrogatories under each of the above topics are intended to be self explanatory. It is proper, however, to particularly mention some of the questions raised—

As the inquiries are directed to the entire railroad system of the land, it is obvious at the outset that many details will be found important upon some roads which do not exist upon others, so that some of the inquiries are not necessarily to be answered by all of the lines. This point is more fully elaborated in the Book of Instructions, a copy of which is also annexed.

Upon page 4 of the report a subdivision is made calling: 1, for the "name of every railroad the operations of which are included in the revenue account," with a description of the same; and 2, for the "name of all coal, bridge, canal or other properties, the profit or loss only from which is included in the general balance sheet." It is intended under the last caption to provide for a general statement of properties owned which are not strictly railroad properties, and the operations of which therefore need not be stated in detail, but which nevertheless aid to produce the general financial result shown upon the ultimate balance of the corporation books.

On page 5, Capital Stock, inquiries appear which are intended to answer the requirements of section 20 of the Act in reference to ascertaining amounts paid for capital stock, and the manner of payment for the same. This opens the subject of over capitalization, or of the

watering of stock, so called, which was discussed in the report of the Senate Select Committee on Interstate Commerce. It is believed that cases are now comparatively rare in which the capital stock of our railroad companies, as the same now exists, was actually issued for cash to *bona fide* investors in the same. In many cases roads have been built by the issuance of stock to the contractors or construction companies; frequently by the creation of bonds to an amount nearly or quite sufficient to cover the actual construction cost, the stock issued being in the nature of a *bonus* or profit, or being employed as compensation for services or expenses collaterally attending the construction of the road. In a vast number of instances the original mortgage bonds have been foreclosed, thus legally extinguishing the title of the original stockholders. In such cases stock has at times been issued by a new corporation organized among the bondholders, and at other times a general reorganization has been effected, under which stock of various classes and priorities has been substituted for pre-existing securities of different grades; frequent consolidations have required the opening of new books upon which former issues of stock are merged in a new form of security; and the foregoing as well as many other methods of substitution in respect to corporate capital are constantly in progress.

The result of this is that most of the carriers now profess to be actually unable to state the amounts paid upon their capital stock or the manner of payment for the same, with any approximation to precision, claiming that these results can only be reached after a critical examination of their books, especially of the books of antecedent companies long since closed and depending also in many cases upon the knowledge of officers in respect to transactions of the past, many of whom are long since dead. As a matter of book keeping, capital stock in the ledger accounts usually stands at its par, and is treated as representing an equivalent amount of cash in the general balance, being placed against the ordinary items of construction or cost of road and equipment to a like amount. Under these circumstances it seems that the question of actual cost of railroad property, or of actual value represented by railroad stock, can only be satisfactorily ascertained by a rigid inquiry in each instance, where the various original books and evidence relating thereto shall be sifted. The subject is recognized as an exceeding important one, but it is believed that it can only be handled gradually and in detail. Meanwhile the interrogatories referred to, which are prepared in accordance with the requirements of section 20 of the Act, are of value as affording a basis for such future investigation as may be found desirable or necessary.

Another line of inquiry required by the Act relates to "the cost and value of the carrier's property, franchises and equipment." For the reasons above stated it is found impossible to satisfactorily obtain immediate information which shall show the cost of the railroad property; the corporate books usually showing the cost to be substantially the amount of capitalization effected to reach the present condition of affairs, the cost standing against capital, and

the necessities of double entry book keeping requiring the preservation of a constant balance. The blanks upon pages 8 and 9 contain inquiries which are intended to elicit the desired information so far as the same can be obtained from the corporate records. It is found, however, that very many roads are unable to give the information asked upon these pages.

In respect to ascertaining the "value of the carrier's property, franchises and equipment," an entirely different question arises. The present value of a railroad property is necessarily very largely matter of opinion only; it depends upon a vast number of contingencies and uncertainties, a road apparently of great value to-day may soon become worthless by the opening of a competing line having superior advantages, or by the competitive struggles of other lines which operate to reduce the income of all; the value of a railroad largely results from the personal characteristics of its officials; the policy pursued by its directors, whether conservative and economical or aggressive and daring, is a great factor in the determination of the current value of the property; a railroad property is not necessarily worth what it would cost to replace it, and, on the other hand, it may be worth very much more than that.

In seeking for lines of inquiry which should tend to answer this demand of the Law certain ways were suggested for approximating a possible estimate of value. A going institution like a railroad, a manufactory, or a bank, is at times valued upon the basis of what it will earn; in other words, the net income from the operation of the property may be considered as affording some criterion of its producing power and some basis of estimating its actual value, providing no change occurs in the situation; under this view the value is measured, in a certain sense, by the net revenue as expended in interest upon bonds and other obligations, and in dividends to stockholders. By comparing the result thus obtained with the earning power of money generally in the community where the road is situated, a rough estimate of the value of the road may be made; but this is found so complicated with expenditures for additional construction, for permanent improvements, for development of the property in various ways, as well as for sinking funds and other fixed payments and in competitive warfare, that the result is far from affording a satisfactory basis of estimation.

Again; it is at times claimed that a property is worth what it will sell for in the open market; or applying this idea to railroads, that they are worth what the equity of redemption will bring when added to the amount required to discharge incumbrances; thus by taking the funded and floating debt of a road, and adding thereto the market value of the shares of stock as bought and sold by the public from day to day, an estimation of the value may be made. This method is pursued in some of the States in endeavoring to ascertain the value of railroad properties for the purpose of taxation.

In view of this claim and the support which this method of ascertaining value has received in some quarters, an interrogatory was inserted on page 5 of the blanks calling for a statement of the market price of shares on June 30, 1888, and also the average market price of the stock

during the fiscal year. The answers to this interrogatory, with other information found in the blanks, will enable an estimate of value to be made upon the basis last suggested; nevertheless, it must be admitted that an attempt at valuation founded upon the fluctuations of the stock market, often affected by manipulations designed either to create fictitious values or to unduly depress actual values for purposes of present gain, is an exceedingly unsatisfactory criterion for determining this important question.

An appraisal might perhaps be resorted to; but who can appraise the value of a franchise? What railroad official would be willing to place an estimated valuation either upon his own property or the property of his neighbor, in view of the ultimate results that might follow in respect to taxation, changes in transportation charges, or fortunes to be made or lost by dealers in securities? The difficulties surrounding this question are so great that, while the Commission has endeavored to the best of its ability to comply with the provision of the law in question, it will be found impossible to establish any safe basis of determining the result desired from any data which it has as yet been able to procure.

Proceeding with the consideration of the subjects embraced in the blanks, page 6, "Funded debt," will be found to be supplemented by a statement upon page 22, entitled "Security for funded debt." This last statement is perhaps novel in railroad reports, but its importance and value are obvious. It is found that many corporations have a great number of different securities, for the payment of which they are responsible either directly or by way of guaranty or indirect assumption. Page 22 calls for the enumeration of all these varied obligations, with a statement as to each, showing what road is mortgaged, giving the termini and mileage thereof, what equipment, if any, is mortgaged, what income is mortgaged, or what securities are pledged. Investors in this country, as well as in foreign countries, have constantly complained that they were unable to ascertain with any degree of precision what security existed for the ultimate payment of the obligations issued by our railroad companies. This information is now afforded in an official form, and under the sanction of an oath, so that it will be found possible to estimate the strength of the innumerable corporate bonds and other obligations outstanding, upon the basis of the actual security represented by each, with proper regard to relative priorities between different issues.

On page 7, "Floating debt and current liabilities," it is intended to exhibit the correct balance of floating debt, or of cash assets, as the case may be, upon an actual cash basis, including obligations for wages, traffic balances, supplies, interest and rentals, up to the date of closing the account, and excluding any offset against the same of so called assets which may not in the ordinary operation of the property be applied to the payment of the floating debt or current liabilities. Materials and supplies on hand are not treated as cash assets for the purposes of this table, it being considered that they are intended for consumption in the ordinary operation of the property, and are not

available for the payment of debts—even in case the management of the road should be taken up by its creditors.

The income account, on page 10, is so prepared as to exhibit at a glance the general results of the operation of the railroad property proper, including revenue obtained from securities owned in other companies, and showing the fixed charges, including taxes and rentals, necessary to be deducted before dividends can properly be declared. This table does not vary materially from the form of statement heretofore in use as prepared by the best authorities.

It has been found, however, that a custom has been quite prevalent among carriers of making certain deductions upon their books before stating in figures what are commonly termed "Gross earnings from operation;" in other words, that certain expenditures have been treated as outside the province of their financial reports and have been excluded altogether in their preparation. This has been the case in respect to payments in fact made from the railroad treasury, and operating to diminish traffic receipts, by way of so called commissions, overcharges, rebates, drawbacks, and otherwise. It has been the hope of the Commission in the preparation of its blanks to put an end to this practice.

In the statement of "Earnings," on page 12, the total receipts from passenger and freight revenue are called for, and a column is provided for in the blank for the deduction of all expenditures by way of tickets redeemed, excess fares refunded, overcharges to shippers paid, and other repayments made of moneys which may be considered never actually to have been the property of the railroad company, although temporarily resting in its hands until returned to the lawful owners thereof. Commissions are treated as an expense of obtaining business and their statement is provided for on page 16 of the blank. And the oath required calls for a statement "that no deductions were made before stating the gross earnings or receipts herein set forth, except those shown in the foregoing accounts; and that the accounts and figures contained in the foregoing return embrace all of the financial operations of said company during the period for which said return is made."

In the statement of "Earnings from operation," page 12, no subdivision of passenger and freight revenue is required, and in this respect the blank is very much more simple than the forms heretofore in ordinary use under the requirements of state commissions and otherwise. The reasons for this change were stated in the circular of January 31, 1888, as follows:

The present distribution is exceedingly unsatisfactory; although the same words are quite universally used they by no means signify the same thing in different parts of the country, or even within the limits of the same State. "Through" and "local" freight are the words most usually employed; sometimes "through," "local," and "joint"; sometimes "local" and "competitive," the latter phraseology having grown rapidly into favor of late in many parts of the country, as particularly adapted to the distinctions observed in the tariff sheets; these distinctions, however, are of a kind which the Act to Regulate Commerce does not directly recognize, and the use of these terms by no means solves the question of what is "through" or "competitive" business. The answers vary as be-

fore the adoption of the newer phrase. On the whole the Commission is inclined to abandon the attempted distinction altogether for the present. No highly useful purpose is apparent for its continuance. It is likely to greatly mislead. If in any State or on any road the information given by such a division of the earnings and expenses is desired, the tables, as framed, can be easily enlarged so as to include it.

The classification of operating expenses, pages 15 and 16, presents a subject of the greatest interest to railroad accountants. The distribution into four general classes was determined upon as the most scientific and satisfactory of the various systems in use, while the subordinate heads under each class are so arranged as to require no important change from what is known as "The classification of operating expenses," which was agreed upon by a convention of state commissioners at Saratoga June 10, 1879, and which has been quite generally adopted in actual use. This Saratoga Classification was also published and distributed by the Commission for the information of such accounting departments as had not already adopted the same.

The Act requires a statement of "the earnings and receipts from each branch of business and from all sources." This clearly requires a separation of freight and passenger earnings, and it is believed to be important, also, to apportion expenses between the freight and passenger service. This, however, clearly can not be done with entire accuracy; expenses of maintenance of way and structures and the general expenses of the corporation must be apportioned between the two classes of traffic upon some arbitrary rule, as it is impossible to tell how much, for example, of the wear and tear of the roadbed is attributable to passenger trains and how much to freight trains. Nevertheless, the division can be approximated with reasonable precision, and the separation has been so generally customary that the continuance of the practice involves no hardship.

The rule adopted by the Commission is the one which has been most usually applied, viz.: that all expenses which are not naturally chargeable to either traffic should be apportioned on a mileage basis, making the division between freight and passenger traffic in the proportion which the freight and passenger train mileage bears to the total mileage of trains earning revenue. It is quite possible that a more strictly accurate rule may hereafter be ascertained and established; but for the present, and for the purposes sought, it is believed to be sufficiently precise. This explanation is made in view of the fact that certain carriers, in connection with the filing of their returns, have protested that the principle of the division required is not exact. As above shown, it is understood to be in part an estimate, but an estimate which is thought to be reasonably satisfactory until some more accurate basis of division is announced.

Page 19, "Financial operations for the year," furnishes information which is not obtainable from the ordinary balance sheet; it calls for a statement of moneys received and expended outside of the ordinary traffic operations of the carrier; for example, by issuing new stock or bonds or other securities, and by the construction of new road, equipment, and betterments;

without this information the reports would manifestly be incomplete.

Page 25, "Freight traffic movement," is intended to afford definite information in respect to the movement of the principal commodities upon each line, and in the country as a whole. The distribution of the first two columns between freight originating on this road and freight received from connecting roads and other carriers was not expected to be available to any great extent in the returns for the past year. The information obtained by a separate presentation of traffic which originates on each road is of obvious value, both in the aggregate, showing the total amount of each commodity moved in the internal commerce of the country, and in detail, showing the traffic resources of each line, and their relative importance.

No more extended presentation of the considerations which influenced the preparation of the blanks issued appears to be required, beyond the general statement that the plan pursued has in view the accumulation of statistics upon the topics prescribed by the statute, including such matters of detail as are believed to be of serious importance and value, and excluding a vast number of items which have been called for at times, but which are more peculiarly of local than of general interest.

It will be observed that the blanks are not adapted to returns from carriers by water, although by the first section of the Act such carriers under certain circumstances are subject to its provisions. The requirement of annual returns from this class of carriers is clear and has not been overlooked by the Commission; but the subject has not been entered upon for lack of sufficient time to properly consider the various questions presented and to prepare proper blanks for the purpose; it opens many questions which are found to be entirely novel and which demand careful attention in their treatment.

The work of compilation of the returns on file and being received, and of deducing such results therefrom as may be of value, has been placed in the hands of the statistician of the Commission, whose preliminary report upon the subject will be found in Appendix H. The organization of his office now embraces a statistician, an assistant, a stenographer, eleven clerks, and a messenger.

AMENDMENTS TO THE ACT.

The Commission in its preceding report expressed the opinion that the Law for the Regulation of Interstate Commerce should be permitted to have a growth, and that it would most surely as well as most safely attain a high degree of efficiency and usefulness in that way. A few amendments to the Act were nevertheless recommended.* It ought, it was believed, to indicate in plain terms whether the express business and all other transportation by the carriers specified in the Act should be governed by its provisions. The provision against the sudden raising of rates without notice ought to be clearly made applicable to joint rates as well as to others, and the Commission ought to have authority to bring about something like uni-

formity in the method of constructing and publishing rates; an amendment upon this subject is now pending before Congress. All these recommendations are respectfully renewed.

Certain other amendments to the Law are also urged upon the attention of Congress. The power suddenly to reduce rates without notice of intention to do so is very often exercised in such a manner as to cause annoyance and loss to individuals and to other carriers, and sometimes so that the effect is equivalent to the giving of a rebate. The Commission believes that notice of intention to reduce any rate which any carrier subject to the Act makes or joins in ought to be published not less than three days before the reduction should be given effect, as provided in the amendments now pending.

There are provisions in the Act as it now stands which would render the carrier, its officers or agents, punishable, if by false billing, false classification, false weighing or false report of weight, or by any other device or means whatsoever, they shall give undue or unreasonable preferences or advantages. The Commission believes that the penal provisions against wrongs of this nature should embrace also the owner of the property or any party acting for the owner or consignor of property who shall be a party to any such unlawful conduct, and it urges the passage of the provisions on the subject contained in the pending bill.

There are many instances in which important lines, in transporting property from one point in a State to another point in the same State, will pass through another State; as lines from New York to Buffalo pass through New Jersey and Pennsylvania, and lines from northern Louisiana to New Orleans pass into and out of Mississippi. It is sometimes claimed that a carrier engaged in such transportation is not subject to the Act, since the property or persons transported are received for carriage from point to point within the same State, and not from one State to another State. The construction suggested is technical, and is not accepted by the Commission as sound, but a certain plausibility is given to it by the fact that the carriers engaged in transportation from point to point in the United States through a foreign country are expressly made subject to the Act, while the same words are not applied to carriers engaged in transportation from point to point in a State, but through another State. The Commission suggests that the question thus raised be settled by express provision.

Another question of construction ought also to be settled by legislation in order to take away the pretense on which certain through lines are now claimed to be local lines in fact and through lines only in appearance. It is well known that many cases exist in which one corporation, either directly or through a trustee, holds the majority or perhaps all the stock of another, and thus controls the other to all intents and purposes, though keeping up a separate organization for the distribution of income among stockholders. The official board and staff of the two in such a case may not be identical; in many cases they are wholly so.

There are also cases in which a corporation created for the purpose of operating existing roads does so through a control of stock in the

*See 1 Inters. Com. Rep. 674 [Ed.]

companies owning them. The claim is understood to be made in some cases, where separate organizations are maintained and no lease given of the subordinate road, that the road is to be considered and treated precisely as though no such ownership or holding of its stock existed, and that a through line is not formed over it in connection with the one owning or holding its stock except when by contract between the two such a line is expressly created. If the Law now sustains this claim, it should, as the Commission thinks, be amended; if a line is in fact a through line by reason of ownership, the corporation controlling it ought not to be at liberty to make through rates or to decline to make them at pleasure.

The Act to Regulate Commerce, in its third section, requires every common carrier subject to its provisions, according to their respective powers, to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith. It is claimed by some carriers, and perhaps the claim represents the prevalent opinion among them on the subject, that while each carrier must afford equal facilities for the interchange of traffic as between competing lines, when it furnishes any, it is at liberty to abstain altogether from entering into joint arrangements with other lines for the exchange of traffic, and that when it shall do so it may remain altogether a local road. Especially is this claim made on behalf of roads whose lines are wholly within the boundaries of a single State. It is said they are purely state roads, and they can not, except at their own option, be compelled to engage in interstate traffic.

As is said elsewhere in this report, however, there are probably very few of the carriers by rail in the country that are not to some extent engaged in interstate commerce, and whether or not such a carrier enters into joint arrangements with other carriers for the purpose is believed to be immaterial to the power of Congress to regulate such interstate traffic as it actually engages in. Probably the Act as it now stands in its specification of the carriers to which it is made to apply would not reach the case of a carrier by railroad entirely within a State that did not enter into joint traffic arrangements for interstate traffic; but the specification falls short of the full power of Congress in this regard, and it is believed that it would be quite within that power to make provisions under which all roads engaged in interstate traffic, whether by contract arrangements with other roads or not, would not only be subject to regulation when they make joint traffic arrangements, but should be required to make such arrangements when the interests of the general public seem to demand it, and that, in case of a failure to agree with other roads upon the terms of arrangement, the Commission should be empowered to prescribe them.

It must also be within the power of Congress when a state road enters into traffic arrangements with another, so as to be, in respect to the traffic covered by it, within the terms of the Act, to require it to give, in respect to such

traffic, the same reasonable, proper and equal facilities for the interchange of traffic to other roads that it does to the line with which the arrangement is made. In other words, as the Commission believes, it should not be within the power of what is commonly called a state road, merely because its line does not extend beyond state boundaries, to so limit its participation in interstate commerce as to establish discriminations therein between connecting lines, or between places and persons, as it is now claimed that it may do.

It is the opinion of the Commission that the interest of the public would be subserved by further amending the third section by adding thereto a provision that—

The facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by every such common carrier, at the request of any other such common carrier, of through traffic at through rates or fares. If any one of such common carriers shall desire to form a through route for interstate traffic or any class thereof over its own line or any part thereof, in connection with the line, or any part of the line of one or more other common carriers, it shall address a request in writing to the other common carrier or carriers, describing therein the proposed route specifically, and naming proposed through rates or fares and divisions thereof for such traffic, and shall deliver such request to such other carrier or carriers and also transmit a copy thereof to the Commission hereinafter named. If the other common carrier or carriers shall not, within ten days after receiving such request, make and serve and file with the Commission written objections either to the proposed route or to the proposed rates, fares or divisions, the same so far as not objected to shall be deemed agreed to; but if either the route, the rates, or fares, or the divisions, are objected to, the objections shall be stated in writing and transmitted to the Commission, and the Commission shall then have power to determine whether, having regard to all the circumstances, the route proposed is demanded in the public interest and is a reasonable route for the traffic, and if the Commission shall so find, and the rate or divisions are not assented to, the Commission shall have the further power to prescribe the same; but the Commission in any case, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance or working of the route, or any part thereof, as well as any special charges which any such common carrier may have been entitled to make in respect thereof; and it shall not be lawful for the Commission in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit, on any other line of communication between the same points, being the points of departure and arrival of the through route.

The Commission also recommend that the carriers engaged independently in interstate traffic on the rivers, lakes and other navigable waters of the country be put, in respect to the making, publishing and maintaining rates, upon the same footing with interstate carriers by rail. It is believed they will be benefited rather than harmed thereby, and that the excuses now made by carriers by rail for great disparities in rates for corresponding transportations as between points which are and points which are not affected by water competition would thereby to a large extent be taken away.

The Commission also refers to what is said regarding the transportation of immigrants in another part of this report, in which general legislation on that subject is urgently recommended.

For the purpose of convenient and necessary reference in connection with the foregoing suggestions the Commission has caused to be printed and annexed to this report, marked Appendix A, a copy of the Act to Regulate Commerce Approved February 4, 1887,* and also extracts from legislation in the Dominion of Canada and in Great Britain upon cognate subjects, including a copy of the Railway and Canal Traffic Act enacted by the English Parliament

August 10, 1888, which is to come into operation January 1, 1889.†

All of which is respectfully submitted.

Thomas M. Cooley,
William R. Morrison,
Augustus Schoonmaker,
Aldace F. Walker,
Walter L. Bragg,

Interstate Commerce Commissioners.

Dated December 1, 1888.

THE INTERSTATE COMMERCE COMMISSION.

NEW ORLEANS COTTON EXCHANGE

v.

CINCINNATI, NEW ORLEANS & TEXAS
PACIFIC R. CO., Alabama Great Southern R. Co., Vicksburg & Meridian R. Co., Vicksburg, Shreveport & Pacific R. Co., and New Orleans & North Eastern R. Co.

(No. 97.)

1. **To correctly estimate the causes influencing the movement of cotton** and the falling off in the proportion of the crop received at New Orleans in recent years, the rail lines of transportation constructed, improved methods, and new conditions must be taken into account.
2. **Whether railroad companies combine or act separately in making rates and charges** is not so important; the essential requirement is that however made they shall be reasonable of themselves, and so fairly adjusted as to be reasonable in their relations to each other and in their results.
3. **That under like conditions freight can be carried proportionally lower for long than short distances** is as nearly settled as anything relating to railroad charges can be. Equal mileage rates would often prevent legitimate competition and give a monopoly in transportation to the best and shortest road.
4. **The reasonableness of rates** cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties.
5. **Commerce between points in the same State**, but which in being carried from one place to the other passes through another State is interstate commerce, and subject to regulation by the provisions of the Act to Regulate Commerce.‡
6. **In determining what are reasonable rates** the fact that a road earns little more than operating expenses is not to be overlooked; but it cannot be made to justify grossly excessive rates. Wherever there are more roads than the business at fair rates will remunerate they must rely upon future earnings for the return of investments and profits.

7. **To be reasonable** the rate from Meridian to New Orleans should not exceed \$1.50 per bale, compressed cotton.

(Complaint filed November 11, 1887. Amended Complaint filed November 25, 1887. Answer filed December 10, 1887. Heard March 5 and 6, 1888. Decided November 26, 1888.)

PROCEEDING on complaint alleging unjust and unreasonable rates for the transportation of cotton.

Mr. B. R. Forman, for complainant.

Mr. Edward Colston, for defendants.

REPORT AND OPINION OF THE COMMISSION.

Morrison, Commissioner:

The New Orleans Cotton Exchange complains of the defendants that they are an association and combination of railroad companies, on and over the roads of which companies transportation, whether local to one or continuous on all, is done under a common control, management and agreement and on which the charges for transportation, especially the charges for carrying cotton from Meridian, Miss., Monroe and Shreveport, La., and from other points on defendants' roads to New Orleans, complainant alleges to be unreasonable and unjust; that they, the defendants, demand and receive from the members of the Cotton Exchange and other business men of New Orleans greater compensation for the transportation of cotton to and from the City of New Orleans than it collects from other persons for doing for them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions and are guilty of unjust discrimination; that they, the defendant companies, in connection with other carriers, the names of which are unknown to the complainant, carry cotton and other freight to Boston, Lowell and New York, from Meridian, Shreveport and other points in the cotton growing districts at rates many times less per ton per mile than the rates and charges per ton per mile from the same places to New Orleans, thereby subjecting that city, the members of the Cotton Exchange and other dealers in cotton, to unreasonable disadvantages, and giving undue preference to the Cities of New York, Boston and Lowell and to the cotton dealers of said eastern cities.

The complainant prays that the defendants

*See 1 Inters. Com. Rep. 3. [Ed.]

†See Appendix I. to this volume. [Ed.]

‡See Lehigh Valley R.Co. v. Commonwealth, ante, 226 [Ed.]

may be required to discontinue such alleged unjust and unreasonable charges, discriminations, preferences and disadvantages and may be ordered and directed to carry cotton from Meridian, Miss., and other points in the cotton growing region, to New Orleans at one half cent per ton per mile and at no greater rate per ton per mile than is received by defendants for carrying cotton from the same points to Boston, Lowell and New York.

The defendant companies answering together but making their answer separate and distinct as to each, deny all unjust and unreasonable charges, discriminations, preferences and disadvantages alleged against them or any of them. They aver that their roads are conducted in harmony, to the extent that through transportation is effected without break of bulk or change of cars by passengers; that said companies are separate and distinct corporations, each having its own board of directors, making its own contracts, owning its own railroad and rolling stock; that they have no joint property, accounts, liabilities or profits; that each company, for business over its line makes its own rates independent of the others and for business over the lines of more than one of the defendant companies such companies alone make rates and charges.

The answer further avers that the road of the Vicksburg & Meridian Railroad Company is wholly within the State of Mississippi; that the road of the Vicksburg, Shreveport and Pacific Railroad Company, extending from Delta through Monroe to Shreveport, is wholly within the State of Louisiana; that through shipments of freight from Monroe and Shreveport, La., to New Orleans are made by the Vicksburg, Shreveport & Pacific Railroad from said points to Delta, on the Mississippi River opposite Vicksburg from which point it is taken to New Orleans by the Louisville, New Orleans and Texas Railroad Company; that the rate on such shipments is made by these two companies and is not made or participated in by any party to this proceeding except the Vicksburg, Shreveport & Pacific Railroad Company. The defendants ask that the complaint be dismissed.

From the testimony heard, depositions taken and read, the published rates filed with the Commission, and from such statements made in the complaint and answer as are not disputed the facts are found to be these:

1. The complainant is a corporation under the laws of the State of Louisiana composed of merchants, traders and dealers in cotton.

2. The defendants are corporations and common carriers engaged in the transportation of passengers and property by railroad, associated and advertising themselves together as the "Queen & Crescent Route." The Cincinnati, New Orleans & Texas Pacific Company as lessee, operates a line of road 335 miles in length from Cincinnati, Ohio, through Kentucky to Chattanooga, Tennessee, sometimes known as the Cincinnati Southern Railway. The road of the Alabama Great Southern Railroad Company runs from Chattanooga to and through Georgia and Alabama to Meridian, Miss., a distance of 295 miles. The line of road of the New Orleans & Northeastern Railroad Company extends from Meridian to New

Orleans, La., a distance of 196 miles. The road of the Vicksburg & Meridian Railroad Company extends 140 miles from Meridian, Miss., to Vicksburg, in the same State. The line of road of the Vicksburg, Shreveport & Pacific Railroad Company is 174 miles long from Delta, La., to Shreveport, La.

3. These several roads maintain separate organizations. Their roads are operated in harmony and as a continuous line for the transportation of through freight or passengers. Charles Schiff, who is president of the Cincinnati, New Orleans & Texas Pacific Railway Company, is president of each of the other companies and the same is true of all the general officers of said companies. H. Collbran is, or was when this case was heard, general freight and passenger agent for each of the roads separately, and as such made the rates for all. These general officers have but one salary, for the payment of which each of the companies contributes in proportion to its earnings. The majority of the capital stock in all the companies is owned by the same interest.

4. The distance from Meridian over the Alabama Great Southern and the Cincinnati, New Orleans & Texas Pacific, the "Queen & Crescent Route" to Cincinnati, and thence by their connections to New York, is 1506 miles. The distance from Meridian to New York by the East Tennessee, Virginia & Georgia Railway and its eastern connections, a road competing at Meridian for cotton and other east bound freight, is 1246 miles. The distance over the Vicksburg, Shreveport & Pacific Railroad and connecting line, the Louisville, New Orleans & Texas Railway from Shreveport to New Orleans is 409 miles. Over the Texas Pacific Railway the distance from Shreveport to New Orleans is 328 miles.

5. In 1859 fifty per cent of the entire cotton crop was received at New Orleans; in 1870-'71 thirty-three per cent. Formerly all cotton receipts were handled at New Orleans.

The cotton movement at New Orleans for seven years compared with the cotton crop of the United States during the same period was:

| Year. | Crop (bales). | Gross receipts at New Orleans. | Handled in presses. | Proportion of total crop received at New Orleans (gross). | Proportion of total crop handled in presses at New Orleans. |
|---------|---------------|--------------------------------|---------------------|---|---|
| 1886-'7 | 6,505,087 | 1,919,186 | 868,875 | 29.5 | 13.4 |
| 1885-'6 | 6,375,691 | 1,946,037 | 1,133,112 | 29.3 | 17.3 |
| 1884-'5 | 5,706,165 | 1,697,597 | 984,587 | 29.7 | 17.2 |
| 1883-'4 | 5,713,200 | 1,709,381 | 1,103,379 | 29.9 | 19.3 |
| 1882-'3 | 6,949,756 | 2,013,586 | 1,296,220 | 29.0 | 18.6 |
| 1881-'2 | 5,456,048 | 1,373,175 | 1,104,866 | 25.2 | 20.2 |
| 1880-'1 | 6,605,750 | 1,883,849 | 1,417,679 | 28.5 | 21.5 |

The receipts for the year 1887-'8 show a slight decline from the average of the several previous years. The present facilities for receiving, forwarding, and handling cotton at New Orleans are as ample as at any former

period. The increase in the annual crop is largely west of the Mississippi River, which brings New Orleans nearer to the center of the cotton growing region.

6. Of the cotton carried by the New Orleans & Northeastern Road 95 per cent and of that carried by the Vicksburg, Shreveport & Texas Pacific Railroad 73 per cent is carried to New Orleans. More is received there by rail and less by water in recent years. Cotton is carried in considerable quantities from Meridian and the surrounding cotton growing districts by all railroads to eastern ports and markets and on through bills by way of Baltimore, Newport News, Brunswick, Savannah, and other south Atlantic ports to eastern and to foreign markets.

7. The earnings of the New Orleans & Northeastern and of the Vicksburg, Shreveport & Pacific Roads are above operating expenses. They are not and never have been sufficient for the payment of operating expenses and interest or fixed charges. The New Orleans & Northeastern Road runs through a flat pine wood and not very fertile country, passing several miles over Lake Pontchartrain and adjacent swamps. Its cotton rates from Meridian to New Orleans are substantially the same as the rates on the Illinois Central from Jackson and other points equally distant as is Meridian from New Orleans. The rates fixed by the Railroad Commissioners of Mississippi and Alabama between interior points are about the same for the same distances as the New Orleans and Northeastern rates. In 1887 eleven per cent of its tonnage was cotton, while its earnings on cotton were \$117,775.00, or 24.7 per cent of its total revenue from freight, excluding receipts from company's freight. It carried that year 32,349 tons, 30,826 of it to New Orleans, 26,163 of it from Meridian, 4,663 of it from local stations. Its gross earnings and operating expenses per mile were (excluding taxes):

| | | | |
|--------------------|----------|-----------|----------|
| In 1884, earnings, | \$3,048; | expenses, | \$3,431. |
| " 1885, " | \$3,562; | " | \$3,041. |
| " 1886, " | \$3,373; | " | \$2,716. |
| " 1887, " | \$3,631; | " | \$2,820. |

It was built in 1883.

8. The rates from Meridian to New Orleans over the New Orleans & Northeastern Road is \$2.00 per bale or 4.08 cents per ton per mile on compressed cotton; on uncompressed \$2.25 per bale. From Meridian over the lines of the Alabama Great Southern, the Cincinnati, New Orleans & Texas Pacific and eastern connections to New York the rate is fifty-nine cents per hundred pounds or $\frac{7.8}{100}$ cents per ton per mile on compressed cotton. To Boston and Lowell the rate is sixty-four cents per 100 pounds. Of the through rate from Meridian to New York, Boston and Lowell, "Queen & Crescent" Roads received for the 631 miles distance to Cincinnati thirty-two cents per 100 pounds or 1.01 cents per ton per mile.

9. The rates of the Vicksburg, Shreveport & Pacific Railroad on cotton from Shreveport, La., to New Orleans, New York and Boston were from September 1, 1887, the date at which the cotton season begins, to February 1, 1888, and are as follows:

From Shreveport, La., September 1, 1887, to February 1, 1888.

| | To New Orleans. | | New York. | Boston. |
|-------------------|--------------------|---------|-------------|---------------|
| | Comp. | Uncomp. | Compressed. | Uncompressed. |
| V., S. & P. R. R. | 17 | 25½ | 25 | 25 |
| Beyond | 13 | 19½ | 45 | 50 |
| Total | 30 | 45 | 70 | 75 |

(\$1.50 per bale.)

And from Monroe, La., between September 1, 1887, and December 8, 1887.

| | | | | |
|-------------------|----|----|----|----|
| V., S. & P. R. R. | 20 | 37 | 12 | 12 |
| Beyond | 10 | 13 | 50 | 55 |
| Total | 30 | 50 | 62 | 67 |

(\$1.50 per bale.)

On December 8, 1887, these rates were lowered as follows:

| | | | | |
|------------------|----|-----|----|----|
| V., S. & P. | 12 | 15½ | 12 | 12 |
| Beyond | 8 | 9½ | 50 | 55 |
| Total | 20 | 25 | 62 | 67 |

(Per bale, \$1 00.)

And on December 17 they were further lowered as follows:

| | | | | |
|------------------|-----|----|----|----|
| V., S. & P. | 10½ | 13 | 12 | 12 |
| Beyond | 6½ | 3 | 45 | 50 |
| Total | 17 | 20 | 57 | 62 |

(Per bale, 85 cts.)

And on February 1 as follows:

| | | | | |
|------------------|----|----|----|----|
| V., S. & P. | 9 | 13 | 12 | 12 |
| Beyond | 5 | 7 | 45 | 50 |
| Total | 14 | 20 | 57 | 62 |

Per bale, seventy cts., at which they now, March 6, 1888, stand.

The all rail rate from Houston, Texas, to New Orleans, a distance of 360 miles, is \$1.00 per bale compressed.

10. On January 23 and 26 and February 25, 1888, shipments of cotton were being made from Vicksburg to New Orleans over the Vicksburg & Meridian and the New Orleans & Northeastern Roads at seventy cents per bale, while the New Orleans rate of the Meridian & Vicksburg Road published January 23, 1888, was fifty-five cents per bale. The rate of the New Orleans & Northeastern in January, 1888, by the "Queen & Crescent Route" from New Orleans, La., to Lawrence, Mass., was fifty cents per 100 pounds, the substantial equivalent of the rates by water to the same point, with the usual allowance for difference in time and insurance.

Complaint is here made, and proof offered in support, of unreasonable charges and preferences and unjust discriminations. The discriminations and preferences complained of are alleged to have diverted to New York, Boston and Lowell a considerable cotton trade which otherwise would have gone to New Orleans.

from Meridian, Miss., Shreveport, La., and other points on the defendant's roads.

Much more than half the cotton crop is now grown in the four States of Texas, Mississippi, Arkansas and Louisiana. The center of production is thus brought nearer to New Orleans. Capital, practically without limit, is there available for handling cotton. Storehouses, presses and other advantages and facilities for handling, receiving and forwarding are ample. Among the other advantages are extensive wharves and landings at which inland water transportation and railroads from tributary cotton fields meet sea-going transportation to eastern domestic and to foreign markets. With these commercial advantages the receipts of cotton at New Orleans which in 1859-'60 were nearly one half (forty-five per cent) of the entire crop, and in 1870-'71 one third, but little exceeded one fourth of the crop in 1880-81 or in any subsequent year. Of these annual receipts not more than one half is now handled in presses, while the quantity passing by in transit annually increases.

The sole cause of this falling off in the proportion of the crop annually received at that city, the Cotton Exchange finds in the alleged cotton rate discriminations made by the defendants against New Orleans, diverting, as is claimed, a part of its cotton business to eastern cities. In urging this view the complainant apparently takes no account of the comparatively recent construction of several all rail lines of transportation from Meridian and other cotton shipping points to eastern ports and markets; nor of the construction of railroad lines connecting, through the ports of Virginia, Georgia and the Carolinas, with water lines to such ports and markets or foreign ports. In thus assigning a cause for a change or modification in the direction of cotton traffic and movement no account is taken of extended facilities or improved methods. Through these, cotton is compressed at interior towns, railroad stations, and in transit. When not yet on its way to market the price it is to bring may be made available on through bills of lading domestic or foreign at the county town next to the cotton field. Such facilities and accommodations were formerly to be obtained only in New Orleans or some other of the larger cities. That city is not the place of manufacture or ultimate destination of the cotton received. It is carried there for distribution—to be forwarded. Like other business this is largely controlled and directed by economy in time and cost. Any estimate is faulty which does not include these new conditions among the causes influencing the movements of cotton in the past fifteen years.

It is proven that the defendant companies have separate corporate organizations; their lines are habitually operated as through lines for through business; the same man who holds a general office in one holds the same office in all the companies, and receives one salary which is paid by all, the maker of rates for one makes rates for all, the majority of stock in all the companies is owned by the same interest which elects boards of directors for all. These facts, complainant insists, show a combination of the defendant companies under one control, dominated by the Cincinnati, New Orleans & Texas

Pacific Railway Company. It insists too that the discriminations and disadvantages complained of result from this combination so dominated or ruled.

There are some facts in the relations of defendants tending to show such combination and unity of control as might afford opportunity for corporate abuse. If Mr. Collbran, freight and passenger agent of all the defendant companies, has so adjusted the rate of one of their roads as to take freight east by Cincinnati which with a proper adjustment would go by New Orleans, the change so effected made a difference of 770 miles in the length of haul over and in favor of roads represented by him. Yet it was possible for Mr. Collbran while making rates as the officer of the Vicksburg, Shreveport & Pacific Railroad to forget that he held the same office on the connecting roads to Cincinnati but not on the connecting road to New Orleans.

Let the existence of such combination be conceded and there is no evidence that one of the defendant companies is more responsible for its existence or its acts than another. Any one of them is as much responsible as another and all are alike responsible for anything done against the provisions of the Interstate Commerce Act. Whether rates and charges are, or are to be, made by the companies combined or acting separately is not so important. The essential requirement is that however made they must be reasonable of themselves, and be so fairly adjusted as to be reasonable in their relations to each other and in their results.

In this proceeding the petition is for equal mileage rates on cotton, and that no rate to New Orleans from cotton shipping points on the defendants' road shall exceed the rate per ton per mile from the same points to New York, Boston and Lowell. No testimony has been offered on behalf of the complainant as to the relative cost of construction of the several roads or the cost of moving freight equal distances over them. We are without better evidence or information as to what rates would be relatively reasonable than such evidence as is afforded by comparison. Applied to this proceeding the equal mileage rate asked is to be made applicable to a line less than 200 miles long and to lines more than 1700 miles long.

It is as nearly settled as anything relating to railroad charges can be that under like conditions freight can be profitably carried long distances at rates proportionately lower than short distances. The movement of freight short distances is necessarily by local trains with frequent stops, and is much more expensive than movement by through trains over long lines. There are some items of cost such as loading and unloading which are common to long and short hauls, and which make a considerable item in the cost of carrying short distances but become very slight when apportioned on business over long lines.

The rule of equal mileage rates asked for would often prevent legitimate competition and frequently give a monopoly in transportation to the best and shortest road. Enforce the equal mileage rate asked for at Shreveport and not a bale of cotton would pass over the Vicksburg & Shreveport Road to New Orleans, for the Texas Pacific being eighty-one miles the shorter route would take the freight. The

milage rate over it would be \$7.48 less on the car load. Put it in force at Meridian and not a bale of cotton would go east over the defendant roads. The East Tennessee, Virginia & Georgia being 260 miles the shorter route would take the freight \$24.24 lower per car load than its longer rival under the equal milage rate. In view of such results the equal milage rate rule insisted upon by complainants must be refused.

In support of the alleged unreasonable rates and charges from Shreveport and Monroe to New Orleans the specifications of the complaint state the rates from these points to New Orleans to be, in proportion to distance, higher than to New York, Boston and Lawrence over the Vicksburg, Shreveport & Pacific Railroad, and the specifications are sustained by the proof. But it does not appear that this company has authority to make rates to any of the points named beyond its own line or that it is responsible for the through rates except to the extent it shares in them. The connecting roads responsible in part for these through rates are not parties to this proceeding, and the reasonableness of the rates in which they are so directly interested cannot be fairly determined in their absence. *Allen v. Louisville, New Albany & Chicago R. Co.* 1 Inters. Com. Rep. 621.

This road, the Vicksburg, Shreveport & Pacific, is wholly in the State of Louisiana. The rates from Shreveport and Monroe to New Orleans here complained of are rates between points in that State, though the carrying between the points is done through the State of Mississippi and over the Vicksburg & Delta ferry, between the two States. This commerce or traffic between points in the same State the defendants, by counsel, claim is not interstate but "intrastate" commerce—subject to regulation by the State of Louisiana and without the jurisdiction of this Commission.

All commerce is subject to regulation; that wholly within a State and subject to its sovereign power by the State; that among the States and with foreign Nations and not wholly within the sovereign power of any one State by the United States, for the reason that to be effectual, regulation must be uniform, at least not conflicting. Commerce between Shreveport and New Orleans, while crossing on the ferry between Delta, La., and Vicksburg, Miss., is not subject to regulation by the State of Louisiana. The business of transferring freight by the ferry between the two States is interstate commerce. *Gloucester Ferry Co. v. Pa.* 114 U. S. 196 [Bk. 29 L. ed. 158].

While passing through Mississippi after passing from Louisiana, this commerce is interstate, and subject alone to interstate regulation. It is not subject at any place between Shreveport and New Orleans to regulation by both the State and the Congress. It passes by continuous carriage from Louisiana to, and through, the State of Mississippi. It is not transportation "wholly within one State." It is subject to regulation by the provision of the Act to Regulate Commerce; and the Commission has jurisdiction to revise the rates when the parties interested in them are before it.

The only remaining question is the reasonableness of the Meridian and New Orleans cotton rates on the New Orleans & Northeastern
2 INTER S.

Road. Practically this includes the whole case as presented in the complaint against the defendants.

To protect the rights of shippers these rates must be reasonable of themselves. They must be reasonable and equitable in their relations to prevent undue prejudice or disadvantage to any person or kind of traffic. The rates from Jackson, Miss., by the Illinois Central Road, and other Mississippi points about the same distance from New Orleans as Meridian are substantially the same as the Meridian and New Orleans rates in question. Neither are the rates complained of excessive in comparison with the rates fixed by the Railroad Commissioners of Mississippi and Alabama for like distances between interior Mississippi and Alabama points. But they are excessive in comparison with the rate from Shreveport to New Orleans over the Vicksburg, Shreveport, Texas Pacific Road and connections which is twice the distance (409 miles) while the rate is one fourth less. They are excessive in comparison with the Texas Pacific rate which is one fourth less for 328 miles between Shreveport and New Orleans—nearly double the distance; or in comparison with rates from Houston, Texas, to New Orleans 360 miles, which is but half the Meridian and New Orleans rate for nearly twice the haul. The share of the New Orleans & Northeastern Road in the through rate (seventy cents per bale) from Vicksburg to New Orleans, was less than forty-one cents, or one cent more than one fifth part the rate in dispute over the same road. The rate of this road from New Orleans to Lawrence is fifty cents per 100 pounds, of which its proportion for the carriage over its whole line is but nine cents per 100 pounds—less than one fourth the rate over it in dispute. It is true that these very low rates are greatly the result of water competition at the points of shipment. Yet it can hardly be that they are in any sense remunerative, as we must believe them to be, if the rates complained of are not excessive and unreasonably high. Some of these low rates are over the same line and in the direction of New Orleans. There is nothing in the evidence to show that the cost of service under like conditions is more expensive on the road from Meridian to New Orleans than on the roads carrying to that city from Shreveport or Houston.

As cotton is carried to New Orleans to be forwarded to eastern destination, the relative rates to the place of destination from Meridian and New Orleans is significant in determining what it is worth to the Meridian shipper to have this cotton carried to New Orleans. For the purpose of forwarding it cannot be worth more than twenty cents per 100 pounds, if the shipper is to reach the eastern market at the same cost by way of New Orleans as he can by other routes from Meridian. A reduction to that rate does not seem justifiable in view of the scant earnings and earning power of the road. That this road earns little more than operating expenses is not to be overlooked, but the fact cannot be made to justify rates grossly excessive. Wherever there are more roads than the business at fair rates will remunerate, they must rely upon future earnings for the return of investments and profits.

In the opinion of the Commission, to be reasonable, the rate on compressed cotton from Meridian to New Orleans, 196 miles, should not exceed \$1.50 per bale, which is the rate on one of the associate and defendant roads from Shreveport to New Orleans, a distance of 409 miles. No testimony has been offered or heard as to reasonable rates on uncompressed cotton, and this is left for adjustment by the defendants.

INDEPENDENT REFINERS ASSOCIATION of Titusville, Pa., and Independent Refiners Association of Oil City, Pa.

v.

WESTERN NEW YORK & PENNSYLVANIA R. Co., New York, Lake Erie, & Western R. Co., Delaware & Hudson Canal Co., Fitchburg R. Co., and Boston & Maine R. Co.

(No 153.)

COMPLAINT filed December 4, 1888, charging the exaction of excessive and unjust rates for the transportation of petroleum from Titusville and Oil City, Pennsylvania, to Boston and other New England points.

To the Honorable, the Interstate Commerce Commission:

I. The complainants and petitioners allege that they are Associations composed of about sixteen separate and distinct petroleum refining companies, organized for the purpose, among other things, of obtaining from railroad and transportation companies, lawful, equal, reasonable and just rates of freight upon refined petroleum, and products of petroleum manufactured and sold by the members of said Associations, at and from works owned and operated by them respectively, in the Oil Regions of Pennsylvania, at or near the Cities of Titusville, Crawford County, and Oil City, Venango County, in said State of Pennsylvania. And they further aver that in the lawful pursuit of their business as refiners and sellers of petroleum products your petitioners ship, and for several years heretofore have shipped from their works in Pennsylvania, over the railroads of respondents, large quantities of petroleum to Boston in the State of Massachusetts, and to intermediate points, and to Portland, Maine, and various points in the New England States, for sale in the markets of said places. The past year's total shipments from their works by members of said Associations, who manufacture and sell in competition with themselves, as well as with other persons, firms and corporations, engaged in the same business, was about 900,000 barrels; and the aggregate daily capacity of the works owned by members of said Associations is about 5,500 barrels of crude petroleum per day.

II. The respondent, the Western New York & Pennsylvania Railroad Company is a corporation chartered by the States of Pennsylvania and New York, owning and operating, *inter alia*, a line of railway transportation from Oil City and Titusville in the State of Pennsylvania, to the City of Buffalo, in the State of New York. The New York, Lake Erie & Western Railroad Company is a corporation chartered by the States of New York and New Jersey,

owning and operating a line of railway through the States of New York, Pennsylvania and New Jersey. The Delaware & Hudson Canal Company is a corporation chartered by the State of New York, owning and operating a line of railway partly through the States of New York and Vermont. The Fitchburg Railroad Company is a corporation chartered by the State of Massachusetts, and owning and operating a line of railway, *inter alia*, from Troy, in the State of New York, to Boston in the State of Massachusetts. The Boston & Maine Railroad Company is a corporation chartered by the State of Massachusetts, owning and operating a line of railway from Boston and other points in the State of Massachusetts, to Portland and other points in the States of Maine and New Hampshire, and each of said companies is a common carrier, engaged in interstate transportation.

The said five Railroad Companies connect with each other, and, by and under contracts between themselves and various traffic arrangements, form and operate a continuous through route for the transportation of petroleum products from the oil refineries of your petitioners, situated as aforesaid, through or partly through the States of Pennsylvania, New York, Massachusetts and Maine, as well as other New England States; and car loads of oil are billed through from Titusville and Oil City at through joint rates of freight, divided among said respondent companies, under traffic contracts between themselves.

III. The respondents have established and published a schedule of joint, through rates and charges, which are now in force, for the transportation of the manufactured products of petroleum, in barrels, in car load lots upon their said railroads from Oil City and Titusville aforesaid to Boston, in the State of Massachusetts, and other points in the New England States on the line of the said Fitchburg Railroad Company and the said Boston & Maine Railroad Company, called Boston points, by which respondents charge, collect and receive twenty-five cents per hundred pounds, making the rate per barrel one dollar, the weight of the package being included and charged for therein.

Your petitioners aver that the said rates and charges for said service are excessive, unjust and unreasonable and are in violation of the provisions of the Act of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce."

IV. The said rates and charges established by respondents as aforesaid, and demanded and collected by them, subject your petitioners and their said traffic, and the said localities to which their petroleum products are carried as aforesaid, to an undue and unreasonable prejudice and disadvantage; because, among other things, the rates and charges for said service are practically prohibitory upon the traffic of petitioners to said localities, and under average circumstances and conditions sufficient to nearly absorb the profit of petitioners in their trade to said localities, and, under conditions as they exist during some periods of each year, and under competition, will entirely absorb and destroy all profit in the business of petitioners to said localities, and, if continued, will com-

pel them to abandon their trade in that region of country. In addition to the injury to petitioners, the respondents will be deprived of a large amount of traffic, and the localities mentioned will be deprived of the benefit of the competition which the business of petitioners affords them.

With just and reasonable rates for transportation petitioners' traffic to said localities over the respondents' roads would in the past have been much greater, and in the future would be much greater, than it has been.

V. Your petitioners further aver that said respondents in making said rates and charges, and demanding and collecting the same for the said service, subject your petitioners and their said traffic and the said localities to which petroleum products are carried as aforesaid, to an undue and unreasonable prejudice and disadvantage, because, among other things, the same are disproportionate as compared with the rates for the like service in the like traffic under substantially similar circumstances and conditions from Titusville and Oil City aforesaid, to New York and New York points, which rate is now sixty-six cents. Previous to September 13, 1888, said rate to New York City and New York City points was fifty-two cents, but on or about that date was wrongfully raised to sixty-six cents. The difference in charge on petitioners' traffic destined to said points respectively is over 50 per cent, the just difference in charge should not exceed 10 to 20 per cent, and as petitioners are informed and believe no greater difference than this (10 to 20 per cent) is made by respondents in the transportation of other merchandise from the West to Boston points.

There is competition in said traffic by ocean transportation from New York City to Boston points. Any unjust or unreasonable difference in rates to said points as compared with New York points is injurious to petitioners' business, discriminates against their traffic and said Boston points.

VI. The first two named carriers join in both the Boston and Boston points and New York and New York points joint through rates. As to them the service which they perform in petitioners' traffic for each destination is a like and contemporaneous service in the transportation of a like kind of traffic under the same or substantially similar circumstances and conditions. They demand, charge and collect, as petitioners believe, more in proportion for the same service when the petroleum products are destined for Boston and Boston points than when destined for New York, etc., whereby they unjustly and unlawfully discriminate against the first named localities and the said traffic destined for such localities.

VII. And your petitioners further complain and say that the said respondents on September 3, 1888, established and published a schedule of joint through rates and charges for the transportation of the manufactured products of petroleum in barrels in car load lots upon their said railroads from Oil City and Titusville aforesaid to Manchester in the State of New Hampshire, Salem in the State of Massachusetts, Portland in the State of Maine, and about one hundred and fifty other points in the said States reached by the said Boston & Maine

Railroad Company by which respondents charged and collected for said service twenty-five cents per hundred pounds or \$1 per barrel.

By notice dated October 25, 1888, said rates for the said points were abrogated and withdrawn, to take effect November 6, 1888. Said notice was not communicated to your petitioners until November 2, 1888, and public notice was not given thereof until said date of November 2, 1888; and the same was not posted or exhibited for public inspection until said last named date in the depots or stations of the initial road, the Western New York & Pennsylvania Railroad Company. Respondents have not established and published any rates for said service to said points and refuse to state what their charge for the same will be, although often requested by petitioners so to do. While respondents do not refuse to carry petitioners' traffic for said points, yet they will not state what the charges will be, and give petitioners to understand that an arbitrary addition will be made to the rates established September 3, 1888, which were themselves unreasonably, high, excessive and unjust. Because of these things petitioners are unable to ship their products to said points, by reason of which the said respondents have and do violate the provisions of the said Act to Regulate Commerce.

VIII. And your petitioners further charge that they are subjected to undue and unreasonable prejudice and disadvantage in relation to their business and traffic over the railways of the respondents, and undue and unreasonable preference and advantage is given to their competitors in business by the said respondent companies, relative to the traffic and transportation of refined petroleum over their lines of transportation as aforesaid, to wit: to an organization known as the Standard Oil Trust, which is formed by a combination of numerous firms, associations and corporations, engaged in the business of refining, buying and selling petroleum and its products, for home trade and for export, and is also engaged in the business of storing crude petroleum in iron tanks, gathering the same from wells in the oil region of Pennsylvania, and transporting the same as a common carrier by means of pipe lines to the seaboard, at or near Philadelphia in Pennsylvania, Baltimore in Maryland, New York in the State of New York, and to Buffalo in New York, and Cleveland in Ohio; the charge to the seaboard for transportation through said pipe lines being the same as that made by the railroad companies, known as the Trunk Lines.

Your petitioners are informed and believe, and so charge, that the said respondent companies, either directly or indirectly, act under contracts, agreements and arrangements made by the said Standard Oil Trust, or some of the pipe line common carrier companies allied with said Standard Oil Trust and forming part of it, to wit: the National Transit Company, with other common carriers by rail, engaged in interstate transportation of petroleum, for the pooling or division of freights of different and competing common carriers, and for dividing between them some part of the net proceeds of the earnings of said common carriers from petroleum interstate traffic, or of said traffic *in specie*, by means of which such net earnings are divided, in violation of section 5 of the Act

of Congress approved February 4, 1887, entitled "An Act to Regulate Commerce."

And your petitioners charge that under said pooling contracts or agreements, made between said trunk lines and said Standard Oil Trust, or its National Transit Company, the rates charged by said respondent companies for transportation of petroleum from Oil City and Titusville in the State of Pennsylvania, and herein complained of, are fixed by said combination; and all connecting roads—including the initial railroad, the Western New York & Pennsylvania, which your petitioners must use, and from which they must obtain, and do obtain, their rate of through freight to the localities as aforesaid—are obliged to accept and charge the rate so fixed; and that said rate is made in the interest of the said Standard Oil Trust, and its allied companies, who are competitors of your petitioners in the business of refining, and for the purpose of maintaining the said division of oil freights or earnings among the members of said combination or pool, and of maintaining an excessive and unreasonably high rate of freight; and also with the intent of giving to the said Standard Oil Trust an advantage over your petitioners in the manufacture, transportation and sale of their products.

IX. Petitioners aver that all the acts of the respondents herein complained of are in violation of the provisions of the said Act of Congress entitled "An Act to Regulate Commerce."

Wherefore, your petitioners pray:

First. That the Commission will order an investigation of the charges herein made, and will make such orders as to the production of documents, contracts, agreements, freight schedules and vouchers, and the taking of such testimony, and at such times and places, as may be necessary to enable your petitioners and the Commission to establish the truth of the allegations herein made;

Second. That the Commission will of its own motion institute all further inquiries and proceedings that it may deem necessary, proper or expedient, not herein specifically prayed for, or which may be omitted by petitioners in the course of proceedings, and give its aid in the examination of witnesses and production of documents, that the whole truth bearing on the matter in controversy may, as far as possible, be brought out and made plain;

Third. That the Commission will order and direct the said respondents, the Western New York & Pennsylvania Railroad Company, the New York, Lake Erie & Western Railroad

Company, the Delaware & Hudson Canal Company, the Fitchburg Railroad Company, and the Boston & Maine Railroad Company to desist from and cease the unlawful acts complained of herein;

Fourth. That after a full investigation of the matters complained of, or in controversy, the Commission will order the said respondents to adopt such rates and charges for the services mentioned as the Commission shall find to be just and reasonable; and further that the said respondents be ordered and directed to make such reparation to petitioners for the injuries that the Commission shall find to have been done them by respondents as shall be just and proper;

Fifth. That the Commission will make such other findings and orders as may be lawful and just.

And they will ever pray, etc.

[Signed and verified.]

M. J. Heywang,

Counsel for complainants, Titusville, Pa.

INDEPENDENT REFINERS ASSOCIATION of Titusville, Pa., and Independent Refiners Association of Oil City., Pa.,

v.

WESTERN NEW YORK & PENNSYLVANIA R. CO., New York, Lake Erie & Western R. Co., and Lehigh Valley R. Co.

(No. 154.)

THE complaint herein, filed December 4, 1888, is similar to that in the preceding case, and concludes with the same prayers for relief. It differs from that complaint, however, in that it does not contain paragraphs V, VI and VII, and in that the traffic referred to is from the complainants' works at Titusville and Oil City, Pennsylvania, to the Atlantic Seaboard, at or near Perth Amboy, New Jersey—a New York Harbor point; the rate exacted by the respondents for the transportation of the manufactured products of petroleum in barrels, in carload lots, from Titusville and Oil City to Perth Amboy is stated to be 16½ cents per 100 pounds, making the rate per barrel sixty-six cents, the weight of the package being included and charged for therein—which rate is alleged to be excessive, unjust and unreasonable, and in violation of the Act to Regulate Commerce.

OHIO COMMON PLEAS, HAMILTON COUNTY.

Jacob BOGART, *Plff. in Err.*,

v.

STATE OF OHIO.

B. H. BUSSE, *Plff. in Err.*,

v.

STATE OF OHIO.

1. The statute of a State, requiring owners of vehicles using the streets of a city to pay an annual license, and providing that the license moneys be placed to the credit of the street repairing fund of the public treasury of said city, is not repugnant to article 1, § 8, clause 3 of the Constitution of the United States (the interstate commerce clause), when enforced upon owners who are nonresident of the State and not engaged in any business in the State, for vehicles used by them upon such streets in interstate transportation and in prosecution of interstate commerce.
2. Such license fees being intended by the statute for the repair of the streets, their enforced payment must be regarded as compensation for the advantages and facilities afforded to such transportation; and the requirement of license is not a restraint or other form of regulation of interstate commerce.

(December 6, 1888.)

WRITS of error to the Police Court of Cincinnati to review judgments against the defendants below in prosecutions for violations of the Ohio Statute known as the "Russell Law." *Affirmed.*

The facts are set forth in the opinion.

Messrs. Jordan & Jordans and **B. W. Nelson** for Bogart.

Mr. Edwards Ritchie for Busse.

Mr. John C. Schwartz for the State.

Shroder, J., delivered the opinion of the court:

These cases, on error from the Police Court of Cincinnati, present the same question for decision and may be considered together. They are prosecutions of citizens and residents of Kentucky, for violation of the Act of April 16, 1883, as amended by the Act of March 25, 1884 (80 Ohio L. 129; 81 Ohio L. 77), commonly known as the Russell Law.

The information in the court below against each of the plaintiffs charged their unlawful use, on May 21, 1888, of the streets of the City of Cincinnati with a vehicle without first having obtained, in accordance with law, a license from the comptroller of the city. Upon the evidence the court below found each guilty, and pronounced judgment accordingly.

At the time of the offense charged, Bogart was a resident and citizen of Newport, Ky., engaged there in business, and having none in the State of Ohio. From time to time, for uses of his business, he bought materials in Ohio and other States, and sold goods to Ohio and other States; and, whenever necessary, the materials and goods were delivered at the

wharves and depots of interstate transportation companies of Cincinnati, Ohio. In the course of his business it became necessary to transport these materials and goods to and from such wharves and depots across the Ohio River from and to his place of business. On May 21, 1888, in the course of his business, he drove a vehicle owned by him over the streets of the city, his route being between his place of business and the railroad depot where he delivered a load of goods manufactured and sold by him at said business place, for shipment to the State of Missouri, and thus used the streets for a temporary purpose. He had not obtained any license from the city comptroller under the Russell Law. The license fee which would be required of him greatly exceeded the expense of issuing it, and the excess would have been used as a source of supply for the public treasury of the city.

In the other case the facts are that at the time of the offense charged Busse was a resident doing business in Covington, Ky., there selling goods manufactured by him in Covington to purchasers in various parts of Cincinnati, where he was required by the purchasers to make deliveries. On May 21, 1888, in making such deliveries, he used, with a vehicle owned by him, the streets of the city. In all other respects the facts are the same as in the *Bogart Case*.

By section 29 of the Act referred to owners of vehicles used upon the streets of the city are required to pay specified annual license fees. Certain exceptions, not applicable to either of these plaintiffs, are made by statute. By section 38 all moneys received for licenses from vehicles are placed to the credit of the street repairing fund, and all other license fees are placed to the credit of the general fund. Section 2 of the Act enacts the penalty for violation of any of the provisions of the same.

The plaintiffs assign as error that the Act as applied to them upon the foregoing facts is repugnant to article 1, § 8, clause 3 of the Constitution of the United States, which provides among other things that Congress shall have power to regulate commerce among the several States. The contention is that in relation to interstate commerce Congress possesses exclusive jurisdiction, and that if the law charges a license fee upon the vehicles used in the transportation of interstate freight, it was a regulation of interstate commerce, and therefore unconstitutional and void as to the plaintiffs.

As favorable to the proposition, plaintiffs' counsel refer to decisions of the United States Supreme Court, among which were *Pickard v. Pullman Co.* 117 U. S. 34 [Bk. 29 L. ed. 785]; *Fargo v. Mich.* 121 U. S. 230 [Bk. 30 L. ed. 888]; *State Freight Tax Cases*, 82 U. S. 15 Wall. 232 [Bk. 21 L. ed. 46]. These decisions do not however support their view. See *Wabash R. v. Ill.* 118 U. S. 585 [Bk. 30 L. ed. 253].

It is settled that commerce among the States includes transportation of property from one State to another. 114 U. S. 196 [Bk. 29 L. ed. 158]. If the subject of commerce is national in its character, requiring uniformity of regulation, the power of Congress is exclusive; if, however, it is local or limited in its sphere of

*Head notes by SHRODER, J.

operation, the State may prescribe regulations until Congress acts upon it. 15 Wall. 232 [*supra*]; 107 U. S. 692, 701 [Bk. 27 L. ed. 585, 588]; 102 U. S. 691 [Bk. 26 L. ed. 238]; 114 U. S. 196 [Bk. 29 L. ed. 158]; 118 U. S. 558, 585 [*supra*].

It seems from these decisions, if it be conceded that the use made of the vehicles in these cases was to constitute them instruments of interstate commerce, the local character of this use upon the streets of the city would bring them within the authority of state regulations.

The State has full power to regulate within its limits whatever will promote the convenience and prosperity of its inhabitants, and this power embraces the construction and maintenance of highways. Until Congress lawfully acts upon the subject, the power of the State is plenary. This power extends to the imposition and collection of tolls for transportation thereon, and to the disposition of the revenues thus derived. *B. & O. R. R. Co. v. Md.* 21 Wall. 456 [Bk. 22 L. ed. 678*]; *Escanaba Co. v. Chicago*, 107 U. S. 683 [Bk. 27 L. ed. 445].

And if the charging of the license fee may be taken as compensation for the keeping the streets in condition for use in course of transportation, then the Russell Act could be held to be a state regulation over its highways. Under Revised Statutes, section 2640, the city is vested by the State with control of the streets, and is under obligation to keep them in repair. *Johns v. Cincinnati*, 45 Ohio St. 278.

By the Russell Act, the license fees collected from owners of vehicles used upon the streets, are placed to the credit of the street repairing fund of the city. These statutes together, for the purpose of the cases, constitute the regulations by which the State preserves its highways within city limits for the convenience of its people. These license charges are not intended as directly imposed upon commerce as such; and that interstate transportation may remotely or incidentally be affected thereby does not make them operate as a restraint upon or as a regulation of interstate commerce in the constitutional meaning of that term. 18 Wall. 30, 31 [Bk. 21 L. ed. 791]; 15 Wall. 293 [Bk. 21 L. ed. 167]; 118 U. S. 585 [*supra*].

If in these cases, however, the license fees are to be considered as compensation for the facilities provided by keeping the streets in repair for use of vehicles, even when engaged in interstate commerce, then these fees are clearly allowable under the Constitution of the United States. The Supreme Court of the United States has repeatedly sustained the validity of wharfage charges under like conditions. *Packet Co. v. Keokuk*, 95 U. S. 80 [Bk. 24 L. ed. 377]; *Packet Co. v. St. Louis*, 100 U. S. 423 [Bk. 25 L. ed. 658]; *Packet Co. v. Catlettsburg*, 105 U. S. 559 [Bk. 26 L. ed. 1169].

Tax or tolls were held valid under the Constitution of the United States, when imposed upon vessels on streams within the jurisdiction of the United States, to meet expenses incurred in improving the navigation of the waters—the charges being regarded as compensation for additional facilities thus provided. *Kellogg v. Union Co.* 12 Conn. 7; *Thames Bank v. Lovell*, 18 Conn. 500; *McReynolds v. Smallhouse*, 8 Bush (Ky.) 447, cited with approval in 114 U. S. 217 [Bk. 29 L. ed. 165]; *Mobile Co. v. Kimball*, 103 U. S. 691 [Bk. 26 L. ed. 238].

Now, under the statute, the license is required to be paid upon vehicles only when used on the streets, and the license moneys collected are placed in the street repairing fund. These provisions indicate that the fee is required as means to the keeping the streets in repair. It is a mode of paying for the repair of the streets by those whose use of them makes such repair necessary. It is analogous to the requirement of toll upon a country highway, and is, according to experience, the only practicable way of collecting similar compensation for like use of a city highway. The fact of temporary use by these plaintiffs ought not to influence the conclusion, since, under all circumstances, the use of the streets by vehicles by any person whatsoever must necessarily be but temporary; nor would it be practicable or possible to adjust or fix a compensation upon a scale proportioned to the quantum of use. The supreme court, in *Marmet v. State*, 45 Ohio St. 76, said: "The principle involved is not different from that upon which the establishment of toll roads and the authority to collect tolls of those traveling upon them . . . is sustained." Nor is the fact material that the moneys are a source of supply to the public treasury of the city, since this treasury does not exclude the street repairing fund; nor does the fact imply a diversion of the fees from the fund. The supreme court, in the *Marmet Case*, 45 Ohio St. 68, said that the provision placing these fees in the street repairing fund refutes the claim that the money from this source is raised for general revenue. It, therefore, appears from the language of the Act, from its purpose and intention, and under the construction given to it by our supreme court, that these license fees are charged by and for compensation for the privileges and facilities afforded to owners of vehicles in the use of the streets. In such case the law requiring the obtaining of such license and punishing the use of the street without first obtaining the same, is not repugnant to the interstate commerce clause of the United States Constitution. This conclusion disposes of the only question presented in these cases, and requires that in each case the judgment below be affirmed.

THE INTERSTATE COMMERCE COMMISSION.

RICE, ROBINSON & WITHEROP

WESTERN NEW YORK & PENNSYLVANIA R. CO.

(No. 119.)

1. Where unreasonableness of freight

*See note to this case in L. ed. [Ed.]

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rates on oil in car load lots is charged on short local hauls, for example from Titusville, Pa., to Buffalo, N. Y., and the charge is attempted to be sustained on a comparison of these rates with rates on what is usually an inferior grade of oil transported from Titusville through Buffalo to Perth Amboy, N. J.,

for export, chiefly in the cars of another company, and it appears that upon such shipments destined to Buffalo there are expensive terminal charges, while upon such shipments to Perth Amboy these terminal charges are far less considerable, the circumstances and conditions which control the making of the rates in each instance are substantially dissimilar.

2. **In arriving at what is a just and reasonable rate** on freight transported by a carrier on a short local line having but a small volume of business, where the cost of transportation is exceptionally great, arising from steep grades, sparse population, and light traffic, these are circumstances and conditions of controlling weight in the making of the rates, and can not be overlooked when a question of their reasonableness is involved; and under such circumstances the fact that an independent pipe line from Titusville to Buffalo transports oil between these points at lower rates than the railroad company, constitutes no just reason why the railroad company should be required to reduce its rates to those of the pipe line.
3. **Where a change of rates**, for example those on the defendant's line in this instance, would involve a reduction of rates on the Dunkirk, Allegheny Valley, Pittsburgh, and other competing lines not parties to this proceeding, and unsettle relative rates in a large extent of territory, such a change ought not to be made unless based upon adequate grounds.
4. **The charge of unjust discrimination** is not sustained by the evidence in this case.

(Heard at Washington September 27, 1888.—Decided December 2, 1888.)

PROCEEDING on complaint charging unjust and unreasonable rates for the transportation of petroleum. See pleadings, 1 Inters. Com. Rep. 717, 792, 795, 811.

Mr. Mark J. Heywang, for petitioners.
Messrs. J. D. Hancock and George Zabriskie, for defendant.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

The complaint alleges that the car load rates charged on refined petroleum oil carried by the defendant from Titusville, Pennsylvania, to Buffalo, New York, are unreasonable and unjust. The petitioners aver that the rates are higher than the traffic can afford to pay on account of the competition of other refiners at Buffalo, and that they are relatively unjust because they are very considerably greater than the proportion of a through rate accepted by the same carrier for the haul to Buffalo on shipments of oil from the same place to Perth Amboy, on New York Harbor.

The material facts are as follows: the petitioners have for several years carried on busi-

ness as refiners and shippers of oil at Titusville, Pennsylvania, and their business has been large and increasing. They have for a considerable period shipped from 90 to 95 per cent of the refined oil sent from Titusville. For several months before the hearing they were the only shippers of refined oil from that place, the other refiners having ceased the business. Their shipments to Buffalo since April 5, 1887, have averaged about four or five car loads per week.

The shipments of the petitioners have been made on the road now owned and operated by the defendant during the period they have been in business, a dozen years or more. The defendant company has been in control of the road only since December 1, 1887. Prior to that time it was in the hands of a receiver and going through a proceeding of foreclosure and reorganization.

Until 1884 the tariff rate on oil carried on this road from Titusville to Buffalo was fifty cents a barrel in car loads, and sometimes thirty-six cents a barrel,* but rebates were allowed, reducing the actual charge to twenty-five cents a barrel. In 1884 the open public rate to Buffalo was made at twenty-five cents a barrel. This rate was continued until the Act to Regulate Commerce took effect, April 5, 1887, when new classifications were made by the roads generally, and oil, which had previously been in a commodity class with a special rate, was, by all the roads operating in the same territory, placed in the fifth class, and given the same rate as other articles in that class, which was 8½ cents per 100 pounds, or thirty-four cents per barrel of 400 pounds. That rate has since been maintained except for a brief period, during which it was nine cents per 100 pounds.

When the classification and rate were changed the car load quantity was also changed from fifty barrels to sixty barrels to the car, or from 20,000 pounds to 24,000 pounds. This change, on account of the size of the cars used, made it necessary to deck load, or place ten barrels on top of the others, and to make use of certain lumber to support and hold them in their positions. This caused some additional expense to the shipper, amounting to about a dollar a car, and required some more labor and time to load.

The rate from Titusville to Corry, on defendant's line, a distance of twenty-eight miles, is twenty-eight cents a barrel. To some points nearer Titusville it is sixteen cents and twenty cents a barrel. The rate to all points between Corry and Buffalo, a distance of ninety-two miles, is the same as to Buffalo. The distance from Titusville to Buffalo is 120 miles.

Empty barrels carried from Buffalo to Titusville are rated fourth class and charged ten cents per 100 or seven cents per barrel.

The testimony does not show the extent of the oil business at the points between Titusville and Buffalo; but whatever its amount may be it is probably shipped to those points by the petitioners, as there are no other shippers of refined oil from Titusville.

The petitioners also ship refined oil in considerable quantities to Perth Amboy for export. This is carried by the defendant over the same road to Buffalo to a point outside the city and

there delivered to the Lehigh Valley, by which it is hauled to Perth Amboy. This transportation is mostly in cars of the Lehigh Valley Company. The through rate from Titusville to Perth Amboy is fifty-two cents a barrel. The proportion of the rate accepted by the defendant is twelve cents a barrel or three cents a hundred pounds. The through rate is determined by the conditions of competition with other lines of road and pipe lines carrying from the same territory to the same destination for export. The distance hauled from Titusville to Perth Amboy is about 550 miles.

The system of roads operated by the defendant consists of three divisions; one from Emporium to Buffalo, called the Buffalo Division; one from Rochester to Olean, being the narrow gauge system, and called the Rochester Division; one from Olean to Oil City and from Oil City to Buffalo, and from Stoneboro' to New Castle, called the Pittsburgh Division. The Pittsburgh Division routes are two; one from Oil City to Buffalo, using part of the Buffalo Division; and one via Brocton, called the Brocton Road. Brocton is fifty miles south of Buffalo on Lake Erie. The shipments by the petitioners are over the Brocton Route of the Pittsburgh Division.

There are other roads connecting Titusville with Buffalo.

The Dunkirk, Allegheny Valley and Pittsburgh Company operates a road from Titusville to Dunkirk, where it connects with the Lake Shore & Michigan Southern Road and the New York, Lake Erie & Western. Both the Nickel Plate and the Lake Shore run parallel with the defendant's road from Brocton to Buffalo. All the roads in the territory are more or less engaged in oil transportation, and the rates are the same on the roads competing with the defendant.

There is a pipe line from Olean to Buffalo through which crude oil is transported to Buffalo and there refined, and this oil comes in competition with that of the petitioners. The pipe line is under independent control and the defendant has no concern in it. Its charges to the public for a distance of seventy miles are stated to be thirty-five cents a barrel for crude oil; but the cost of the service, with a reasonable profit added, is probably much less.

The route over which the petitioners' oil is transported has heavy grades and only half as many cars can be hauled in a train as over the other divisions. At one or two points the trains are divided in sections on account of the grades. For a considerable distance the country along the road is thinly populated, and the local business is light.

The total earnings and expenses of the Pittsburgh Division for the year ending September 30, 1887, as given in the evidence, were as follows:

Total earnings, \$480,632.85; total operating expenses, \$445,436.83; total net earnings \$35,196.02. The gross earnings from all the divisions of the system for the same time were \$2,716,388.67; the gross operating expenses were \$2,231,336.03; gross net earnings, \$485,052.03.

The whole tonnage carried was 3,254,874 tons. Of this amount 2,351,893 tons consisted of coal, lumber, stone and lime, iron ore and

bark, all bearing low rates, being sixth class or under.

The annual report of the carrier filed with the Commission since the hearing shows the following results for the year ending June 30, 1888: earnings, \$2,949,105.98; operating expenses, \$2,123,540.32; net income from operation, \$825,565.66; deductions from income for interest on funded and floating debt, taxes, rentals and other items, \$480,145.13; leaving a balance of \$345,420.53.

The outstanding mortgage bonds of the defendant are \$8,500,000 of first mortgage at 5 per cent interest, and \$20,000,000 of second mortgage at 3 per cent for first five years and 4 per cent thereafter. The outstanding stock is \$20,000,000.

The question of the reasonableness of the rate complained of is to be determined on all the facts of the case. If the interests of the petitioners only were to be considered, it would be an easy matter to order such a reduction of the rate as would give them better advantages in the Buffalo market, and render their business more profitable. But the rights of the carrier and of its creditors and shareholders are to be respected as well as those of the complainants. The complainants have the right to be protected against unreasonable and unjust rates; but their reasonableness and justice must be determined not alone by the exigencies of the complainants' business, but with due regard for the circumstances of the carrier as well. The rate challenged may be high for the distance hauled, if that only be regarded. It is also high as compared with the former twenty-five cent rate; and it is high compared with the proportion of the through rate to Perth Amboy on export oil, accepted by the defendant. The argument for a reduction of the Buffalo rate is mainly grounded upon the fact of the former Buffalo rate and upon the proportion received of the export rate. Neither of these, however, is a standard by which to determine the rate in question. An explanation of both those rates is furnished by the testimony. The twenty-five cent rate was first allowed as a secret rebate, while the established rate was fifty cents. It was afterwards made an open rate to the terminal point, while, according to the custom of carriers at that time, higher rates were exacted at the intermediate points. When the Act to Regulate Commerce took effect this practice became unlawful and could no longer be pursued. The rates had to be so adjusted that no more should be charged for the shorter than for the longer haul. In making these adjustments carriers had the right, and it was their duty, to see that their revenues should be sufficient not only for their operating expenses and the incidents and casualties of their business, but that the rights of their creditors and shareholders should be regarded so far as might be practicable. In view of all these considerations the carriers in the whole territory embracing the traffic in question reached the conclusion that refined oil should be placed in the fifth class, and that it should bear the rate of other articles in that class. This established the rate for the haul to Buffalo at 8½ cents per hundred pounds, or thirty-four cents per barrel. The defendant probably exercised no controlling influence in establishing the classification

or rate. It adopted them in common with other carriers in that territory and other portions of the country, some of which were competitors. The rate of thirty-four cents thus became the uniform rate for all the points on the road except the short distance to Corry.

The through export rate to Perth Amboy was fixed by the conditions of competition and not by the voluntary choice of the rail lines. The pipe line competition in crude oil refined at the seaboard forced down the rail rates, and a very low rate became necessary in order to meet the competition in the traffic. It gave the benefit of those low rates to the shippers, from the oil regions, of refined oil, and enabled them to compete in foreign markets with pipe line oil. The petitioners shared the advantages of these low rates and are large shippers of export oil. The division of the export rate received by the defendant is evidently barely sufficient to cover the cost of the movement of the oil over its road. It would be palpably unreasonable to require shipments to Buffalo to be carried at that rate. It would be destructive to the carrier.

It was held by the Commission in the case of the *Detroit Board of Trade and others* against the *Grand Trunk Railway Company and others* (ante, 199) that it is not a violation of the Law for a carrier to accept a less division of a through rate for traffic going over its road than the charges to the stations it serves; that the circumstances and conditions are substantially different, and the service entirely dissimilar. The reasons there assigned need not be repeated. This case illustrates the dissimilarity of the conditions and of the service. The haul alone is nearly identical. But the export traffic is carried mainly in cars of another road. Before reaching the terminus in Buffalo they are taken from the tracks of the defendant by the Lehigh Valley Company, and hauled to their destination. The defendant has no terminal expense and no expense for delivery or collecting charges; and the empty cars are brought back and delivered to it again, or perhaps are returned loaded, giving it a haul of freight over its own road.

The shipments to Buffalo, however, involve considerable additional expense. They must be taken to its yards and depots in the city for delivery. This includes the use of its terminal property and whatever cost may be incident to the ownership and maintenance of the property and the force of employes necessary for the business done. All portions of the traffic accommodated by these facilities must necessarily contribute their just share to this expense.

As the oil shipped respectively to Buffalo and to Perth Amboy is destined for different markets and is not at all in competition, no question of discrimination or prejudice can arise. It is also shown by the evidence that the oil sent to Buffalo is of a superior quality to the export oil, and may for that reason bear a higher rate.

The competition in the Buffalo market with oil refined there and conveyed in a crude state through a pipe line from the oil region is urged as a ground for the reduction of the rate. It is said that the pipe line is under the control of the competing parties, and that the cost of transportation by that mode is merely nominal, 2 INTER S.

affording the petitioners' competitors great advantages in the market. Very likely the pipe line transportation is materially less expensive, and the oil so conveyed can be put on the market for a lower price, but the testimony throws little light on the subject. Whether the petitioners' sales are remunerative or not does not appear. But the fact appears that, notwithstanding the rate complained of, their production and shipments have increased. The rate does not become unlawful, however, by reason of the pipe line competition, nor is it a sufficient argument to compel a lower rate. The rail carrier is not responsible for the pipe line nor for the lower means of transportation it affords, and cannot be required at its own expense to make good to a shipper disadvantages of location or of cheaper facilities for reaching markets enjoyed by competitors. It must not unnecessarily or arbitrarily create inequalities, but it is not bound to injure itself to remove differences for which it is not responsible. It is not the duty of a carrier to regulate markets. If by reason of competition in transportation or the condition of markets a carrier sees fit to move traffic at very low rates in order to participate in the business, that may be done and often is done, but that is a very different matter from compelling it to reduce all its rates to equalize competition between shippers from different fields of supply and by different and unrelated routes.

The point was made, and some evidence was given to show, that the rate was made at the behest of and to favor the pipe-line shippers, but the proof was insufficient to establish the fact. Had that fact satisfactorily appeared, the case would have presented a different aspect.

It is insisted by the defendant that in view of the character of the route over which the oil is transported, the heavy grades, the small number of cars that can be hauled in a train, the necessity to take the trains in sections over some of the summits, the comparatively light amount of traffic and the nature of most of the traffic, like coal, lumber, iron, and bark, necessarily bearing low rates, and the heavy funded debt of the Company, the rate in question is reasonable and just, and cannot be lowered with justice to the carrier. It is also insisted that, except for the revenue derived from the other divisions, the rates on this division would have to be increased to maintain the property. There is force in these considerations. The particulars enumerated are elements in arriving at the reasonableness of a rate, and cannot be arbitrarily disregarded. In the absence of other controlling factors they may determine the question. They have that effect to a large extent in this case.

The conditions, however, may change so that a lower rate might be warranted. The report filed by the defendant with the Commission, and covering a period nine months later than the exhibits in evidence, shows a material improvement in its revenues. It is to be presumed that the defendant will recognize the propriety of giving its patrons the benefit of a reduction as soon as it can reasonably be made.

Another consideration is not to be overlooked: a reduction of the rate on the defendant's road would necessarily occasion a reduction on the

Dunkirk, Allegheny Valley & Pittsburgh Road and on other competing roads. A like reduction would also be required to divers points reached by other lines, to which the same rate is made as to Buffalo. Those carriers have not been heard, and injustice might be done to them. The rates in that territory are so related on the different roads that a change on one unsettles others. A change requires, therefore, consideration and caution, and should be based on adequate grounds.

A point was made respecting the additional expense of deck loading. It is not a very important item. But a carrier in defining a car load and fixing the rate should furnish a car adapted to carry properly the quantity designated, and not put the shipper to any expense to fit up the car. This expense would seem to be in excess of the tariff rate and unlawful.

Upon all the facts of the case the conclusion of the Commission is that the rate complained of is not shown to be unreasonable, and the complaint is therefore not sustained.

Putnam P. BISHOP

r.

H. R. DUVAL, as Receiver of Florida Railway & Navigation Co.

(No. 155.)

James A. HARRIS

r.

H. R. DUVAL, as Receiver of Florida Railway & Navigation Co.; and Savannah, Florida & Western R. Co.; Central Railroad & Banking Co. of Georgia; Western & Atlantic Railroad Co.; Nashville, Chattanooga & St. Louis R. Co.; Louisville & Nashville R. Co.; Evansville & Terre Haute R. Co.; Chicago & Eastern Illinois R. Co.; St. Louis, Keokuk & North Western R. Co., and Florida Southern R. Co.

(No. 156.)

A BSTRACT of Complaints, filed December 17, 1888, alleging unjust charges for the transportation of oranges.

Messrs. Hocker & Mabry, solicitors for complainants.

The complaint in the first case alleges unjust, unreasonable and greatly disproportionate charges for the carriage of oranges in car load lots between points in the State of Florida when such carriage forms part of the through transportation from Citra in said State to New York, Boston and Philadelphia; and it further alleges that such charge, namely: twenty-five cents per crate from Citra to various Florida points, is an arbitrary charge made by the defendant in combination with the Florida Southern Ry. Co. to apply on all through shipments destined without the said State of Florida, and that said arbitrary rate, in comparison with the pro-rate of twelve cents per crate received by defendant for longer hauls of the same traffic over its line to the same points, including the shorter haul from Citra, constitutes unjust discrimination against the orange shippers of Citra. The arbitrary rate is also charged to be greatly

in excess of the rate allowed by the Florida State Railroad Commission on the local traffic between the same points.

In the second case, the complaint makes the same allegations, except that the arbitrary rate charged for the transportation of oranges in the State of Florida is complained of when the shipments are destined to Chicago, Illinois, and Keokuk, Indiana, over the roads of the defendant companies.

MANUFACTURERS AND JOBBERS UNION of Mankato, Minnesota,

r.

MINNEAPOLIS & ST. LOUIS R. CO.,
Chicago, Rock Island & Pacific R. Co.,
Kankakee & Seneca R. Co., and Burling-
ton, Cedar Rapids & Northern R. Co.

(No. 76.)

A NSWER filed December 17, 1888, to amend-
ed complaint, *ante*, 228, charging the im-
position of unjust rates.

For their joint and several answer to the complaint in the above entitled proceeding, the defendants named therein show:

That by their agreement there is to be paid, and is paid, to the Minneapolis & St. Louis Railway Company for its share of the compensation for the transportation of property between points to which the tariff of rates named in said complaint relates, forty per cent (40%);

That the distance from Waterville to Albert Lea, where the Minneapolis & St. Louis Railway connects with that of the Burlington, Cedar Rapids & Northern Railway Company, is forty-three (43) miles; the distance from Waterville to Mankato is twenty-eight (28) miles; the distance from Albert Lea to Chicago by way of the lines of said defendant companies is four hundred and twelve (412) miles; the distance from Faribault to Waterville is seventeen (17) miles; the distance from Northfield to Waterville is thirty (30) miles; from Randolph to Waterville, thirty-eight (38) miles; from Red Wing to Waterville, sixty-six (66) miles; the distance from Faribault to Chicago by way of the Chicago, Milwaukee & St. Paul Company's lines is three hundred and ninety-eight (398) miles; the distance from Northfield to Chicago by way of said last named company's lines is four hundred and six (406) miles; the distance from Red Wing to Chicago by the said last named company's lines is three hundred and seventy (370) miles; the distance from Randolph to Chicago by way of the lines of the Chicago, St. Paul & Kansas City Railway is three hundred, eighty-seven and one half (387½) miles; the distance from Mankato to Chicago by way of the line of the Chicago, Milwaukee & St. Paul Company is four hundred and thirty-two (432) miles; between the same points by way of the Chicago, St. Paul, Minneapolis & Omaha, and the Chicago & North-Western is four hundred and ninety-eight (498) miles; between the same points by way of the Winona & St. Peter and the Chicago & North-Western is four hundred and thirty-five (435) miles;

That the business to which the rates named in said complaint apply, east of Waterville on the lines operated by the Minneapolis & St. Louis Railway Company, comprises eighty per cent (80%) of the freight business done over said line, and that the said rates are the same rates made by the other railway companies above named between Chicago and the points above specified, and that the Minneapolis & St. Louis Railway Company, unless it made the same rates, would get none of the business at those points;

That the said line operated by the Minneapolis & St. Louis Railway Company from Red Wing to Waterville, cost in actual cash more than fifteen thousand dollars (\$15,000) per mile, and that said line has never earned sufficient to pay six per cent (6%) upon fifteen thousand dollars (\$15,000) per mile, and that for the six months ending June 30, 1888, the said line from Red Wing to Waterville did not earn its operating expenses but incurred a deficit in operating expenses alone of twenty-five thousand dollars (\$25,000), which has not been made up by the earnings since that date.

And defendants further say that the rates made as aforesaid to the points east of Waterville, do not yield, and have not since they have been in force yielded, adequate compensation for the services rendered, but that so long as the same rates were in force between Chicago and the competitive points above named by way of the other lines above specified the Minneapolis & St. Louis Railway Company was obliged, either to make the same rates, or else close up the said line from Red Wing to Waterville.

Defendants further say the rates to Mankato by way of the lines of the defendants are not excessive, and do not discriminate against the City of Mankato, or points intermediate the same and Waterville; that such rates do not yield defendants adequate compensation for the services rendered, but they were obliged to make the same in order to secure business, because the other lines running to the same points had made the same rates between said points and Chicago.

And defendants deny that the fact that a higher rate per ton per mile is made on business between Chicago and Mankato than between Chicago and points north of Waterville is any discrimination against Mankato, but that defendants are obliged to make said rates to points north of Waterville, because it is intersected at said points by other lines running to Chicago having shorter distances, and that unless it does so it will be deprived of any business between said points, although rates applicable thereto do not yield adequate compensation for the services rendered; so much so, that the said Minneapolis & St. Louis Railway Company has been unable to earn the interest upon the actual cost of the lines operated by it and the equipment thereof, in consequence of which it was placed in the hands of a receiver on the 28th day of June, A. D. 1888, because of the default in the payment of its interest, and has hitherto, and is now being operated by said receiver; the lines so operated by the receiver extending from St. Paul by way of Minneapolis, Waterville, Albert Lea and Fort Dodge to

2 INTER 5.

Angus, Iowa, and from Hopkins to Morton, Minnesota.

The line from Red Wing to Mankato, Minnesota, and from Morton, Minnesota, to Watertown, Dakota Territory, are not in the hands of a receiver, but are operated on account for the owner thereof, the Wisconsin, Minnesota & Pacific Railway Company.

Wherefore, defendants pray that the said complaint may be dismissed on the merits, and that the complainant take nothing thereby.

J. D. Springer, Atty. for Defts.

Minneapolis, Minnesota.

John P. SQUIRE *et al.*, Firm of John P. Squire & Co.,

MICHIGAN CENTRAL R. CO., New York Central & Hudson River R. Co., and Boston & Albany R. Co.

(No. 159.)

COMPLAINT filed January 19, 1889, charging unjust discrimination in rates for transportation of live hogs as compared with rates on slaughtered hogs, etc.

To the Honorable the Interstate Commerce Commission of the United States of America.

1. Respectfully represent John P. Squire, Frank O. Squire, and Fred. F. Squire, of Arlington, in the County of Middlesex, in the Commonwealth of Massachusetts, that they are copartners under the firm style of John P. Squire & Company, and are engaged in the business of slaughtering hogs, and curing and selling the meats thereof, and that their trade lies in the New England, Middle and Southern States of the United States of America, and also in England and other foreign countries.

That they buy large numbers of hogs in the Western States, and procure them to be transported over divers lines of railroad from the markets where purchased to their slaughter house in the Cities of Cambridge and Somerville, in said County of Middlesex, in said Commonwealth of Massachusetts.

2. That in the prosecution of said business said complainants purchase large numbers of live hogs in the western markets, principally in Chicago, but some in Kansas City, Omaha, St. Joseph and St. Louis. The hogs purchased at the said points west of Chicago being concentrated at Joliet, in the State of Illinois, near the said City of Chicago, and are transported by rail from said City of Chicago and Joliet to the slaughter house in said Cambridge and Somerville, and said shipments from Chicago and Joliet to the places aforesaid aggregate an average of about 175 car loads per week.

3. That the said business of complainants aggregates about \$13,000,000 to \$15,000,000 per annum; in which are employed about 1,000 persons. Said business is exclusively the purchasing, slaughtering of hogs, and the curing, packing and sale of the products; the item of freight on the live hogs shipped in said business aggregating over \$700,000 per annum.

4. That the chief source of supply for the business in which complainants are engaged is the said western markets; that said markets are indispensable to said business; that they are compelled to compete in the various markets where their hog products are sold with various persons, firms or corporations which have slaughter houses in the Western States, where the live hogs are purchased, and with the sellers of dressed beef who have slaughter houses in the Western States; that their competitors who are engaged in the sale of hog products and dressed beef are thus relieved from the burden of transporting the live hogs and cattle from the cities of purchase to the cities where the markets for consumption are—a burden which your complainants are compelled to bear.

5. That the item of freight on the hogs brought from Chicago and Joliet to the places aforesaid is one of great magnitude, and upon this, relatively to the freight on other products hereinafter to be mentioned, very largely depends the ability of complainants, and all others similarly engaged, to carry on such business, as is hereinafter more particularly set forth.

6. That the meat supply of the country consists mainly of the products of slaughtered beeves and slaughtered hogs; that the consumption of the one or the other by the largest portion of the consuming public depends upon the price at which these respective articles are sold in the markets, whether cured or uncured, and, especially, in the fresh state, and whatever enables the dealer to relatively cheapen either lessens the demand for and impairs the sale of the other, unless that other can be correspondingly cheapened in price.

7. That the principal source of supply of the market for beef, both fresh and cured, is the West, and chiefly Chicago; that enormous quantities of beef, in the slaughtered state, are constantly being shipped from Chicago to Boston and other points on the eastern seaboard for market; that within a few years past the business of transporting slaughtered beeves from Chicago to Boston has been extensively carried on, and the beef supply for the public in the various markets where complainants' products are sold has been and is almost entirely from that source, and this supply is sold in competition with the hog product produced by said firm and all others similarly engaged.

8. That for more than a year last past the Michigan Central Railroad Company, operating its own road, and also, as lessee, operating the Canada Southern Railroad Company, the New York Central & Hudson River Railroad Company, and the Boston & Albany Railroad Company (the said companies being corporations and common carriers of passengers and property, partly by rail and partly by water, under a common control, management, or arrangement, for a continuous carriage or shipment), have been, and still are, transporting freights over the railroads of said companies as one continuous line between Joliet and Chicago and the places aforesaid; that during said period said companies have been receiving from complainants for transportation, and have been transporting over such continuous line between said places an average of about 175 double deck car loads of live hogs per week, the aggregate amount of freight charged to said firm on ac-

count thereof during the past year being not less than \$700,000, as aforesaid.

9. That during said period the said railroad companies, as a continuous line, as aforesaid, have been and now are engaged in transporting slaughtered beeves and live cattle, and the products of slaughtered hogs, from Chicago to said points hereinbefore referred to, in enormous quantities, for the markets hereinbefore mentioned.

10. That the just relative rate of charges for transportation between said points upon live hogs and upon slaughtered beef, and the products of slaughtered hogs aforesaid, is in the ratio of thirty cents to sixty-five cents per 100 pounds; that is to say, when the freight charged on live hogs is thirty cents per 100 pounds, the freight on slaughtered beef and the said products of slaughtered hogs should not be less than sixty-five cents per 100 pounds, and the just relative rate between live hogs and live cattle is thirty to thirty-five; and any less ratio than the aforesaid unjustly operates to the injury of the shipper of the live hogs.

11. That during the period aforesaid the said railroad companies, in the matter of the respective transportations aforesaid, have grossly, and to the great injury of said firm and others similarly engaged, discriminated, and are now so discriminating, against the said live hog traffic and your complainants, by charging for said transportation of slaughtered beef, live cattle, and slaughtered hog products greatly less than the ratios aforesaid, as will more fully appear by their tariff schedules, a compilation of which is hereunto annexed and made a part hereof, marked "Exhibit A."

12. That the schedules of rates and charges established and collected by said respondent railroad companies from your complainants for the transportation of live hogs between said City of Chicago and said Town of Joliet and said Cities of Cambridge, Somerville and Boston, as compared with the schedules of rates and charges established and collected by said respondent railroad companies for the transportation of dressed hogs and hog products between said points between the dates set forth in the schedule of rates and charges hereto annexed and marked "A," are an undue and unreasonable prejudice and disadvantage to your complainants, and the same being the schedule of rates and charges for the transportation of these two specified descriptions of traffic established by the respondent railroad companies is an unlawful act on the part of said respondent railroad companies, and prohibited by the provisions of said Act.

13. That the schedule of rates and charges established by said respondent railroad companies for the transportation of live cattle and dressed beef between said points between the dates specified in said schedule of rates and charges hereto annexed, and marked "A," as compared with the schedule of rates and charges established by said respondent railroad companies for the transportation of live hogs between the same dates and points, are an undue and unreasonable preference and advantage, given by said respondent railroad companies to said first named description of traffic, to wit: the live cattle and dressed beef traffic, and an unjust, undue and unreasonable prejudice and

disadvantage to said second named description of traffic, to wit: the live hog traffic, and is an unlawful act and prohibited by the provisions of said Act.

14. Your complainants represent that the act of said respondent railroad companies in establishing said schedule of rates and charges is an unjust discrimination against your complainants and the live hog traffic, and, though often protested against by your said complainants, has been continued by said respondent railroad companies to your complainants' great damage, and against your complainants' legal rights in the premises.

Your complainants aver that the relation between live animals and the products of the same is such that a relatively lower rate of freight should be charged for the transportation of the live animals, as compared with the rate of freight charged for the transportation of the dressed products, than the rate between the dates set forth in said schedules, hereto annexed, established and charged.

And your complainants aver that live beef cattle, live hogs and the dressed products of each of the same are and should be placed in one classification of freight, so far as rates and charges for transportation of the same are concerned; and that the published schedules and tables of classification of freight issued by said respondent railroad companies should place these several descriptions of traffic in one classification, as indeed has been the case until the recent action of said railroad companies in making the unjust discrimination herein complained of, and, when reasonable relative rates have been fixed upon, established and published by said respondent railroad companies, any change in the rate of transportations for any one or more of said descriptions of traffic should be followed by a corresponding relative change in the rate and charge of transportation for all of said descriptions of traffic.

15. Your complainants maintain that the changes made in the schedule of rates and charges for transportation of cattle, dressed beef and dressed hogs on the dates beginning with the 21st day of November and continuing until the 26th day of December, A. D. 1888, and on the dates beginning with May 14th and continuing until the date of the filing of this complaint, whereby large reductions were made in the rates and charges for the transportation of cattle, dressed beef, dressed hogs, and no change made in the rates and charges for the transportation of live hogs until the 25th day of June, A. D., 1888, and on and after said date but a small change made therein, are an unjust, undue and unreasonable discrimination against your complainants and the live hog traffic, and enables the persons, firms or corporations engaged in transporting live cattle, for example, to transport, on the 13th day of July, 1888, live cattle at the rate of 10½ cents per 100 pounds between Chicago and Boston, and exacts from your complainants and the live hog traffic twenty-five cents per 100 pounds for transporting live hogs between said points—a difference and discrimination in favor of the live cattle traffic of more than 100 per cent, exacting from the live hog traffic and your complainants the same amount of money for transporting 100 pounds of live hogs between said

points as said respondent railroad companies charge the live cattle traffic for transporting 238 pounds of live cattle; whereas, the actual relative reasonable rate of charge for transporting 100 pounds of cattle is greater than that for transporting 100 pounds of live hogs by 16½ per cent; that is to say, complainants aver and charge that, when the price for transporting 100 pounds of live hogs is thirty cents, the relative reasonable price for transporting 100 pounds of live cattle is thirty-five cents, and should not be less in ratio to the live hog price. And said unjust, undue and unreasonable discrimination enables the persons, firms, or corporations engaged in the sale of dressed beef and dressed hog products, for example, on the same date, to transport their dressed products at eighteen cents per 100 pounds, while the live hog traffic and your complainants are charged for transporting 100 pounds of live hogs between said points twenty-five cents, enabling the dressed beef and dressed hog dealers to transport 138⅓ pounds of their products for the same price as is charged to the live hog traffic and your complainants for transporting 100 pounds of live hogs between said points; whereas, the actual reasonable rate of charge for transporting dressed beef and dressed hog products, as compared with that of transporting live hogs, is as sixty-five cents per 100 pounds for the dressed products to thirty cents for the live hogs; that is to say, your complainants aver and charge that, when the price for transporting 100 pounds of live hogs is thirty cents, the price for transporting 100 pounds of the dressed beef and hog products should be sixty-five cents and not less. And any less price per 100 pounds for the transportation of the dressed products than sixty-five cents, when the price for transporting 100 pounds of live hogs is thirty cents, is an unjust discrimination against your complainants and the live hog traffic; all of which will more particularly appear by Exhibit "B," hereto annexed, and made a part hereof.

16. Your complainants show that said respondent railroad companies made reduction in the rates of charges for transporting cattle, dressed beef, and dressed hog products, beginning with November 21, 1887, and ending with December 26, 1887, varying from 10 to 52 per cent from the rates and charges which had been in force up to the beginning of said period, and made no reduction in the rates and charges for transporting live hogs between said dates; that, beginning with May 14, 1888, and ending with December 17, 1888, said respondent railroad companies made a reduction in rates and charges for transporting cattle, dressed beef, and dressed hogs, varying from 28 to 70 per cent on cattle, and 38 to 73 per cent on dressed beef and hog products, while, during the same period, the rates on live hogs were reduced but twice, to wit: 16⅔ per cent from June 25 to July 14, 1888, and 33⅓ per cent from July 14 to October 22, 1888, from the rates in force on June 20, 1887, and up to November 21, 1887; all of which will more particularly appear by Exhibit "C" hereto annexed and made a part hereof.

17. And your complainants say that the action of said respondent railroad companies in discriminating against your complainants and

said live hog traffic has entailed a loss of a sum exceeding \$75,000 during the period beginning with the 21st day of November, 1887, and, if continued by said companies, jeopardizes the continuance of the business of your complainants, inasmuch as it renders the prosecution of the business of complainants in competition with the persons, firms, or corporations engaged in transporting live cattle and in the sale of dressed beef and dressed hog products impossible without a loss.

18. Your complainants show that the persons, firms or corporations engaged in transporting live cattle, in selling dressed beef products and dressed hog products, by reason of the unreasonably low ratio of rates and charges exacted of them by said respondent railroad companies, as compared with the rates and charges exacted of your complainants and said live hog traffic, are enabled to compete in the markets, where the trade of your complainants lies, with your complainants, so as to entail a loss on your complainants, and to render the prosecution of the business of your complainants at anything but a loss almost impossible.

Wherefore, your complainants pray that said respondent railroad companies may be required to answer to the several matters contained in this complaint, and that on final hearing such sums of money may be awarded your complainants as shall be just and equitable, and that such other orders may be passed by this honorable Commission as may be deemed necessary, and as justice may require.

"A."

Rates of Freight on Live Stock and Dressed Meats from Chicago to Boston, taking effect on the dates following, being the rates in cents per 100 pounds.

| Date. | Cattle. | Hogs. | Dressed Beef, and Dr's'd Hogs with Dressed Beef. | Dressed Hogs in Common Cars. | Dr's'd Hogs in Refrigerator Cars. |
|----------|---------|-------|--|------------------------------|-----------------------------------|
| 1887. | | | | | |
| June 20, | 35 | 30 | 65 | 60 | 65 |
| Nov. 21, | 31½ | 30 | 58½ | 54 | 58½ |
| Nov. 21, | 28½ | 30 | 52½ | 48½ | 52½ |
| Nov. 23, | 25½ | 30 | 47½ | 43½ | 47½ |
| Nov. 25, | 23 | 30 | 42½ | 39 | 42½ |
| Nov. 26, | 20½ | 30 | 38½ | 35 | 38½ |
| Nov. 28, | 18½ | 30 | 34½ | 31½ | 34½ |
| Nov. 29, | 16½ | 30 | 31 | 28½ | 31 |
| Dec. 26, | 35 | 30 | 65 | 60 | 65 |
| 1888. | | | | | |
| Jan. 23, | 35 | 30 | 67 | 60 | 65 |
| Jan. 23, | 35 | 30 | 70 | 60 | 70 |
| Apr. 26, | 35 | 30 | 65 | 60 | 65 |
| May 14, | 25 | 30 | 65 | 60 | 65 |
| June 25, | 21½ | 25 | 40 | 40 | 40 |
| June 29, | 16½ | 25 | 35 | 35 | 35 |
| July 2, | 14½ | 25 | 30½ | 26½ | 30½ |
| July 3, | 14½ | 25 | 29½ | 26½ | 29½ |
| July 5, | 14½ | 25 | 29½ | 26½ | 29½ |
| July 6, | 14½ | 25 | 29½ | 26½ | 29½ |
| July 7, | 13½ | 25 | 28½ | 25½ | 28½ |
| July 7, | 12½ | 25 | 27½ | 24½ | 27½ |
| July 10, | 11½ | 25 | 26½ | 23½ | 26½ |
| July 11, | 10½ | 25 | 25½ | 22½ | 25½ |
| July 12, | 10½ | 25 | 19 | 19 | 19 |
| July 13, | 10½ | 25 | 18 | 18 | 18 |
| July 14, | 10½ | 23 | 17 | 17 | 17 |
| July 30, | 10½ | 23 | 17 | 17 | 17 |
| Aug. 3, | 10½ | 23 | 17 | 17 | 17 |
| Aug. 20, | 16 | 23 | 30 | 30 | 30 |
| Oct. 22, | 17½ | 30 | 35 | 35 | 35 |
| Dec. 17, | 22½ | 30 | 50 | 45 | 50 |

"B."

Table showing the Percentage of Reduction in the Rates of Freight on Live Stock and Dressed Meats from Chicago to Boston, on the following dates, from the Tariff of Rates of Freight published and in force on June 20, 1887.

| Date. | Cattle. | Hogs. | Dressed Beef, and Dr's'd Hogs with Dressed Beef. | Dressed Hogs in Common Cars. | Dr's'd Hogs in Refrigerator Cars. |
|----------|------------|------------|--|------------------------------|-----------------------------------|
| | Reduction. | Reduction. | Reduction. | Reduction. | Reduction. |
| 1887. | per ct. | per ct. | per ct. | per ct. | per ct. |
| Nov. 21, | 10.00 | 0.00 | 10.00 | 10.00 | 10.00 |
| Nov. 21, | 18.57 | 0.00 | 19.23 | 19.16 | 19.23 |
| Nov. 23, | 27.14 | 0.00 | 26.92 | 27.5 | 26.92 |
| Nov. 25, | 34.28 | 0.00 | 34.61 | 35.00 | 34.61 |
| Nov. 26, | 41.42 | 0.00 | 40.76 | 41.66 | 40.76 |
| Nov. 28, | 47.14 | 0.00 | 46.92 | 47.5 | 46.92 |
| Nov. 29, | 52.85 | 0.00 | 52.3 | 52.5 | 52.3 |
| Dec. 26, | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| 1888. | | | | | |
| Jan. 23, | 0.00 | 0.00 | 3.07 | 0.00 | 0.00 |
| Jan. 23, | 0.00 | 0.00 | 7.69 | 0.00 | 7.69 |
| Apr. 26, | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| May 14, | 28.57 | 0.00 | 0.00 | 0.00 | 0.00 |
| June 25, | 38.57 | 16.66 | 35.46 | 33.33 | 38.46 |
| June 29, | 38.57 | 16.66 | 46.15 | 41.66 | 46.15 |
| June 29, | 52.85 | 16.66 | 53.07 | 49.16 | 53.07 |
| July 2, | 58.57 | 16.66 | 59.23 | 55.33 | 59.23 |
| July 3, | 58.57 | 16.66 | 59.23 | 55.33 | 59.23 |
| July 5, | 58.57 | 16.66 | 59.23 | 55.33 | 59.23 |
| July 6, | 58.57 | 16.66 | 59.23 | 55.33 | 59.23 |
| July 7, | 61.42 | 16.66 | 60.76 | 57.5 | 60.76 |
| July 9, | 61.42 | 16.66 | 63.84 | 60.83 | 62.84 |
| July 10, | 67.14 | 16.66 | 66.15 | 63.33 | 66.15 |
| July 11, | 70.00 | 16.66 | 63.46 | 65.33 | 68.46 |
| July 12, | 70.00 | 16.66 | 70.76 | 68.23 | 70.76 |
| July 13, | 70.00 | 16.66 | 72.30 | 70.00 | 72.30 |
| July 14, | 70.00 | 16.66 | 73.84 | 71.66 | 73.84 |
| July 30, | 70.00 | 16.66 | 73.84 | 71.66 | 73.84 |
| Aug. 3, | 70.00 | 16.66 | 73.84 | 71.66 | 73.84 |
| Aug. 20, | 54.28 | 23.33 | 53.69 | 50.00 | 53.84 |
| Oct. 22, | 50.00 | 0.00 | 46.15 | 41.66 | 46.15 |
| Dec. 17, | 35.71 | 0.00 | 23.07 | 25.00 | 23.07 |

"C."

Table showing the number of Pounds of Live Cattle, Dressed Beef, and Dressed Hog Products carried for every 100 pounds of Live Hogs at the Rates on the Dates following, and the number of Pounds of Cattle which could be carried per annum for the same amount of money as Hog Slaughterer with Business of 200 cars, minimum weight of 20,000 Pounds each, would have to pay at the rates on said dates.

| Date. | Cattle. | Dressed Beef, and Dr's'd Hogs with Dressed Beef. | Dressed Hogs in Common Cars. | Dr's'd Hogs in Refrigerator Cars. | Cattle Carried per Annum for Price of 248 Million lbs. of Hogs. |
|----------|---------|--|------------------------------|-----------------------------------|---|
| 1887. | | | | | |
| June 20, | 84.3 | 46.1 | 50. | 46.1 | 175,344.000 |
| Nov. 21, | 95.2 | 51.2 | 55.5 | 51.2 | 198,016.000 |
| Nov. 23, | 105.2 | 57.1 | 61.8 | 57.1 | 218,816.000 |
| Nov. 25, | 117.6 | 63.1 | 68.8 | 63.1 | 244,608.000 |
| Nov. 26, | 130.4 | 70.5 | 76.9 | 70.5 | 271,232.000 |
| Nov. 28, | 146.3 | 77.9 | 85.7 | 77.9 | 304,304.000 |
| Nov. 29, | 162.1 | 86.6 | 95.2 | 89.9 | 337,168.000 |
| Nov. 29, | 181.8 | 96.7 | 105.2 | 96.8 | 378,144.000 |
| Dec. 26, | 84.3 | 46.1 | 50. | 46.1 | 175,344.000 |
| 1888. | | | | | |
| May 14, | 120. | 46.1 | 50. | 46.1 | 249,600.000 |
| June 25, | 116.2 | 62.5 | 62.5 | 62.5 | 241,696.000 |
| June 29, | 116.2 | 71.4 | 71.4 | 71.4 | 241,696.000 |
| June 29, | 151.5 | 81.9 | 83.6 | 81.9 | 315,120.000 |

| Date. | Cattle. | Dressed Beef, and Dr's'd Hogs with Dressed Beef. | Dressed Hogs in Common Cars. | Dr's'd Hogs in Refrigerator Cars. | Cattle Carried per Annum for Price of 200 Million lbs. of Hogs. |
|----------|---------|--|------------------------------|-----------------------------------|---|
| July 2, | 172.4 | 94.3 | 94.3 | 94.3 | 358,592,000 |
| July 7, | 185.1 | 98.4 | 98. | 94.5 | 385,008,000 |
| July 9, | 200. | 106.3 | 106.3 | 106.3 | 416,060,000 |
| July 10, | 217.3 | 113.6 | 113.6 | 113.6 | 451,984,000 |
| July 11, | 238. | 121.9 | 121.9 | 121.9 | 495,040,000 |
| July 12, | 238. | 131.5 | 131.5 | 131.5 | 495,040,000 |
| July 13, | 238. | 139.4 | 138.8 | 138.8 | 495,040,000 |
| July 14, | 219. | 135.3 | 135.3 | 135.3 | 455,520,000 |
| Aug. 20, | 143.7 | 76.6 | 76.6 | 76.6 | 298,896,000 |
| Oct. 22, | 171.4 | 85.7 | 85.7 | 85.7 | 356,512,000 |
| Dec. 17, | 133.3 | 60. | 66.6 | 60. | 277,264,000 |

[Complaint subscribed and verified.]

ORDER BY THE COMMISSION.

It appearing upon an inspection of the com-

plaint in this case that the questions raised are such that other carriers not named as defendants have an interest therein, that is to say: The Vermont Central Railroad Company, the New York, Ontario & Western Railway Company, the Pennsylvania Railroad Company, the New York, Lake Erie & Western Railroad Company, the Delaware, Lackawanna & Western Railroad Company, the Baltimore & Ohio Railroad Company, and the Grand Trunk Railway Company.

It is now ordered that each of said carriers be furnished with a copy of the petition and of this order, and that they have leave to intervene as parties by filing notice of desire to do so within twenty days from this date, in which case they will receive notice of hearing, and may appear and be heard thereon if they so desire.

Washington, January 19, 1889.

ADDRESS BY CHAIRMAN COOLEY.

AN address delivered by Hon. Thomas M. Cooley, Chairman of the Interstate Commerce Commission, on January 8, 1889, before the Boston Merchants' Association, on Pooling and Combinations which affect the operation of the Interstate Commerce Act.

COMBINATIONS IN TRANSPORTATION.

I believe I am expected to say something on the subject of Combinations and Concentrations of Interests with special reference to the business of transportation of persons and property by railroad. The occasion for saying anything may be attributed, I suppose, to the desire now being expressed in some quarters that the Act to Regulate Commerce should be repealed, or at least be amended by striking out certain clauses which are supposed to bear heavily on the railroads.

I do not understand that the question of the repeal of the Act is to be discussed at this time; and if it were, I do not know that I should care to speak upon it. I may say, however, that the Act has a good purpose in view; it was intended to correct enormous abuses previously existing; but they cannot be corrected without cutting off some sources of improper income. These did not all accrue to the benefit of the railroads or of railroad men; other classes profited upon them also, and it is expecting altogether too much to suppose that they will acquiesce in the sources of their illegitimate profits being cut off without making an effort to retain them. The reform therefore which the Law intends must embrace other classes besides those who are in railroad service, and it must be expected that others besides railroad men will for personal reasons desire to get rid of it.

The urgent call for a modification of the Act which comes from railroad circles has sprung up recently. There were indeed some objections made to it immediately after its passage as well as before; but when it was given effect it was found, quite to the surprise of some who had prophesied disaster to the railroads from it, that the disasters did not follow. Indeed,

for six months or more after the Act took effect, it was generally conceded it helped the railroads instead of harming them. They gained in revenue from the anti-discriminating clauses more than they lost from the prohibition of the greater charge upon the shorter haul. Every one ought to have been gratified with this, because the gain to the roads was not at the expense of the general public; it was, on the other hand, to their advantage, because it was a gain resulting principally from taking away unfair advantages which before were benefiting favored persons at the expense of others upon whom the burden was proportionally increased.

I desire to call special attention to this fact: that the period during which the Law operated most to the benefit of the railroads was precisely that during which its provisions were best observed. I think this to be an undeniable fact; and if it is a fact, it is deserving of more attention than up to this time it has received from the managers of railroads. It was also the period during which the Law was complained of the least.

There are very vigorous complaints now. They relate mainly to the clause of the Act which forbids the greater charge on the shorter haul on the same line in the same direction where the circumstances and conditions are similar, and that which makes pooling unlawful. The first mentioned clause embodies a principle right in itself. In large sections of the country the roads have come into conformity with it and not suffered loss from doing so. In others it was not practicable to do so, at least immediately. But the difficulties are greatly increased by the excessive competition of the roads at leading points, and they will diminish as the managers come to better understanding among themselves. The provision does not establish an iron rule; it is meant to be sufficiently elastic to operate justly, and if the managers give their best efforts to come into conformity with it, they will be very likely to find, perhaps to their surprise, that they can do so without injury. What they lose in one way they will make up in others.

But the chief reason the railroad managers bring forward for an amendment of the Law concerns the matter of pooling. The privilege of pooling is supposed by them to be of vital importance, and their opinions on the subject are entitled to respectful consideration.

I have referred to the fact that the Law was best observed at the outset. But in a few months it began to be noticed that many persons in railroad service were giving more attention to contrivances for evading the spirit and intent of the Law than they were to obeying it. Their ingenuity in this regard may almost be pronounced marvelous; the old mischiefs were reproduced under new guises just so far as plausible excuses could be invented for the purpose. One curious feature of the sort of railroad management that was indulged in was that the methods that were devised for evading the Law, instead of increasing the pecuniary returns from railway service, almost invariably diminished them. A secret rebate made to a favored dealer does not increase the aggregate of railroad shipments, and is therefore a total loss to railroad revenues. When property is allowed to go forward underbilled, there is a like loss. If any member of the Association had been in Chicago a few weeks ago and had had occasion to look into one of the general railroad ticket offices he might have thought that all travel had ceased, for nobody seemed to be calling for tickets. In the "cut-rate" office across the way, however, he might have discovered a very different condition of things. It was the scalpers who were selling the tickets, and they were doing so on such terms as enabled them to grow rapidly rich while the roads were growing poor.

I know of no reason for supposing that the general travel of the country was increased through the assistance of this class of men, and so far as could be seen the commissions paid were altogether lost. Very likely some roads lost more than others through the improper diversion of revenue from their treasuries; possibly some of them may have been actual gainers by their illegitimate courses; but the probabilities are all against it.

Any misconduct of this sort on the part of one road is imitated at once. The general practice has been for each road to give rebate for rebate, make cut for cut; and in the end the account of profits and losses shows gains by no one. It is all loss, and all the roads share it.

These things are done in ways supposed not to be actually criminal under the Law, but the whole business is very plainly opposed to the spirit of the Law, and it is done with a purpose of evasion. The Law intends that the rates for the transportation of persons and property shall be the same for all classes and shall be steadily maintained. It also intends that the railroad business of the country shall be done openly and with full publicity. This equal and just purpose of the Law is defeated by contrivances that are clearly opposed to the intent of the Law if not to its terms.

Now, when parties are thus busy in contriving methods for rendering the Law of no effect, and their evasions of its purpose are seen to have a direct tendency to diminish the corporate revenues, they are hardly the parties to put themselves upon the stand to prove that the

Law is injuring their roads. Besides, the evidence they bring forward is not to the point.

We can all see that the old practices which the Law undertook to put an end to, but which are still persisted in, are harmful. What we need to be shown is that the fruits of obedience to the Law would be equally injurious, or perhaps more so. These are precisely the proofs that are not brought forward.

The reply made to us when this is said is that the disregard of legal obligations comes from excessive competition. Formerly this was kept within bounds by the device of pooling, but pooling is now prohibited, and there are no means within the reach of the railroads to protect them against rate wars. These wars will break out inevitably, and when they do the roads will reach for traffic by every available means. If one gives rebates another will; if one puts its passenger tickets into the hands of outside parties its competitor is compelled to do the same. This is the plea.

Putting aside for the time being the question whether pooling ought or ought not to be allowed, I must insist that the argument now made for it is radically unsound and vicious, because it rests upon an assumption that violation of law by one is justification for violation by another. The sentiment in railroad circles on this subject is not only opposed to sound public morality, but it necessarily tends to the perpetuation of the very evils under which the roads are now suffering.

Every man ought to be a law abiding citizen, railroad managers just as much as any other class of persons. Violation of a law which has a just purpose in view, and especially of any provision of the law that is unmistakably just and right in itself, ought to be odious. Any citizen knowing of the violation, instead of imitating it, ought to assist in bringing the offender to justice. If the violation particularly affects any one business, the persons engaged in that business ought to feel themselves under special obligation to see not only that the crime is punished, but that it is made disreputable. If a sentiment to any such effect exists in railroad circles it has not been made known outside of them. In saying this I wish distinctly to be understood that I do not join in any general indictment of railroad managers. I understand too well that a great many among them desire that the Law shall be enforced, and would willingly obey it to the letter if they thought under the circumstances they could do so, but many even of these are affected by the old notions growing out of old and chronic abuses, and when a competitor breaks the Law they do not hesitate to do the same thing in order to get even with him. The crime thus spreads from one to another until all are involved. Each one justifies his own conduct by the bad conduct of the one who preceded him in disobedience, or is supposed to have done so. He would have us understand that he would not have done what he did if he had been a free agent, but that what the other had done left him no choice but to follow the example. He was thus compelled to violate the Law because another did, and he fails to recognize an obligation as a citizen either to institute prosecutions himself or to furnish the evidence on which the public authorities can prosecute.

Now I know nothing corresponding to this in other lines of business. If one merchant cheats his competitor by dishonest and criminal means the latter does not retort in kind, but hands the case over with the proofs to the public prosecutor. We never hear from one merchant that the criminal conduct of his competitor forces him into like conduct. The plea of a saloon keeper who should throw open his doors at forbidden hours because he found his rival had a back door open and was likely to draw away business, would be overruled as promptly by public sentiment as it would be by the courts.

Even where an alleged secret cut in rates is met in a perfectly legal manner, by an open reduction, the question often remains whether the alleged offense was not imaginary rather than real; and whether, if not, it would not have been possible to correct it by an appeal to the Law instead of making a costly sacrifice of revenues by measures of retaliation.

We see in these facts the radical error on the part of many who are now saying that pooling is indispensable to railroad harmony and prosperity. The evidences they bring forward do not prove or tend to prove the fact. They only prove that they themselves have been culpable in failing to give the Law the proper support—in failing to make the effort fairly required of them to render the Law beneficial to themselves and to the public with that privilege denied. A duty to this effect rested upon them as citizens, but also specially and particularly because they were in the management of great properties charged with a public trust.

But putting this aside for the present, we need when one pleads for the privilege of pooling to be informed exactly what it is that he means by it. The term is used in very different senses nowadays. Does he mean the voluntary pooling as formerly practiced, and which existed without any legal basis; or does he mean pooling sanctioned by law with the power of enforcing the pooling contracts? Or does he perhaps mean something quite different from either—something in the nature of a trust? It is very important that we should have definite information on this subject before pooling, vaguely suggested, is either condemned or endorsed.

The old pooling was never so harmful as some persons supposed, and was probably condemned by law more because of what it was feared it would become, or might become, than because of what it was. But, on the other hand, it was never so beneficial to the roads as it is now customary to claim. The most that can be said in its favor is that it had a tendency to the steady maintenance of rates. It was a contrivance whereby it was made to the interest of roads not to push competition to excess, and not to engage in destructive rate wars. But in order to have pooling it was necessary, in the first place, to agree upon a basis; and this agreement was not always possible. And when the basis was agreed upon it had no stability; it had no legal support; it depended for its existence from day to day upon the continuous consent of parties. The result was that pooling agreements were constantly being broken up, and the most destructive rate wars in railroad history occurred before pool-

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ing was prohibited. The little practical value of the old device was often confessed by those who made greatest efforts to render it effectual. This fact is not to be ignored in the talk for restoring it.

For a very large proportion of railroad controversies voluntary pooling cannot possibly be a remedy, for the very obvious reason that they concern matters which have to be settled before there can be any pooling. They concern the substructure, so to speak. Take, for illustration, the difficulties that have existed in trunk-line territory during the last year. They concerned the basis; they related to controversies which had to be determined as a preliminary step to any pooling; so that, so far as we can see, the controversies would have run their course and been just as active and violent with the right to pool in existence as they were without it. And the peculiarity of railroad service is such that controversies of the sort are never really settled, for pooling itself only establishes a temporary truce in respect to them.

Let us see what pooling involves:

It is desired to establish it, we will say, in trunk-line territory. There are some strong lines there and some very weak ones; there are short lines and long; there are direct roads for the business between leading points, and there are roads twice as long which nevertheless demand a share of the business. There are local roads which have fair claim to nothing but local business, but which are nevertheless capable of being made links of long but circuitous lines, and of thus becoming disturbers of rates for the whole territory. The problem, when pooling is proposed, is how to satisfy all the parties; how to apportion the business so that all will be content and remain so. And at the outset it must be understood that there is not business enough to make them all profitable, and inevitably some must have precarious existence.

To expect to satisfy all under such circumstances is as vain as to expect to satisfy a miscellaneous collection of carnivorous beasts by dividing among them a carcass which is insufficient to more than whet their appetite. Content with the division is out of the question. Each will take what is allotted to it if it sees no chance of getting more, but with such mental protests as will make it eager to embrace any circumstance which seems to give promise of a better division if the pool is broken up. And such circumstances are constantly presenting themselves. The pooling family is very seldom a happy family; it is seldom, if ever, bound together by friendly ties. Each considers his neighbor unfair and unjustly grasping, and chafes under the fact.

Thus all the elements of disorganization attend it from the start. Moreover, the most perfect pool is liable to be invaded by means of arrangements that may seem altogether unnatural and yet be very effective. The Canadian Pacific, notwithstanding its enormous length of line, showed itself quite capable of dictating terms to the American transcontinental roads in respect to business between San Francisco and the cities of the interior; and a pool which should embrace all the lines of the Northwest might find its arrangements broken in upon by a line connecting Chicago and New York, but made in part by roads south of the Ohio and

the Potomac. There is almost no limit to the possibility of forming such roundabout lines as may constitute disturbers and disorganizers of rates; and the ingenuity in forming them is sufficiently active to prevent pooling being more than an experimental device for keeping the peace, whose duration is dependent first on the good faith of the parties, and next upon the power of others to upset their arrangements.

Pooling with a legal sanction would have all the elements of weakness that attended the old pooling except one. When the pool as it used to be formed broke up, there was no enforcing such obligations as had been incurred while it existed; there was no compelling payment of balances. With a legalized pooling there might be the power to do this; but there would be the same difficulty in forming the pool, the same elements of disorganization would be involved, the same continuous good faith would be essential, and the same possibilities would exist of fatal intrusions from outside.

The difference between a trust and a pool is almost as great as that between a despot on the throne and the player who mimics him on the stage. I do not understand that I am expected to speak particularly of trusts. They are of course a feature of the times to which all thoughtful men must now be giving some attention, but at this time I do not care to dogmatize on the subject. A few things can, nevertheless, be said of trusts without danger of mistake. They are things to be feared. They antagonize a leading and most valuable principle of industrial life in their attempt, not to curb competition merely, but to put an end to it. The course of the leading trust of the country has been such as to emphasize the fear of them, and the benefits that have come from its cheapening of an article of commerce are insignificant when contrasted with the mischiefs that have followed the exhibitions in many forms of the merciless power of concentrated capital. And when we witness the utterly heartless manner in which trusts sometimes have closed manufactories and turned men willing to be industrious into the streets in order that they may increase profits already reasonably large, we cannot help asking ourselves the question: whether the trust as we see it is not a public enemy; whether it is not teaching the laborer dangerous lessons; whether it is not helping to breed anarchy? One thing would seem manifest: there are some trusts whose members are estopped from complaining of organized laborers when, by strikes or boycotts or any kindred means, they seek to force compliance with their demands. They are estopped because their own methods have been of like nature, and having been employed with greater skill and power, have been generally more effective and mischievous.

Anything in the nature of a trust, that should bring the railroads of the country, or of any considerable section of the country under a single head, with irresistible power to divide business and make rates, would be more to be dreaded than any other trust ever formed or proposed. The reason is obvious: it would control more property, have more power of controlling and coercing the action of individuals and of the public authorities. It would besides, if formed now, in all probability fall

to the control of that class of managers who in handling railroad property do not hesitate to subordinate law to corporate interests and rivalries. No prudent man would give assent to a railroad trust until he was first shown that very effective legal restraints had been put upon it.

If it were not taking time, unwarantably, something might be said about excessive railroad building as one of the reasons for enormous recent losses on railroad stocks. A gentleman of considerable experience remarked recently, "The most profitable business now is the building of worthless railroads; no matter how worthless if the bonds can be sold. The projectors put nothing in, and they determine for themselves how much they will take out for building." The proposal of a new railroad is very often a mere confidence operation. Many roads are built that instead of increasing the aggregate value of the railroad property of the country, diminish it very largely. The millions put into them are sunk, and perhaps as many millions more previously put into roads which the new roads make unprofitable.

I trust that what I have said sufficiently indicates the weakness of pooling as a specific for railroad evils. But this further must be said of it. It is not at all probable that pooling will be legalized before managers show: *first*, a different attitude towards the Law; and *second*, a better disposition to observe mutual engagements. It is right at this point that the radical mistakes have been made. If the obligations entered into in forming railroad associations had been observed, pooling would have been of much less moment than is now contended. But the obligations in many cases seem only to have been assumed that they might be violated, and when men guilty of the violation ask for the legalization of pooling to enable them to obey the Law the request does not have a winning sound; it repels votes instead of gaining them. Before further law is made at their request they should show a purpose to obey the Law they now have. This is the way it is likely to strike a legislative body. The true method of railroad management is undoubtedly something in the nature of representative regulation under government control, and to this pooling is not half so essential as is the creation of a sentiment in railroad circles that will not tolerate the disregard or open breach of mutual engagements.

Many recent rate wars have not had the slightest justification in either policy or in morals. The railroad companies had not long since an arrangement regarding the transportation of emigrants which was accomplishing for them the purposes of a pool. Suddenly it was broken up and a horde of harpies brought in to feed upon railroad revenues. An actual pool would have been of no service there. The evils of course did not end when the war did.

All these things go to show that something else needs reforming besides the Law. It is poor reformatory work that the Law can do in any line of business unless the moral forces in the same business come to its support. Of course effectual reform will necessarily reach beyond railroad circles. Large dealers who formerly prospered upon special favors must be content to forego them. The bribing of a

railroad servant to underbill goods or in some other way to give an advantage to a shipper ought to be as disreputable as the hiring of a thief to steal a neighbor's goods.

In an address made by Charles Francis Adams in this city a few days since, that gentleman did not speak any too strongly on this general subject. And we all know that on railroad subjects he speaks from ample knowledge and experience.

I have spoken of the want of reformatory power in the Law. One who investigates railroad disorders will be surprised to find how many of them, though plainly opposed to the spirit of the Law, may still be practiced legally. Rate cutting in passenger service is very largely done by the use of tickets which the Law expressly exempts from its provisions, and coupon tickets are so manipulated by one company as to cut the rates of another without the other being a participant otherwise than as it suffers from a fraud practiced upon it. The general manager of a long line of road who was careful, as he thought, to render cutting on his line impossible, was astonished recently by having a ticket broker to whom he was a stranger offer

him a ticket over his own line at a cut rate. He at first pronounced the ticket a forgery; but it was not a forgery, nor was it a ticket which had been partly used; it was his part of a coupon ticket which had been put into the hands of the passenger agent of a distant road, and this agent had cut it off and passed it to the scalper as a means of cutting the local rate. One of the crying evils in railroad service now needing attention is the combination between the scalper and the unscrupulous general passenger agent. This will be broken up just as soon as there are applied in railroad matters the same general maxims of business prudence which are expected to control in other interests. If the combination in the same person of the two characters of railroad manager—in whatever official position—and of speculator in railroad stocks could be rendered impossible, we might hope to see the time when the question *What is right and wrong in railroad matters*, would be heard a good deal oftener than it is now, and the question *What can be done in evasion of the Law without encountering its penalties*, a good deal more infrequently.

THE INTERSTATE COMMERCE COMMISSION.

William L. RAWSON

v.

NEWPORT NEWS & MISSISSIPPI
VALLEY R. CO.

(No. 161.)

COMPLAINT filed January 22, 1889, charging violations of sections 3 and 6 of the Act to Regulate Commerce.

To the Honorable The Interstate Commerce Commission.

The petition of William L. Rawson, residing at the time of the occasion of this complaint in Richmond, Va., and engaged in the manufacture and shipping of lumber, having a storage yard at Covington, Va., on the Chesapeake & Ohio Railway, and shipping from other points also; wherein the petitioner will endeavor to show your honorable Commission a violation on the part of the Newport News & Mississippi Valley Co., an incorporated company having for its object the leasing and operating of railroads, the principal office being located at 23 Broad Street, New York, of which company C. P. Huntington, Esq., is president—the said Newport News & Mississippi Valley Co., operating at the time of the occasion of this complaint, the Chesapeake & Ohio Railway, within the States of Virginia and West Virginia.

The violation complained of is of the third and sixth sections of the Act to Regulate Commerce, whereby said violation resulted in injustice and pecuniary injury to the petitioner.

The facts in the matter are, briefly, as follows:

For some years previous to, and during the spring and early summer of, 1887, there existed a tariff on the Chesapeake & Ohio Railway (which tariff sheets it is beyond my power to exhibit) for the transportation of lumber from various points on its line to New York City, which included delivery without any charge

for lighterage, to any point within the known lighterage limits of New York Harbor. The rate prevailing at the time last mentioned was twenty-four cents per 100 lbs., and the routeing was via Richmond, Fredericksburg & Potomac Railroad from its junction with the Chesapeake & Ohio Railway—at which time, routeing and rate, the petitioner had shipped a number of cars of lumber to New York City.

On or about the 10th day of August, 1887, the agent of the petitioner at Covington, Mr. Braxton, loaded with lumber car N. N. & M. V. No. 14532 which had been sold to Mr. J. P. Stocksdale, of 78 Wall Street, New York City. Mr. Braxton made out, as he had been doing heretofore, a bill of lading and duplicate for the billing and routeing of the car and handed the same to the agent of the N. N. & M. V. Co., at Covington, to have weights inserted, sign and return. The car was taken out of the yard and away as usual. Some two or three days after it had gone, the agent of the N. N. & M. V. Co., handed to Mr. Braxton (see copy of Mr. Braxton's letter attached marked "A.") *not the B's-L originally made out and given him by Mr. Braxton, but substituted other B's-L routeing via Staunton and the Baltimore & Ohio Railroad, which change incurred an additional charge of not less than five cents per 100 lbs., to be exacted for delivery by lighter from Communipaw to destination within lighterage limits.*

The substituted B's-L were received by the petitioner August 13, and were inclosed on the 15th in letter of the petitioner (see exhibit marked "B.") to General Wm. C. Wickham, then second Vice President of the N. N. & M. V. Co., at Richmond, Va., and wherein is stated that the petitioner had not received any notice of change of routeing, and increase of rate thereby to New York City, by the additional charge of five cents or more for lighterage, nor was there posted for the information of the pub-

file at the office of the N. N. & M. V. Co., in Richmond and Covington, nor at several other stations where the rates of freight displayed for public information were examined by the petitioner.

Upon investigation the petitioner ascertained and was shown a circular printed on light tint colored paper, which was issued in June or July, 1887, from the office of the general freight agent in Richmond, of instructions to agents at stations of the company, which was intended for their information and use solely, and which circular is beyond the power of the petitioner to exhibit, but the same can be furnished by the N. N. & M. V. Co. This circular was not posted at any office examined by the petitioner for public information. Agents were instructed therein as to change of routing and to bill only to Communipaw at twenty-four cents per 100 lbs. lumber in lots of one car, but to bill to New York City the lighterage free, lumber in lots of five cars at twenty-four cents per 100 lbs. These instructions your petitioner claims were in violation of both sections 3 and 6 of the Act to Regulate Commerce, inasmuch as discrimination was made in favor of a shipper of five cars at a lower rate than a shipper of one car of the same commodity.

Again, your petitioner claims a violation of the 6th section, inasmuch as, without any notice whatever to the public, a change of routing and an increase of rate of five cents per 100 lbs. to a total of twenty-nine cents was made for delivery at same destination as under the previous rate of twenty-four cents. Attached to petition is a copy of letter from Mr. Stocksdales, of August 19, 1887 (marked exhibit "C"), wherein he gives distinct instructions as to the delivery of the lumber for which he tendered, and the Baltimore & Ohio Railroad Company received, payment for performance thereof.

The petitioner called General Wickham's attention to the matter again on the 5th of September, which called for his telegram of same date to Frank Harriatt, Esq., G. F. A. B. & O. R. R. Baltimore (copy attached Exhibit "B"), which did not however cover or correct the matter complained of. The petitioner was in New York about the middle of September, and at General Wickham's request ascertained what the status of the matter then was, which the petitioner fully reported to him as per copy of letter of September 23, attached marked "E." It is not possible for the petitioner to show any of the original papers mentioned, as having been delivered to the N. N. & M. V. Co. as the same are still in the possession of said company, and the petitioner has never been able to recover them.

The petitioner conferred with General Wickham personally several times afterwards and at the last interview on the subject, General Wickham had all the papers in his possession and went over the whole ground with the petitioner, explaining that since the receipt of the petitioner's letter of September 23, he had referred the matter to E. D. Hotchkiss, Esq., G. F. Agt. and by him had been referred to John Muir, Esq., then Traffic Manager of the N. N. & M. V. Co. office 339 Broadway, New York, who gave his opinion to the effect that the N. N. & M. V. Co. were not obliged, under the Interstate Commerce Law, to make public such

instructions as were issued to the agents in the circular referred to above; and that he did not consider the petitioner had any claim upon the N. N. & M. V. Co.

The claim of the petitioner had also been referred to Mr. H. T. Wickham, then the counsel of the N. N. & M. V. Co. in Richmond, for his legal opinion, and his written decision was also attached to the papers in which he differed with Mr. Muir and stated that, in his opinion, the action of the company was in violation of the Interstate Commerce Law, as he understood it. General Wickham also concurred in this opinion but stated that as the matter was one connected with the traffic department and the traffic manager had decided to the contrary the matter would have to stand for further consideration. All the letters above referred to were read in full to the petitioner by General Wickham and was the last time the papers have been seen by the petitioner, though he has made repeated requests for the return of such originals as he was entitled to as belonging to him, and the petitioner was never put in possession of any B's-L after the return of those substituted and has never had possession of the lumber.

During the time this claim has been pending with repeated assurances, verbally and by letter, to the petitioner that it would be taken up and adjusted the C. & O. R. went into the hands of the receiver, and then passed again into its own corporate management.

The receiver, General Wickham, died a short time after the last interview related, and only within the past month has the petitioner been informed positively by E. B. Hotchkiss, G. F. A., that the claim would not be paid.

The petitioner earnestly prays that your honorable Commission will compel the submission of all the original papers relating to this matter now in the possession of the N. N. & M. V. Co., or C. O. R. Co. in which substantial confirmation of the statements of your petitioner will be found, and further praying for your decision upon the complaint as set forth therein

William L. Rawson.

Putnam P. BISHOP

v.

H. R. DUVAL, Receiver of Florida R. & Nav. Co.

(No. 155.)

James A. HARRIS

v.

H. R. DUVAL, Receiver of Florida R. & Nav. Co. et al.

(No. 156.)

A BSTRACTS of answers to complaint given *ante*, 302.

The answers of H. R. Duval, Receiver of the Florida Railway & Navigation Co., filed January 1, 1889, deny the right of complainants to complain of a division of through rates, and say that they can only complain as to the reasonableness of the through rates named. The rate charged by him between Florida points

on the transportation of oranges when such transportation forms part of through shipments to points outside of the State is averred to be just, fair and reasonable; and in regard to the allegation of the complaints that the rates allowed by the Florida Railroad Commission to be charged on local shipments of the same traffic between said Florida points, it is further averred that the same are unreasonably low and constitute unjust discrimination against the carriers. All unlawful combination with other carriers is denied. The rates in Florida for longer hauls which are charged to discriminate against Citra, being confined to points within said State are not, therefore, a violation of the Interstate Law.

The answers of the other defendants, filed December 26, 1888, to January 15, 1889, say that no part of the rate is complained of except that charged for the transportation between points in Florida; and with such charge they have nothing to do.

William P. REND

v.

CHICAGO & NORTHWESTERN R. CO.

(No. 127.)

1. **Group rates** may be properly made from a large number of mines practically composing a coal mining district extending across the State of Illinois to points in Western Wisconsin, Minnesota and Dakota, the distance from each part of the group by some route being substantially a fair equivalent of the distance from other points, and the commercial necessities being substantially the same for all.
2. **The group rate** so established is properly extended to coal shipped to the same territory locally from Chicago, on account of the operation of the fourth section of the Act, some of the lines passing through the mining district *en route* from Chicago to the points of distribution.
3. **Through rates** by way of Chicago to the same territory from mines in the eastern part of the group are necessarily made the same with the group rates established on other routes from the same vicinity, and their discontinuance would simply leave the market open to the product of other Illinois mines at the same transportation charge.
4. **Under the exceptional circumstances** requiring such through rates, shippers locally, from Chicago, of Ohio and Pennsylvania coal cannot justly insist upon rates no higher than the division of such through rates which appertains to the lines running northwest from that city—the circumstances under which the through rate is made being such that it cannot be differently adjusted.
5. **The question of relative injustice** must be viewed upon broader grounds

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than a mere balancing of one rate against another. A reduction which will throw into confusion an adjustment of rates over a large section of country which are not claimed to be unreasonable of themselves, should not be required without a clear right thereto exists under some direct provision of the Law.

6. **A reduction of the rates on local shipments** from Chicago to the proportion received by the northwestern lines upon the division of the through rates aforesaid, would involve either a general reduction from the entire group under the short haul clause of the Law, or an abandonment by defendant of the through rates in question, neither of which would benefit complainant, while both would do great injury to all other interests involved. Under such circumstances the preference is not undue, nor is the advantage complained of unreasonable.

(Submitted Oct. 22, 1888.—Decided Jan. 26, 1889.)

PROCEEDING on complaint alleging subjection to disadvantage by reason of rates for transportation of coal. *Complaint not sustained.*

See complaint, 1 Inters. Com. Rep. 793; abstract of answer, *Id.* 812.

Messrs. Smith & Pence for complainant.
Mr. W. C. Goudy for defendant.

REPORT AND OPINION OF THE COMMISSION.

Walker, Commissioner:

The complainant is a coal dealer who resides at Chicago and owns mines of soft coal in Ohio and Pennsylvania. He distributes a portion of the coal produced at said mines through Chicago into Wisconsin, Minnesota and Dakota. Other coal dealers are similarly situated. The product in question is known as Hocking Valley and Pittsburgh coal.

The rate charged on the Hocking Valley coal from the mines to Chicago, about 400 miles, is \$2; on the Pittsburgh coal it is from ten to twenty-five cents more. This coal is of a better quality and commands a higher price than coal produced from mines in Illinois; it is also mined somewhat cheaper than Illinois coal; it brings in Chicago from \$3.10 to \$3.35 per ton, while the Illinois coal is sold at from \$1.75 to \$2.00 per ton, or about \$1.35 less than Hocking Valley and Pittsburgh coal.

The lines which carry Ohio and Pennsylvania coal from Chicago to the northwest do not prorate or make joint tariffs of any nature thereon with the lines that bring it from the mines to Chicago, but treat the transportation of coal from Chicago as an independent shipment; an exception to this practice exists in shipments to Milwaukee and points between Chicago and Milwaukee, where the rate from Ohio and Pennsylvania is made the same as the rate to Chicago by reason of lake competition; the Chicago, St. Paul & Kansas City Road is also an exception and unites with the eastern lines in joint tariffs upon soft coal produced from the Ohio and Pennsylvania mines; this road operates a line from Chicago to St. Paul, but with very few if any branches and not reaching a

very extensive district of distribution in the territory in question.

The defendant reaches a large number of points in Wisconsin, Minnesota and Dakota, to which it has issued a tariff on soft coal from Chicago; other lines interested in the traffic, by agreement, make the same rates into the same territory; the rate to St. Paul may be taken as an illustration, and is \$1.75 for about 400 miles. There are several lines besides the defendant which lead from Chicago to St. Paul and other points in the said territory of distribution; one is formed by the Chicago, Burlington & Quincy in connection with the Chicago, Burlington & Northern; another by the Chicago, Rock Island & Pacific in connection with the Minneapolis & St. Louis; others are the Chicago, Milwaukee & St. Paul, the Wisconsin Central, and the Chicago, St. Paul & Kansas City, above mentioned. All accept the traffic of which complainant's business is a representative, and issue tariffs announcing rates therefor. The Burlington and the Rock Island lines start from Chicago in a direction south of west and pass through various coal producing regions in Illinois.

In supplying coal to Minnesota, Dakota, Western Wisconsin and Northern Iowa these lines are controlled by the operation of the fourth section, or short haul clause, of the Act to Regulate Commerce in this respect, viz.: that the rate established on soft coal from Chicago (Ohio and Pennsylvania coal, etc.) cannot be exceeded in the charges which they make to the same points of distribution on Illinois coal which is mined along their lines. For example, if they establish a rate of \$1.75 on soft coal from Chicago to St. Paul, those roads cannot lawfully make any greater rate to the same place from mines at La Salle and other points in Illinois through which they run. The defendant (the Chicago & Northwestern Railway) and other lines not similarly situated to the Rock Island and Burlington lines might be able to charge a higher rate on coal from Illinois mines than from Chicago; but as usual the lines which, by reason of distance or otherwise, make the lowest rate fix the rate for all lines which compete for similar business; the Northwestern, by a line running southerly from Wisconsin, reaches the Illinois coal bed at Spring Valley near La Salle, from which point it makes the same rate of \$1.75 to St. Paul which is made as aforesaid by its competitors from the same district.

After considerable competitive strife during 1887, when rates were made that afforded complainant and other Chicago dealers admission to the territory of distribution in question upon favorable terms, the northwestern lines in December of that year came to an agreement in respect to rates on soft coal, in making which the situation as above described was a prominent factor. A common rate was established from Chicago to the territory in question, and the same rate was made from all Illinois coal mines that were situated in the vicinity of the Rock Island and the Burlington lines, whether reached directly by those roads or by the Northwestern and other roads above referred to.

In arriving at this result the Burlington Road insisted upon giving the same rate to mines in 2 INTER S.

the vicinity of Streator, situated a short distance southeast of La Salle, and the Illinois Central took the same position in respect to Minonk. It was agreed that Chicago rates should apply on coal mined in the following described territory, all points embraced in which are grouped for the purpose of making rates on soft coal to the territory in question:

"On, north and west of a line drawn along the Chicago & Alton Railroad, Chicago to Dwight, Dwight to Streator and Streator to Lacon; and on, north and west of a line drawn from Lacon to Peoria via the Chicago, Rock Island & Pacific; thence along the Central Iowa Railway from Peoria to Farmington; thence via the Chicago, Burlington & Quincy Railroad through Canton, Vermont, Bushnell and Monmouth, Illinois, to Burlington, Iowa, including points on the boundary line described; also including points on and north of the line of the Toledo, Peoria & Western, from Canton, Illinois, through Bushnell to Iowa Junction; including also Minonk on the Illinois Central Railroad."

The group so defined embraces a very important coal producing region in the vicinity of Wilmington, Braidwood and Coal City. This Wilmington district lies from thirty to fifty miles easterly from Streator and La Salle, and a little to the south of the main line of the Chicago Rock Island & Pacific Road. The latter road reaches a portion of the Wilmington field from Seneca via the Kankakee & Seneca Railroad; the main portion of this field however is served by the Chicago & Alton and the Atchison, Topeka & Santa Fe; principally by the Chicago & Alton, which takes coal there produced to Chicago and delivers it to the Chicago & Northwestern for distribution in Wisconsin, Minnesota and Dakota. Upon this traffic the defendant has united with the Chicago & Alton in a joint tariff, the through rate being made the same as the rate from La Salle, Streator and other points in the group; of the \$1.75 rate from the Wilmington district to St. Paul the Chicago & Alton receives 40 cents and the Chicago & Northwestern \$1.35; the result of this division is that while the defendant carries coal produced at the mines in this district through Chicago to St. Paul on which it receives but \$1.35 as its proportion of the through rate, it charges complainant and others who ship coal mined at the East \$1.75 for the same service from Chicago to the same point.

A similar arrangement at first was made in respect to coal mined at Danville and other points in Eastern Illinois, and block coal produced in Western Indiana; but since February, 1888, joint tariffs through Chicago over the line of the defendant have been restricted to points embraced within the group above described, including Essex and Clark City on the Wabash Railroad in the Wilmington field.

This is the discrimination complained of by the petitioner; it is claimed to give an unreasonable advantage to the producers of coal mined in Illinois within the limits of said group, and to work an undue prejudice against the complainant and other miners of Hocking Valley and Pittsburgh coal, in contravention of the first paragraph of section 3 of the Act to Regulate Commerce.

The alleged injustice complained of arises

from the fact that, under the existing arrangement, coal from the eastern portion of the Illinois group reaches the territory of distribution via Chicago at a through rate of, for example, \$1.75 to St. Paul, while the Hocking Valley coal pays \$2 to Chicago, plus \$1.75, Chicago to St. Paul, making \$3.75 in all—a rate claimed to be substantially prohibitory. The difference in value at Chicago being about \$1.35 or \$1.40 in favor of the eastern coal, it is said that by effacing the discrimination of forty cents which now exists in the rate from Chicago to St. Paul on coal shipped locally, as compared with the division of the through rate on coal received from the Chicago & Alton Road, complainant and other dealers in Ohio and Pennsylvania coal would be able once more to compete in the markets of Wisconsin, Minnesota and Dakota.

Considering the group as a whole, with reference to the territory of distribution here in question, and to the large number of lines of transportation available from the different Illinois mines to the various sections of said territory, crossing each other at various points, and as a whole forming an interlacing network of connecting and competing roads, there is no geographical reason apparent why the group is not a reasonable one. From each part of it some route exists by which the distance from the mines to the consumer is substantially a fair equivalent of the distance from other points, the general average distance to St. Paul being from 400 to 450 miles. It is said however that if this be true as to the coal mining district, there is no propriety in embracing Chicago within the group for the reason that Chicago is not a coal producing point. But the reason why no lower rate can be made from Chicago than from the mines has been explained, and appears to be sufficient. It is a necessary result of the application of the 4th section of the Law to the geographical situation; if any other basis should be adopted all the schedules would be disarranged. The Rock Island and Burlington roads would either be obliged to abandon their tariffs for the transportation of Hocking Valley, Pittsburgh and other soft coal from Chicago to points upon their respective lines, or to reduce their rates from the Illinois mines. If they adopted the latter course the other roads serving Illinois mines in the same district would be called upon to make like reductions, or otherwise the latter mines would be excluded from the business in question. The only way in which reasonable Illinois rates to the territory in question can be properly constructed and maintained appears to be to include Chicago within the group from which a common rate is made.

It will be observed that in making these rates, soft coal, by the concurrent action of all the lines, is treated as a single commodity; in other words no sub-classification is made having regard to value, as is at times the case in other sections of the country; and to this extent the complainant and his associates are treated liberally, no distinction being made between their product and the much less valuable product of the Illinois mines.

It is obvious that the adjustment desired could be effected in two ways: by increasing the rate upon Illinois coal from the group re-

ferred to, or by reducing the aggregate rate on eastern or other coal.

It is apparent that the rate from a large portion of the Illinois group cannot be raised unless the Burlington and Rock Island lines retire from the Chicago traffic and leave it entirely to other roads; those lines cannot lawfully charge more from the Illinois mines along their roads than they charge from Chicago; and the other roads cannot charge more than do those lines upon coal mined in the same immediate vicinity. There appear to be substantial reasons for including the Wilmington coal field within the group, although situated a few miles south of the Rock Island line; the product is substantially the same as that produced in the vicinity of La Salle, and the course of trade has directed it to the same general market; to establish any substantial discrimination in the rate charged—for example, to St. Paul, against Wilmington, Braidwood and Coal City, as compared with La Salle, Spring Valley, Loceyville and Streator—would be properly regarded as a great injustice in the Wilmington district. This whole region appears to be, substantially, a single coal field, and established commercial relations would be seriously disturbed by making any material difference in rates from the various points above named.

The evidence seems to show that the Wilmington region produces the larger part of the coal mined in this district; in its distribution to the Northwest the defendant practically adopts the Chicago & Alton as part of its line, making a through rate which is the same as the through rate charged from Spring Valley, situated a little nearer St. Paul by the direct line than Chicago is; a fact which seems to sufficiently answer the claim of complainant, that the rates in question are established for the benefit of individuals interested in the Spring Valley mines; if it was intended to give a preference to the latter mines the same rates certainly would not be made from the Wilmington district for a distance via Chicago some fifty or sixty miles greater than from Spring Valley to the same points of distribution.

On the other hand, if the defendant was to charge more than \$1.75 from the Spring Valley mines to St. Paul, those mines would be driven from the market by similar coal produced on the Burlington and Rock Island roads at points situated at even a greater distance from St. Paul, which receive the Chicago rate for the reason above given; and even if the Northwestern line were to decline to accept coal from the Wilmington district at the through rate of \$1.75 to St. Paul, a large portion of the same coal, as well as other Illinois coal mined in the grouped region, would reach the same market at that rate by other channels. It is not obvious how any practical change that might be made by defendant in the rates on coal from the Illinois mines under consideration would benefit the complainant or other miners of eastern coal. The petitioner does not ask that rates on coal from the Illinois mines generally should be raised, and probably would not wish to be understood as taking that position.

If complainant, however, could obtain a through rate from his mines in Ohio and Pennsylvania to St. Paul and other northwestern points at forty cents less than the present rate

charged him, the inequality of which he complains would be corrected, so far as an ability to reach the desired market is concerned. But this brings other considerations into view.

Coal is a commodity the market value of which is very largely represented by the transportation charge; the market in question is situated a long distance from the mines; the distance is so great that eastern miners cannot properly expect to be able to lay down their product in the Northwestern States at rates not fairly compensatory for the service; the advantage of consumers is of course promoted by enlarging the field of supply and increasing the limits of reasonable competition, but some point must exist at which a product produced at a much greater distance from the market cannot properly be transported upon rates making it competitive with the product of much nearer points. This is exemplified in the fact that Illinois coals at the present time are apparently unable to compete in Michigan with the Hocking Valley and Pittsburgh product.

In order to effect the establishment of a through rate from Hocking Valley to St. Paul less than the present rate of \$2 plus \$1.75, the concurrence of the lines east of Chicago is required; a rate of \$3.35 might of course be established by agreement between the defendant and the eastern lines, to be divided as they should agree. But if jurisdiction exists under the Act to Regulate Commerce to compel the establishment of a through rate, and the facts are such as to support the claim, the Commission could not order the establishment of such a rate without having before it as parties all the roads composing the proposed line.

Apparently in view of this obvious fact evidence was given to the effect that the eastern lines, or some of them, desired to unite in such a through rate; this it appeared however would be upon the basis that they should continue to receive \$2, and that the Chicago & Northwestern should reduce its charge from Chicago to St. Paul to \$1.35, the amount which it now receives on division with the Chicago & Alton from the group points above described. The eastern roads are not before the Commission asking for a through rate upon different terms than those now existing. It does not appear that they are willing to accept less than \$2 in the division of any through rate that might be made, although this, estimated upon their mileage, produces a greater rate per ton per mile than the rate of \$1.75 gives the defendant from Chicago to St. Paul; the eastern \$2 rate yields only five mills per ton per mile, and it must be admitted that the rate of \$1.75 is exceedingly low for the distance from Chicago to St. Paul; a rate of \$1.35 for the same distance can afford very little if any profit—certainly none unless the cars used can be loaded back from the Northwest to Chicago; this is said to be frequently done however by employing box cars for the service. It also appears that the rates to competitive points, like St. Paul and Minneapolis, are the basis of rates to local points in all directions therefrom, which afford a revenue satisfactory to the carriers although apparently not high for the service performed.

Various considerations have heretofore entered into the making of through rates between railroads; when such rates involve a reduction

from the sum obtained by adding together the local charges, carriers have not been inclined to make such contracts unless business reasons exist why the higher rate cannot be maintained. In the case of the Chicago & Alton through rate in question such a reason is found in the fact that without it a portion of the same coal traffic, as well as much other Illinois coal, would go to the same points by other routes from the same district at the same figure. This reason does not exist in the case of eastern coal, since the lines generally do not take it except at the established Chicago tariff. If there were no mines in Illinois, except those upon the Chicago & Alton Railroad, a very different question would be presented. It is the existence of other mines and of other transportation lines, that enables the miners in the Wilmington district to obtain a rate which might not otherwise be conceded to them, but which, under the circumstances, they unhesitatingly claim.

Another feature of the situation, which may properly be alluded to in this connection, is this: upon other commodities Chicago merchants have been and are exceedingly jealous of through rates less than the added locals, upon traffic between points east and points west of that city; being apprehensive that any change in the existing system which shall encourage the movement of traffic through or around that city, without stopping there for redistribution, will work to their serious injury. Chicago traders would regard the general establishment of such through rates as are here claimed as a commercial calamity; yet, if conceded by the roads to eastern coal, similar proportionate divisions might possibly be claimed upon eastern shipments of dry goods, groceries and other commodities. Such through rates were common upon long distance traffic in many parts of the country before the passage of the Act to Regulate Commerce, and the Commission has held in the *Danville and Omaha Cases** that the law did not make them illegal; but it is for the interest of Chicago as a distributing point that their adoption upon traffic passing through that city should not be pressed.

And the roads themselves have been more than willing to preserve the system of generally routing freight to Chicago and thence again forward to its destination in both directions, practically making a break in the billing at the line of Chicago and the junction points in its vicinity; this system enables the lines each side of the division to escape from rate wars and other complications which from time to time arise among the roads on either side of Chicago; and it also makes it possible for the lines on both sides of that city to secure better revenues from the business which they respectively handle. If therefore the Chicago & Northwestern Company should be required to give the same terms on soft coal to its eastern connections that it gives to the Chicago & Alton, and if those eastern connections should so demand, it might properly consider the question, as a matter of policy, whether it would not be better to decline to continue its present arrangement with the Chicago & Alton road. This is precisely the point to which the present application

**Crews v. Richmond & Danville R. Co.* 1 Inters. Com. Rep. 703; *Martin v. Chicago, B. & Q. R. Co.* ante, 32. [Ed.]

comes. Complainant in his testimony concedes that he is not legally concerned in the rates from La Salle, Streator, Spring Valley, Minouk and other points westerly therefrom in Illinois, except that they should be relatively fair, and he does not attack them. It is the rate from the Wilmington district which he assails, and the legitimate outcome from sustaining his application might be the discontinuance of the present through rate from that field over this line. In other words, what is really asked is a ruling which would put the Wilmington field on the same basis with Hocking Valley and Pittsburgh coal; a result which would very probably exclude both to the same extent to which the latter is now excluded, with no benefit to the latter; the other Illinois mines would remain in possession of the territory in question.

Even if this did not appear to be the inevitable result of making such an order as the complainant seeks, yet it does not appear to the Commission that a case is made out, under the Act to Regulate Commerce, which requires either that the defendant should be compelled to accept as its division of a through rate on eastern coal the same sum that it receives on Wilmington coal, or which requires defendant to make as its local rate from Chicago the sum which it receives as its division of the Wilmington through rate. The latter rate is altogether exceptional. It is clearly forced upon the defendant as the condition of sharing the traffic of the mines in the Wilmington district. It does not operate to antagonize advantages of geographical position; but it is founded upon the geographical location of the Wilmington mines forming part of the general Illinois coal field, and it enables miners operating in that region, where the rates are fixed by other transportation routes, to have an additional route to a large territory of distribution.

On the other hand, all producers of Hocking Valley and Pittsburgh coal now have like rates from Chicago to the Northwest by all the lines, and rates which are not of themselves in any way unreasonable. To compel this defendant to reduce its local rate from Chicago to St. Paul to \$1.35 would involve the other lines in a like reduction, and this in turn would naturally result in a further reduction to the same figure from the Illinois coal fields, a result which would be destructive of the very object that the complainant has in view and would seriously injure the carriers without benefiting the complainant.

The Act to Regulate Commerce does not require rates to be unreasonably low, nor does it prevent the maintenance of rates that are just and reasonable to the carrier as well as to the shipper. On the contrary the Act implies, first, the establishment of rates which are of themselves reasonable and fair; and next, their maintenance, without discrimination among shippers, and without capricious or arbitrary fluctuations. An exception arises when rates are so constructed that injustice is wrought by reason of their relation to other rates notwithstanding that the rate challenged may not of itself be unreasonable.

The question, however, of relative injustice, like other questions arising under the Act, must be viewed upon broader grounds than a

mere balancing of one rate against another. The entire field likely to be affected by any proposed change must be kept in view, and if, upon the whole, more injustice and trouble are likely to result from making the change than from declining to make it, the Commission should hesitate to interfere. In other words, when a reduction is demanded which will apparently throw into confusion an adjustment of rates over a large section of country, which are not claimed to be unreasonable of themselves, and in respect to which any modification upon one line will result in general disturbance and friction among a large number of shippers and carriers of the same product, there should be a clear right to the relief under some direct provision of the Law in order to justify the Commission in requiring it. In the present case, so far as can be seen from the testimony presented, such interference would be neither reasonable nor proper. Under the circumstances, the preference complained of is not found to be undue, nor is the advantage given the Wilmington district unreasonable. On the contrary, they cannot well be avoided. It is not made clear in what way any change could be made which would not presently, and by operation of natural and inexorable laws, result in a reinstitution of the same advantage upon a reduced basis of income to the carriers. Complainant's difficulty arises from the fact that his mines are not advantageously located to enable him to supply the territory which he wishes to reach. To accomplish his purpose he endeavors to force the carriers into reducing their tolls, upon the ground that they make lower divisions of a through rate from other mines, where the circumstances are such that it cannot be differently adjusted. No order could be properly made that would not leave the defendant at liberty to withdraw its joint tariff on coal from the Wilmington district and thus injure immense interests located on the Chicago & Alton line, and cut off consumers in the Northwest from a large field of competitive supply, without affording the slightest benefit to the complainant and others similarly situated.

Since the taking of the proofs the rates have been advanced, the present tariff on soft coal from Chicago and the Illinois mining group to St. Paul being \$2, and rates to other points are proportionately higher. No change in the general system of constructing the tariff is observed however, and precisely the same questions are presented under the new schedules as under those which were put in evidence.

The complaint must therefore be held not sustained.

INDEPENDENT REFINERS' ASSOCIATION OF TITUSVILLE, and The Independent Refiners' Association of Oil City, Petitioners and Complainants,

v.

PENNSYLVANIA R. CO., and Western New York & Pennsylvania R. Co.

(No. 163.)

COMPLAINT filed January 30, 1889, alleging undue charges for transportation of oil

from the Pennsylvania Oil Region to New York Harbor, and undue preference in favor of the Standard Oil Trust.

First. The petition of the Independent Refiners' Association of Titusville, in the State of Pennsylvania, and the Independent Refiners' Association of Oil City, in the same State, respectfully represents: That the petitioners' associations are respectively formed of persons, firms and corporations engaged in the refining of petroleum in the oil regions of Pennsylvania, in competition with various persons, firms, corporations and associations engaged in the same business, and affiliated to an association called the Standard Oil Trust.

Second. That the Pennsylvania Railroad Company is a railway corporation chartered by the Commonwealth of Pennsylvania, and engaged as a common carrier of interstate traffic over its own lines of railroad, and over other lines of railroad owned, leased, controlled or operated by it, in the States of Pennsylvania and New Jersey; and is a common carrier of crude and refined petroleum and its products, as interstate traffic, by railroad from the aforesaid oil regions of Pennsylvania to tidewater in New York Harbor, in the State of New Jersey. And the Western New York & Pennsylvania Railroad Company is a railroad corporation and common carrier, whose lines extend from Oil City and Titusville, in the State of Pennsylvania, to points of connection at Irvineton and Corry, Pennsylvania, respectively, on the Pennsylvania Railroad system, and connect the aforesaid oil regions with the lines of the Pennsylvania Railroad Company, and over which connecting lines of the said the Western New York & Pennsylvania Railroad Company, petroleum and its products, hereafter mentioned, pass as interstate traffic, under through bills of lading, to the lines of the said Pennsylvania Railroad Company aforesaid, from whence the said petroleum and its products are moved by the said Pennsylvania Railroad Company as interstate traffic to their destination at tidewater in New York Harbor, in the State of New Jersey.

Third. That the members of the petitioners' associations, and also other refiners of petroleum, are now, and have been for some time, shippers of petroleum and its products as interstate traffic over the lines owned, leased, operated and controlled by the Pennsylvania Railroad Company and over the Western New York & Pennsylvania Railroad aforesaid, from the oil regions of Pennsylvania to tidewater of New York Bay, in the State of New Jersey aforesaid; and that various persons, firms, corporations and associations affiliated to the Standard Oil Trust are now, and have been for some time, shippers of petroleum and its products as interstate traffic over the said lines and by the said Pennsylvania Railroad Company as common carriers aforesaid between the same points. That of the petroleum so shipped as aforesaid, some is shipped in tank cars in bulk, and some is shipped in wooden barrels, loaded on gondola, box, cattle or other cars. That the shippers affiliated to the petitioners ship principally in wooden barrels, and the shippers affiliated to the Standard Oil Trust ship principally in bulk in tank cars.

Fourth. That a corporation known as the Na-

tional Transit Company, originally controlled by, or affiliated to, the Standard Oil Company, and now controlled by the Standard Oil Trust, are the owners of a pipe line or pipe lines from the said oil regions of Pennsylvania to tidewater in New York Bay aforesaid, and are now, and have been for some time, engaged in the transportation of oil by means of said pipe line or pipe lines, and that resulting from the construction of the said pipe line or pipe lines, and in consequence of the low cost of transporting oil therein, the refining business of the several persons, firms, corporations, and associations now affiliated to the said Standard Oil Trust, has increased and become very remunerative and prosperous at the Atlantic seaboard.

Fifth. That within the last few years, and partly due to the concentration of the refining business by those affiliated to the Standard Oil Trust at the Atlantic seaboard, there has grown into existence a large refining business in the oil regions of Pennsylvania, now principally owned and controlled by the various persons, firms, associations, and individuals forming the two several associations petitioners. That in consequence of an advantage possessed by these refiners over the seaboard refiners, for the local and domestic markets of their vicinity and of the West, the said independent refiners have been enabled to maintain and increase their business, notwithstanding the disadvantage to which they have been subjected on tidewater shipments by reason of the charges for transportation to tidewater hereinafter mentioned.

Sixth. That in the business of refining petroleum there is about 40 per cent of the product which cannot readily be sold in the United States, and for which the only good market that exists is the foreign market or export trade; and that all such oil produced by the members of the associations, petitioners, for the said foreign market or export trade must be shipped from the oil region aforesaid to the Atlantic seaboard for transshipment; and that without command of the export trade or foreign market the business of refining petroleum cannot be carried on at any profit.

Seventh. That the said National Transit Company is a common carrier of oil from the oil regions aforesaid to the Bay of New York, and that after its entrance into business as a transporter of oil by pipe lines aforesaid, and for the purpose of enabling it to charge and maintain a high price for the transportation of oil as a common carrier, so as to secure large profits and maintain an advantage for the said Standard Oil Company and its affiliated industries, now controlled by the Standard Oil Trust aforesaid, over all competitors, it entered into a contract with the said Pennsylvania Railroad Company for the pooling or division of the traffic on oil between the said railroad company and the said the National Transit Company, one consideration of which contract was the maintenance of the same rates on oil by the railroad and by pipe line; and that under and by virtue of said contract the said National Transit Company guaranties to the Pennsylvania Railroad Company 26 per cent of the entire oil traffic from the oil regions aforesaid to tidewater; and that since the making of such contract the said Pennsylvania Railroad Com-

pany and the said National Transit Company have made, kept, and maintained the same rate of charges for the transportation of oil from the oil regions aforesaid to tidewater at New York Bay.

Eighth. That for some years, and until the advance of rates on barreled oil hereinafter mentioned, the said rate was fifty-two cents per barrel from the oil regions to New York Bay, and the said Pennsylvania Railroad Company during said time, in common with the said Western New York & Pennsylvania Railroad Company, or its predecessor corporation, have charged this rate per barrel, irrespective of whether the oil was shipped in bulk by tank cars, or in wooden barrel packages. And the various firms, persons, associations and individuals forming the associations petitioners have been enabled by their advantages in the local markets to keep up, maintain, and even increase their business, notwithstanding the great disadvantage they were put to in their foreign or export trade in competition with their competitors and rivals affiliated to the said Standard Oil Trust aforesaid.

Ninth. That at the said rate of fifty-two cents per barrel from the oil region to tidewater, common to both railroad and pipe line as aforesaid, the disadvantage to which those affiliated to your petitioners would be placed for the export trade aforesaid, as against those affiliated to the Standard Oil Trust aforesaid, would, so far as your petitioners are able to ascertain, be about forty-eight cents per barrel, as shown by the following table, viz.:

Paid by those Affiliated to Petitioners.

| | Per barrel. |
|---|-------------|
| Local pipage and collection | 20 cents. |
| Railroad or pipe line charges to New York Bay | 52 " |
| Total | 72 cents. |
| Deduct, to equalize barrel rates of 42 and 50 gallons, respectively | 8 " |
| | 64 cents. |

Cost to the Standard Oil Trust and Affiliated Industries.

| | |
|---|-----------|
| Local pipage and collection, say | 11 cents. |
| Main line pipage to New York Bay, say | 5 " |
| | 16 " |
| Difference | 48 cents. |

Tenth. That on or about the 13th of September last the said Pennsylvania Railroad Company and the Western New York & Pennsylvania Railroad Company, in common with all other railroad companies having lines leading from the oil regions of Pennsylvania to New York Bay aforesaid, advanced their charges on oil shipped in wooden barrels from the oil regions to New York Bay from fifty-two cents as aforesaid to sixty-six cents per barrel, an advance of fourteen cents per barrel, while the rate on tank oil in bulk remains as before, fifty-two cents per barrel. That this advance was made at a season of the year when the export trade is active, and when large shipments of and contracts for export oil must be made; and that the effect of such advance is to prevent those affiliated to your petitioners from competing with

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those affiliated to the Standard Oil Trust for the export trade, and must result in loss and damage to those composing the associations petitioners, and in the still further aggrandizement and increase of the monopoly already possessed and held by the Standard Oil Trust of the petroleum industry of the country.

Eleventh. Your petitioners aver and charge that the said rate of sixty-six cents per barrel on oil in barrels between the oil region and New York Bay aforesaid is in contravention of the provisions of the Act of Congress, approved February 4, 1887, entitled "An Act to Regulate Commerce," for the following reasons, viz.:

1. It is unreasonable, unjust and excessive.
2. It compels those who pay it to pay a greater sum for a like and contemporaneous service, for a like kind of traffic transported under substantially similar circumstances and conditions, than is paid by those who transport oil in tank cars between the same points, the said oil in wooden barrels being, under the said Act of February 4, 1887, a like kind of traffic as oil in bulk in tanks, and being transported under substantially similar circumstances and conditions as oil in bulk in tanks.

3. It gives an undue and unreasonable preference or advantage to the Standard Oil Trust and its affiliated firms, corporations, persons, and associations, over those composing your petitioners' associations.

4. It subjects those composing your petitioners' associations to an undue and unreasonable prejudice and disadvantage over those affiliated to the Standard Oil Trust.

5. It gives an undue and unreasonable preference or advantage to those shipping oil in bulk in tank cars over those shipping in barrel packages.

6. It subjects those shipping oil in barrel packages to an undue and unreasonable prejudice and disadvantage over those shipping by bulk in tank cars.

Twelfth. Whereupon, your petitioners pray that the matters herein complained of may be investigated by the Commission, and the corporations respondent be ordered to desist from and cease the unlawful acts herein complained of, and to adopt and establish lawful, reasonable and just charges and rates for the transportation of petroleum and its products, and that the petitioners may obtain proper reparation for the injury done to them, and such other relief as the said Commission is authorized to grant.

Independent Refiners' Association of Titusville, Pa.

By John W. Witherop, *President.*

The National Oil Company, Limited, a member of the Independent Refiners' Association of Titusville, Pa., wishes to be excepted from joining in reasons two (2), five (5), and six (6), under paragraph eleventh of foregoing complaint.

W. C. Warner, *Secretary.*

Independent Refiners' Association of Oil City, Pa.

Per D. E. Byles, *Secretary.*

Franklin B. Gowen,
119 South Fourth Street, Philadelphia;

M. J. Heywang,
Titusville, Pa.,

Counsel for Petitioners.

Re GENERAL CONFERENCE OF RAILROAD COMMISSIONERS.

(No. 164.)

THE following circular letter has been sent by the Interstate Commerce Commission to all State Railroad Commissions, to State Boards of Assessors, Secretaries of Internal Affairs and Secretaries of State in States where railroad affairs are under their supervision and no railroad commission exists, and to the Governors of all other States and Territories.

INTERSTATE COMMERCE COMMISSION, OFFICE OF THE SECRETARY, WASHINGTON, JANUARY 31, 1889.

To the
Gentlemen:

The State Railroad Commissions, with gratifying unanimity, have heartily approved the suggestion for a general meeting, and many who desire to attend have indicated the first week in March as the most convenient time.

You are therefore invited to participate in a general conference of Railroad Commissioners, to be held at the office of the Interstate Commerce Commission, No. 1317 F Street, in the City of Washington, at 11 o'clock A. M., on the 5th day of March, 1889.

Among the subjects which may be properly considered are the following:

Railway Statistics, with especial reference to the formulation of a uniform system of reporting;

Classification of Freight, its simplification and unification;

Railway Legislation, how to obtain harmony in;

Railway Construction, should regulation be provided?

And such other topics affecting State and Interstate Commerce as may be brought forward by members of the Conference, the above suggestions not being designed to exclude the consideration of any other subjects of common interest.

An opportunity will also be afforded for consultation in respect to the heating and lighting of cars, automatic car-coupling, continuous train-brakes, and other matters now more particularly within the sphere of State authority.

Brief papers are invited from members of the Conference upon any topic deemed of importance. Arrangements will be made for preserving a permanent record of the proceedings.

Respectfully Yours,

Edw. A. Moseley, *Secretary*.

Re RATE SHEETS OF CHICAGO & NORTHWESTERN R. CO. *et al.*

(No. 165.)

ORDER by the Commission, for an investigation.

At a general session of the Interstate Commerce Commission, held at its office in Washington on the 4th day of February, A. D. 1889.

Present. Hon. Thomas M. Cooley, *Chairman*, Hon. William R. Morrison, Hon. Augustus Schoonmaker, Hon. Aldace F. Walker, Hon. Walter L. Bragg, *Commissioners*.

In the matter of the Rate Sheets of the Chicago & Northwestern Railway Company; Chicago, St. Paul & Kansas City Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Wisconsin Central Railroad Company; Chicago, Burlington & Northern Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island & Pacific Railway Company; Minneapolis & St. Louis Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Burlington, Cedar Rapids & Northern Railway Company.

It appearing to the Commission that it is desirable that an investigation be had in regard to the manner in which the several respondents above named make and publish their respective rate sheets and from time to time change the same, and also as to the forms thereof, with a view to the correction of any errors in method or form, and to insuring the results intended by the Act requiring the same, and that, especially, the following matters may be determined, that is to say:

1. Whether the forms of the rate sheets now issued by the said respondents give to the public the information to which they are entitled under the Act to Regulate Commerce.

2. Whether the rate sheets actually issued are printed and published as required by law.

3. Whether the said respondents do not in some instances put rate sheets in force before they have been duly published.

4. In what manner the said respondents are accustomed to give notice of an advance of rates, and whether the notice as given complies with the Law.

5. Whether joint rates when made are duly agreed upon and filed in proper form with the Commission.

6. Whether it is not desirable that all joint rates be ordered by the Commission to be published, and if not, whether such order should not be made as to some classes thereof.

It is therefore now ordered that such investigation be entered upon at the Palmer House, in the City of Chicago, at 10 o'clock in the forenoon of Tuesday the 19th day of February, 1889, at which time the several respondents will be expected to appear by accredited representatives, with the rate sheets now in force, and be prepared to give such facts in their possession and such explanations as will tend, so far as their respective roads are concerned, to proper conclusions upon the questions and matters stated, and as will aid in the correction of what may be found amiss. And it is further ordered that service of this order be immediately made by mail upon the several respondents above named.

A true copy.

Edw. A. Moseley, *Secretary*.

DAKOTA SUPREME COURT.

NORTHERN PACIFIC R. CO., *Respt.*,
v.

James W. RAYMOND, as Territorial Treasurer, *Appt.* ¶

(From Lawyers' Reports, Annotated.)

1. **The Dakota Act of March 9, 1883**, providing for a tax or a per centum in lieu thereof on the gross earnings of a railroad company, is unconstitutional so far as the earnings are derived from interstate transportation.
2. **The payment of the whole of the annual tax on gross earnings of a railroad company** on the date upon which, under Dakota Act of March 9, 1883, only the first installment thereon had become due, is a valid payment and a satisfaction of the whole tax for the year, and not merely of the first installment.
3. **A right or privilege given by statute** may be waived or surrendered in whole or in part, by the party to whom or for whose benefit it is given, if he does not thereby destroy the rights and benefits conferred upon or flowing to another in or from said statute or other legal or equitable source.

(October 13, 1888.)

APPEAL by defendant, from a judgment of the District Court for Cass County (McConnell, J.), in favor of the plaintiff on overruling a demurrer to a complaint for an injunction. *Affirmed.*

Statement by **Francis, J.**:

Plaintiff's amended complaint was as follows:

1. That said plaintiff is now, and at all times hereinafter named was, a corporation duly organized and existing under and by virtue of that certain Act of Congress approved July 2, 1864, entitled "An Act Granting Lands to Aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget Sound, on the Pacific Coast, by the Northern Route," and under those certain Acts and joint resolutions of Congress relating to the same subject matter.

2. That under and by virtue of the powers conferred on it by said Acts and Joint Resolutions, said plaintiff has constructed, and owns and operates, divers railroads operated by steam power in the Territory of Dakota, to wit: that certain railroad, known as the Northern Pacific Railroad, which has been operated for more than five years prior to January 1, 1887; that certain railroad, known as the Northern Pacific, Fergus & Black Hills Railroad, which has been operated for a period of less than five years prior to January 1, 1887; that certain railroad known as the Fargo & Southwestern Railroad, which has been operated for a period of less than five years prior to Jan-

uary 1, 1887; that certain railroad known as Sanborn, Cooperstown & Turtle Mountain Railroad, which has been operated for a period of less than five years prior to January 1, 1887; and that certain railroad, known as the James River Valley Railroad, which has been operated for a period of less than five years prior to January 1, 1887.

3. Heretofore, to wit: on the 9th day of March, A. D. 1883, the Legislature of the Territory of Dakota enacted a certain Act entitled "An Act to Provide for the Levy and Collection of Taxes upon the Property of Railroad Companies in this Territory," which among other things, provided as follows, to wit:

Section 1. *Percentage of Gross Earnings to Be Paid in Lieu of Other Taxes.* In lieu of all other taxes upon any railroads, except railroads operated by horse power within this Territory, or upon the equipment, appurtenances or appendages thereof, or upon any other property situated in this Territory, belonging to the corporation owning or operating such railroads, or upon the capital stock or business transaction of such railroad company, there shall hereafter be paid into the treasury of this Territory a percentage of all gross earnings of the corporation owning or operating such railroad, arising from the operation of such railroad as shall be situated within this Territory, as hereinafter stated; that is to say, every such railroad corporation or person operating a railroad in this Territory shall pay to said treasurer each year, for the first five years after said railroad shall be or shall have been operated in whole or in part, two (2) per centum of such gross earnings; and for and in each and every year after the expiration of the said five years, three (3) per centum of the said gross earnings; and the payment of such per centum annually, as aforesaid, shall be and is in full of all taxation and assessments whatever upon the property aforesaid. The said payments shall be made one half (½) on or before the 15th day of February, and one half on or before the 15th day of August, in each year; and for the purpose of ascertaining the gross earnings aforesaid an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this Territory on or before the first day of February in each year; the truth of which abstract shall be verified by the affidavits of the treasurer and secretary of said company. And for the purpose of ascertaining the truth of such affidavits and the correctness of such abstracts full power is hereby vested in the Governor of this Territory, or any other person appointed by law, to examine under oath the officers and employees of said company, or other persons; and if any person so examined by the Governor, or other authorized person, shall knowingly or willfully swear falsely concerning the matters aforesaid, every such person is declared to have committed perjury. And for the purpose of securing to the Territory the payment of the aforesaid per centum it is hereby declared that the Territory shall have a lien upon the railroad of said company, and upon all property, estate and effects of said company whatsoever, personal, real or mixed. And the lien hereby secured to the Territory shall have and take precedence of all demands, decrees and judgments against said company.

Sec. 2. *Where Company Shall Fail to Make Returns.* If any railroad company in this Territory shall fail to make return of its gross earnings as aforesaid, or of any part thereof at the time and manner provided by law, and such default shall continue during the period of thirty (30) days, such company shall be subject to a penalty in an amount equal to twenty-five (25) per cent of the tax imposed upon such company by this Act; and the treasurer of the Territory shall forthwith ascertain the amount of such tax justly due from

NOTE.—Taxation of gross earnings of railroads. See Delaware & Hudson Canal Co. v. Com. of Pa. ante, 222.

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Taxation by the Territories, of railroads engaged in interstate commerce. See Atlantic & Pacific R. Co. v. Lesueur, ante, 189.

such company, as nearly as may be, from such evidence as may be available, and shall thereupon collect such tax as so ascertained, together with the said penalty thereon. The amount of tax ascertained by the territorial treasurer, as in this section provided, shall, together, with the said penalty thereon, be by him entered in the books of his office; and such entry, when so made, shall stand in the place of the report required by law to be made by such company, and shall in all courts within this Territory be evidence of the amount of such tax and penalty, and of the other facts stated therein in pursuance of this Act.

Sec. 3. *Neglect to Pay Taxes.* In case any railroad company shall fail or neglect to pay the taxes reported by it to be due, in pursuance of this Act, for the period of thirty (30) days after the same shall have become due by the terms thereof, in such case there shall be added to the amount of such tax ten (10) per centum thereof as a penalty for such failure or neglect to pay.

Sec. 4. *Territorial Treasurer to Distrain.* At any time after the expiration of the period of thirty (30) days after any tax has become due and payable under the provisions of this Act, the territorial treasurer, or his deputy, shall distrain sufficient goods, chattels, or other movable property, if found within this Territory, to pay the taxes or per centum due from such corporation, together with the penalty thereon herein provided, and shall immediately advertise the sale of the same in at least three newspapers published within this Territory, stating the time when and the place where such property shall be sold. Such sales shall take place at some point on the railroad of such delinquent company, and at least four (4) weeks' notice of the time and place of such sale shall be given. Such delinquent company, its successors and assigns, may pay any such taxes and penalty at any time before the sale of property distrained, as herein provided; and thereupon, further proceedings in connection with such distress shall cease and the property distrained be surrendered to the owner thereof.

4. The total gross earnings of the said plaintiff for the year 1886 on the business of said railroads were \$2,654,756.31, distributed as follows, to wit: on the Northern Pacific Railroad, \$2,309,549.25; on the Northern Pacific, Fergus & Black Hills Railroad, \$34,327.13; on the Fargo & Southwestern Railroad, \$192,594.47; on the Jamestown & Northern Railroad, \$69,129.97; on the Sanborn, Cooperstown & Turtle Mountain Railroad, \$29,936.36; and on the James River Valley Railroad, \$19,213.62. Said total gross earnings to wit: said sum of \$2,654,756.31, were composed and made up of earnings of said plaintiff on interstate business and commerce; that is to say, on business and commerce originating or beginning without said Territory, or terminating without said Territory, and earnings of said plaintiff on business that was not interstate business or commerce, but was strictly local to said Territory; that is to say, on business or transportation of persons and freight which originated or began at some point or points within said Territory, and terminated or ended at some point or points within said Territory. The part or portion of said total gross earnings, to wit: of the sum of \$2,654,756.31, which said plaintiff earned for and upon business or transportation of persons and property, or otherwise, which originated and began within said Territory, and terminated and ended within said Territory, did not exceed the sum of \$400,000, and was approximately about as follows, to wit: on the Northern Pacific Railroad, \$346,432.38; on the Northern Pacific, Fergus & Black Hills Railroad, \$5,149.07; on the Fargo & Southwestern Railroad, \$28,889.17; on the Jamestown & Northern Railroad, \$10,369.49; on the Sanborn, Cooperstown & Turtle Mountain Rail-

road, \$4,490.52; and on the James River Railroad, \$2,882.79. The remaining portion of said total gross earnings, to wit: about the sum of \$2,259,425.63, were earnings which were earned by plaintiff on business that was interstate commerce; that is to say, on business or transportation of persons and property between points situated wholly without said Territory; or points without and points within said Territory; or points within and points without said Territory. Heretofore, to wit: on the 5th day of March, A. D. 1887, said plaintiff duly paid to the defendant, treasurer as aforesaid, the sum of \$38,095.31 as and for taxes on its earnings under the terms and provisions of the Act last mentioned.

5. Heretofore, to wit: on the 15th day of August, 1887, the said defendant, treasurer as aforesaid, demanded of said plaintiff the sum of \$38,095.31, which he, the said defendant, pretended was due and payable by virtue of said Act; but thereupon said plaintiff refused to pay the said sum, or any part thereof.

6. Afterwards, to wit: on November 4, 1887, the said defendant, treasurer as aforesaid, at Fargo, Cass County, Dak., did wrongfully and unlawfully levy a pretended distress upon, and seized and took possession of, certain personal property then and there owned by and in the possession of said plaintiff, to wit: one Mogul locomotive No. 147; one Mogul locomotive No. 79; one standard locomotive, No. 347; one standard locomotive, No. 185; one Mogul switch engine, No. 299; one standard engine, No. 159; one standard engine, No. 118; one switch engine, No. 52—of great value, to wit: of the value of \$64,000—pursuant to the provisions of said Act, and to satisfy the pretended taxes aforesaid, to wit: the sum of \$38,095.31, together with a certain pretended penalty thereon of \$3,809.53; and has ever since remained in the possession of the same.

7. Afterwards, to wit: on November 4, 1887, the said defendant, treasurer as aforesaid, caused an advertisement to be, and the same was, published in three newspapers published in said Territory, that he, the said defendant, would sell said personal property at the court house in Fargo, Dak., on the 6th day of December, A. D. 1887, at 10 o'clock A. M., to satisfy said pretended tax and penalty as provided in said section 4 of said Act.

8. That, unless restrained by the order of this court, said defendant will, as plaintiff is informed and believes, sell said property at the time and place mentioned in said advertisement, to wit: on December 6, A. D. 1887, at 10 o'clock A. M., at the court house in Fargo, Dak., to satisfy said pretended tax and penalty.

9. That said plaintiff is a common carrier of goods and passengers for hire in said territory, and the said personal property, to wit: the said engines, are essential and necessary to enable said plaintiff to carry on its business as a common carrier, and to discharge its duties as such to the public; that, if said engines are sold as aforesaid by said defendant, said plaintiff will be deprived of the possession thereof, and will be deprived of the use thereof in its said business as a common carrier; and it will not be able to purchase or procure other engines in their place in less time than a year, for the reason that it will have to purchase such other en-

gines from the manufacturers of railroad locomotives and engines in the United States. And all of said manufacturers now have orders for engines which will require at least a year to fill, and on account of such pressure of business none of them will be able to furnish said plaintiff with any engines in less time than a year; by reason of which the sale of said engines will inflict great and irreparable injury on the business of said plaintiff, and will cause said plaintiff great pecuniary loss, the exact amount of which cannot be computed, and will to a great extent prevent said plaintiff from engaging in its said business, and will destroy said business in part, and will cause said plaintiff great and irreparable damage, which cannot be estimated and determined in an action at law.

10. Said defendant, James W. Raymond, treasurer as aforesaid, is furthermore financially irresponsible, and is not the owner of property and effects equal in value to the value of said engines or of said pretended tax and penalty; so that, if said engines are sold as aforesaid, said plaintiff will not be able to recover the value thereof from said defendant and will not be able to collect any judgment therefor it may obtain against said defendant, and said defendant will be wholly unable to pay any such judgment; and if said plaintiff should pay said pretended taxes and penalty to said defendant, and should afterwards bring an action against said defendant to recover back the same, and should in any such action obtain a judgment against said defendant for the amount of said pretended tax and penalty, said defendant will be unable to pay such judgment by reason of said defendant's financial irresponsibility as aforesaid, and said plaintiff would not be able to collect the amount of such judgment, or satisfy the same by execution or otherwise; but, on the contrary, the amount of said pretended tax and penalty would be wholly and forever lost to said plaintiff.

11. That by reason of the premises said plaintiff has no adequate or complete remedy at law.

Wherefore said plaintiff prays that said pretended tax and penalty, and the whole thereof, be adjudged null and void; and that said defendant, James W. Raymond, treasurer as aforesaid, his deputy and deputies, and his successor and successors in office, be perpetually restrained and enjoined from selling or attempting to sell, said personal property, or any part thereof, to satisfy said pretended tax and penalty, or any portion thereof; that the said defendant and his deputy and deputies, and his successor and successors in office, be restrained and enjoined from selling, or attempting to sell, said property, or any part thereof, to satisfy said pretended tax and penalty, or any portion thereof, during the pendency of this suit; that said plaintiff have judgment against said defendant for the possession of said personal property, besides its costs and disbursements in this action; and that said plaintiff have such other and further relief as may be equitable and just in the premises.

Defendant demurred to this complaint as not stating facts sufficient to constitute a cause of action. The court overruled the demurrer, and, defendant having elected to stand by his demurrer, judgment was rendered for plaintiff, granting a perpetual injunction as prayed for.

2 INTER S.

Defendant appeals.

Mr. Charles F. Templeton, Atty-Gen., for appellant:

In view of recent decisions of the Supreme Court of the United States, particularly *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888), and *Philadelphia Steamship Company v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200), it must be conceded that the tax or per centum upon so much of plaintiff's gross earnings as arose from transportation not local within the Territory, is a tax upon interstate commerce and therefore unconstitutional and void.

At the date of the passage of the Act of March 9, 1883 (Laws 1883, chap. 99), such a law, in its entire scope, was recognized as valid by the Supreme Court of the United States.

See *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 (21 L. ed. 164), which has been limited, if not entirely overruled, by *Philadelphia Steamship Company v. Pa.* 122 U. S. 326 (30 L. ed. 1200).*

The payment of the first installment for the year 1887 was entirely voluntary on the part of plaintiff; there was neither fraud, duress nor mistake of fact. Taxes paid under such circumstances can never be recovered back.

Powell v. St. Croix Co. 46 Wis. 210; *Shane v. St. Paul*, 26 Minn. 543; *Lamborn v. Dickinson Co.* 97 U. S. 181 (24 L. ed. 926); *Union Pac. R. Co. v. Dodge Co.* 98 U. S. 541 (25 L. ed. 196).

Messrs. James McNaught, Ball, Wallin & Smith, and John C. Bullitt, Jr., for respondent:

The portion of defendant's gross earnings derived from interstate commerce was not taxable.

Fargo v. Mich. 121 U. S. 230 (30 L. ed. 888); *Phila. & S. Steamship Co. v. Pa.* 122 U. S. 326 (30 L. ed. 1200); *State v. Woodruff Sleeping & P. Coach Co.* (Ind.) 13 West. Rep. 311.

A party may waive a provision of a statute intended for his benefit.

Shutte v. Thompson, 82 U. S. 15 Wall. 151, 159 (21 L. ed. 123, 125); *Boiven v. Aubrey*, 22 Cal. 566, 572; *People v. Robinson*, 46 Cal. 96.

Francis, J., delivered the opinion of the court:

The amended complaint, the allegations of which are admitted by the demurrer, and are on this appeal to be taken as true, discloses that the gross earnings of the respondent railroad company for the year 1886 (to which the amount in controversy relates) was \$2,654,756.31. That \$395,330.63 of this sum represented all the gross earnings of said respondent for said year 1886, in business originating and terminating within the Territory of Dakota, leaving the sum of \$2,259,425.68 as the total of its gross earnings for said year, from business, namely: the transportation of persons and property, between points situated wholly without this Territory; or points without and points within this Territory; or points within and points without this Territory; and coming under the head of interstate commerce business.

It is clear, at the outset, and conceded by the attorney-general for the appellant, that so much of the Act entitled "An Act to Provide for the Levy and Collection of Taxes upon the Property of Railroad Companies in this Territory," ap-

*See *Del. & H. Canal Co. v. Commonwealth of Pennsylvania*, ante, 222. [Ed.].

proved March 9, 1883 (Dak. Sess. Laws 1883, p. 211), as provides for a tax, or the payment of a per centum in lieu thereof, upon the gross earnings of a railroad company operating in this Territory, received for business—the transportation of passengers and property not local—that is, not originating and ending wholly within this Territory, but interstate, and therefore coming under the head of interstate commerce—is unconstitutional and void. It is an intermeddling with, and an effort to tax, the earnings or proceeds arising from interstate commerce, and the attempted usurpation of a power which, under the Constitution, is to be solely and exclusively exercised by Congress. Among other cases, see *Fargo v. Michigan*, 121 U. S. 220-247 [30 L. ed. 888-895]; *Phila. & S. Steamship Co. v. Pa.*, 122 U. S. 326-347 [30 L. ed. 1200-1205], and cases cited in court opinion.

Applying the principles asserted in these and other cases, and the controlling doctrine established by our country's most eminent tribunal, to the point now under review, it follows that the respondent railroad company in this case could neither be called upon nor compelled by the Territory of Dakota to pay any tax, nor any sum in lieu thereof, upon its earnings or receipts in its interstate commerce business represented for said year 1886 by said admitted sum of \$2,259,425.68. Such earnings are not within the taxing domain of the Territory. Holding this, we necessarily, and in legal logic, reach the conclusion that the only portion of the gross earnings of the respondent for the year 1886 upon which, under said Gross Earnings Law, the Territory could claim the per cent in lieu of taxes, was said sum of \$395,330.63, the amount of its gross earnings for business beginning and ending in the Territory of Dakota, and which, for distinctness, we will term "local business" in this Territory, or business not interstate.

Manifestly, the gross earnings of respondent for this local business for said year 1886, as alleged in the amended complaint, did not exceed the sum of \$400,000, and, following the allegation of the complaint, and the course of counsel, for convenience, we take this sum as the amount upon which the said respondent railroad company was to pay for said year 1886 the per centum of 3 per cent provided for in said Gross Earnings Law, amounting to \$12,000. It must be noted that the validity or constitutionality of said Gross Earnings Law, in its application to the gross earnings of the respondent, for what we have denominated its "local business" in this Territory, is not assailed in this appeal, and is therefore neither questioned nor passed upon by this court, which, for the purposes of this appeal, takes said Act or law as it exists with respect to said local earnings; its legal force in this regard being entirely conceded by counsel for both appellant and respondent, and made the basis of their contention in this case.

The real question to be determined in deciding the case is this, namely: Was any sum due from the respondent railroad company to the territorial treasurer, appellant—that is, to the Territory—under the said Gross Earnings Law, for said year 1886, when the said property of the respondent was seized by the appellant? The appellant claims as due and unpaid the

sum of \$6,000, being the one half of the amount of 3 per cent on the gross earnings of the respondent from its said local business in this Territory for said year 1886. The respondent asserts that nothing is due from it to the appellant on its said local gross earnings for said year, the whole of said 3 per cent, \$12,000, having been paid by it to the territorial treasurer, the appellant, long prior to the seizure of its said property by appellant.

By the terms of said Gross Earnings Law the payment of the 3 per cent is to be made, "one half on or before the 15th day of February, and one half on or before the 15th day of August, in each year," the per cent for 1886 being payable in 1887.

It is alleged in said complaint, and admitted, that "On the 5th day of March, A. D. 1887, said plaintiff (respondent) duly paid to the defendant (appellant) treasurer as aforesaid, the sum of \$38,095.31 as and for taxes on its earnings under the terms and provisions of the Act last mentioned" (said Gross Earnings Law). The plaintiff (respondent) then paid to the defendant (appellant) on that date more than three times the amount due from it to said defendant, under said Gross Earnings Law for said year 1886.

The court is, however, asked by the attorney-general, for the defendant, to hold that as only one half of the 3 per cent for said year 1886 was due and payable at the time said sum of \$38,095.31 was paid by the respondent to and received by the territorial treasurer, defendant, said payment operated only as the discharge or satisfaction of said one half (\$6,000) due on the 15th day of February, 1887, and that the remaining one half of the 3 per cent (another \$6,000) became due and payable August 15, 1887, and has not been paid. Such a holding would shock the conscience of equity, and is not demanded by the letter or spirit of said Gross Earnings Law.

The attorney-general, for the defendant (appellant) contends that "The judgment of the court below, so far as it declares the amount due the Territory August 15, 1887, 'fully paid long prior to the seizure by the defendant of the personal property described in the complaint', is clearly erroneous. There is no allegation in the complaint that it has been paid, or any part thereof; therefore the demurrer admits no such fact. True, there is an allegation in the complaint that plaintiff, on the 5th day of March, 1887, paid into the territorial treasury \$38,095.31; but it is not alleged that it was made in payment of the amount due for any particular year or part of a year, and the court cannot presume that it was intended to satisfy the tax which defendant is now seeking to collect."

The attorney-general, however, entirely saves us from the necessity of venturing upon any presumption, violent or otherwise, and plants us upon the solid footing of fact, when he immediately informs us in his brief that "In fact the amount paid by plaintiff March 5, 1887, was paid in satisfaction of the installment which became due February 15, 1887, and was the exact amount of such installment, as appeared by the voluntary statement made by the plaintiff."

That the said payment of \$38,095.31, made-

by the respondent March 5, 1887, related to the year 1886, is beyond question; and what we are to inquire and determine is this, namely: Did that payment discharge and satisfy only the installment of the 3 per cent payable on or before February 15, 1887, and leave unpaid the remaining installment, payable on or before August 15, 1887, or did said payment of \$38,095.31 (which it is conceded was more than three times the amount of the full 3 per cent due for said year 1886) operate as a discharge and satisfaction of the two installments, or, in other words, the whole sum due for 1886?

When a payment is required to be made on or before a fixed date, it may be made on said date or at any time prior thereto. A payment to be made on or before August 15 can assuredly be made in March prior thereto. The respondent could pay the 3 per cent in two installments, at the precise dates named in the Act for that purpose, or, waiving the full extent of the limit, could avail itself of the effect of the words of limitation, and obey the law by making the payment of the whole amount for the year in one payment, or in two payments prior to the expiration of the last date fixed by the Act; the evident purpose of the Gross Earnings Law in this particular being to provide for the payment of the whole amount before the expiration of August 15, and thus fix a time or limit within which the amount due for each year should be paid. The provision for payment in installments is not so much for the benefit of the Territory as for the accommodation of the railroad company; and the party to whom, or for whose benefit, a right or privi-

lege is given by statute, may waive or surrender that right or privilege in whole or in part if he does not thereby impair, injure or destroy the rights or benefits conferred upon, or flowing to, another, in or from said statute or other legal or equitable source.

After an examination of the case before the court I am convinced that, without resort to presumption, or the violation of any legal principles, but, rather, as a plain extraction of fact from clearly perceptible evidence, and in accord with sound legal and equitable doctrine, we may conclude that the said payment of said sum of \$38,095.31 was in satisfaction and discharge of the full amount due from the respondent railroad company to the Territory under said Gross Earnings Law for said year 1886. The amount, then, claimed by the Territory, and for the alleged nonpayment of which the defendant, treasurer of the Territory, seized the personal property of the plaintiff railroad company, had been paid prior to the date of said seizure, and before the expiration of the last date fixed or limited by the Act for its payment, and at the time of said seizure nothing was due from the respondent to the Territory under said Gross Earnings Law for said year 1886.

The demurrer was properly overruled, and the judgment for plaintiff (respondent) fully warranted by the allegations of the complaint admitted to be true by the demurrer. The errors assigned having no substance, *the judgment of the District Court is affirmed.*

All the Justices concur.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA.

CHICAGO & NORTHWESTERN R. CO.

v.

Peter A. DEY *et al.*, Railroad Commissioners of the State of Iowa.

(From Lawyers' Reports, Annotated.)

1. The federal courts have jurisdiction of a suit against state railroad commissioners, brought by a corporation created by another State, to restrain the

enforcement of a schedule of rates prepared by such commissioners under a state statute claimed by the complainant to be unconstitutional; such a suit is not in effect a suit against the State, and hence is not within the Eleventh Amendment to the Constitution, which prohibits the federal courts from entertaining suits brought against a State by citizens of another State.

2. The authority conferred upon the

NOTE.—Injunction; purpose and object of. An injunction, unless issued after the final decree, when it becomes a judicial process, can only be used for the purpose of prevention or protection, and not for the purpose of commanding the defendant to undo anything he had previously done. *N. Y. Printing & D. Estab. v. Fitch*, 1 Paige, 97; *Audenried v. Phila. & R. R. Co.*, 68 Pa. 372, 3 S. 8 Am. Rep. 197. See *Washington Univ. v. Green*, 1 Md. Ch. 97; *Rosley v. Susquehanna Canal*, 3 Bland, 65; *Atty-Gen. v. N. J. R. & T. Co.* 3 N. J. Eq. 136; *Atty-Gen. v. Patterson*, 9 N. J. Eq. 624. Where neither injury to the plaintiff's property, inadequacy of the legal remedy, nor any serious emergency or danger of loss, or other special ground of jurisdiction is shown by the complaint, it does not show that complainant is entitled to final relief by injunction. *McHenry v. Jewett*, 90 N. Y. 63. See *N. Y. v. Mapes*, 6 Johns. Ch. 46; *Allen v. Meyer*, 73 N. Y. 1; *Wright v. Brown*, 67 N. Y. 1; *Collins v. Collins*, 71 N. Y. 270; *Paul v. Munger*, 47 N. Y. 469; *Sheridan v. Jackson*, 72 N. Y. 170; *Scotfield v. Whitelegge*, 49 N. Y. 259; *Ogden v. Kip*, 6 Johns. Ch. 160; *Babeock v. N. J. Stock Yard Co.* 20 N. J. Eq. 296; *Richards' App.* 57 Pa. 105.

To restrain trespass. A court of equity will not, as a general rule, interfere to restrain a trespass, but it will under certain circumstances: (1) to pre-

vent irreparable mischief or ruin; (2) to prevent a multiplicity of suits; (3) where it is required by some peculiar and special circumstances. *Jerome v. Ross*, 7 Johns. Ch. 315; *White v. Flannigan*, 1 Md. 543; *S. C. 54 Am. Dec. 674*. Adopted, *Amclung v. Seekamp*, 9 Gill & J. 468. See *Hamilton v. Ely*, 4 Gill, 34. Equity will not interpose to restrain a trespass where the injury does not appear to be irremediable and destructive to the estate, and where the ordinary legal remedy is available. *Quackenbush v. Van Riper*, 3 N. J. Eq. 350; *S. C. 29 Am. Dec. 720*. It is within the province of the court to arrest the progress of a trespass, at least until the trespasser shall have established his right at law. *Southmayd v. McLaughlin*, 24 N. J. Eq. 183. See *Varick v. N. Y. 4 Johns. Ch. 55*. The remedy by injunction, at the suit of private parties for private wrong, is recognized and enforced in equity. *Atty-Gen. v. Chicago & N. W. R. Co.* 35 Wis. 533. See *Gardner v. Newburgh*, 2 Johns. Ch. 162; *Belknap v. Belknap*, 2 Johns. Ch. 463, and cases cited in notes, Law. ed.

To restrain threatened trespass. Injunction against a threatened trespass can issue only in an extreme case, where the injury threatened is irreparable and the title to the land is unquestioned. See *Nevitt v. Gillespie*, 1 How. (Miss), 108; *S. C. 26 Am. Dec. 696*; *Lining v. Geddes*, 1 McCord, Ch. 304; *S. C. 16*

railroad commissioners by the Iowa Act of April 5, 1888 (Laws 22d Gen. Assem. chap. 23), to make and put in effect a schedule of rates for railroad transportation within the State, is not an unconstitutional delegation of legislative power.

3. **The fact that said Act imposes a penalty**, to be enforced by criminal prosecution, against any railroad company which shall charge "more than a fair and reasonable rate of toll," does not render the Act invalid as being a penal Act which fails to describe the offense covered thereby with sufficient certainty—as, taken as a whole, the Act makes the commissioners' schedule the test as to reasonableness of rates.
4. **The provision of said Act making the commissioners' schedule prima facie evidence** that the rates fixed thereby are reasonable, is not an infringement of the constitutional guarantees of the right to trial by jury and against deprivation of property without due process of law.
5. **An inquiry by the courts into the reasonableness of rates** established by state authority for railroad transportation is not prevented by the fact that the Legislature has pursued the forms of law in prescribing a schedule of rates; but the question is open and must be decided in each case whether the rates prescribed are within the limits of legislative power, or are mere proceedings which, if not restrained, will work a confiscation of property.
6. **The courts have no power to interfere** with rates for railroad transportation, fixed by a State, when such rates

will give some compensation, however small, to the owners of railroad property; but it is their duty to interfere when the rates prescribed will not pay any compensation to the owners; *i. e.*, some dividend to stockholders after payment of fixed charges and cost of service.

7. **State legislation** which deprives the owners of a railroad line within the State of all compensation from their business, cannot be upheld on the grounds that the company is a foreign corporation; that it is permitted simply as an act of grace to do business in the State; and that it can abandon its business therein if found unremunerative.
8. **Nor can such legislation be upheld** on the ground that the railroad affected thereby is an interstate road, and that its deficiency of revenue may be made up by receipts from interstate commerce or by traffic in other States; or on the ground that a future increase of business may render the prescribed rates remunerative.
9. **A preliminary injunction** will be granted at the suit of a railroad company, to restrain the enforcement of a schedule of rates established by the state railroad commissioners when it is shown that the enforcement of such schedule would probably prevent the company from being able to declare any dividend, and where the state statute furnishes a full remedy for the exaction of any unreasonable rates by the company.
10. **To prevent a multiplicity of suits**, equity may interfere by preliminary injunction, at the suit of a railroad company to restrain the enforcement of a schedule of rates established by the

Am. Dec. 606; *Hart v. Albany*, 9 Wend. 571; S. C. 24 Am. Dec. 165; *Quackenbush v. Van Riper*, 3 N. J. Eq. 350; S. C. 29 Am. Dec. 716. In ordinary trespasses, or where courts of law can afford complete satisfaction, equity refuses to interfere, and will rarely, and only under very peculiar circumstances, entertain jurisdiction in actions of tort. *Bracken v. Preston*, 1 Pinney, 584; S. C. 44 Am. Dec. 420. See *Stevens v. Beekman*, 1 Johns. Ch. 319; *Livingston v. Livingston*, 6 Johns. Ch. 497.

Legal remedy must be inadequate. The general doctrine is well established that this exclusive jurisdiction is not to be exercised in any case for the purpose of enjoining trespasses and other tortious acts to property, at the suit of one having the legal estate, unless the legal remedy—compensatory damages—is inadequate, under the circumstances of the case, to confer complete relief upon the injured party. *Livingston v. Livingston*, 6 Johns. Ch. 497; 1 Pom. Eq. Jur. 223, citing *Garth v. Cotton*, 1 Ves. Sr. 524, 546, 1 Dick. 183, 3 Atk. 751; S. C. 1 Lead. Cas. Eq. 955, 987-1027; *Jesus College v. Bloomer*, 3 Atk. 262, Amb. 54; *Vanwinkle v. Curtis*, 3 N. J. Eq. 422; *Weigel v. Walsh*, 45 Mo. 560; *Muselman v. Marquis*, 1 Bush, 463; *Hicks v. Compton*, 18 Cal. 266; *Gause v. Perkins*, 3 Jones, Eq. 177; *Hawley v. Clowes*, 2 Johns. Ch. 122; *De Veney v. Gallagher*, 20 N. J. Eq. 33; *Coe v. Winnipissee Lake C. & W. Mfg. Co.*, 37 N. H. 254; *Burnham v. Kempton*, 44 N. H. 78; *Gallagher v. Fayette County R. Co.*, 38 Pa. 102; *Johnson v. Conn. Bank*, 21 Conn. 148, 157; *Hardesty v. Taft*, 23 Md. 512, 530; *Mechanics & T. Bank v. Debolt*, 1 Ohio St. 591; *Eastman v. Amoskeag Mfg. Co.*, 47 N. H. 71, 78; *Watson v. Sutherland*, 72 U. S. 5 Wall. 74 (18 L. ed. 580); *Parker v. Winnipissee Lake C. & W. Co.*, 67 U. S. 2 Black, 545, 550 (17 L. ed. 333, 336), and cases cited; *Creely v. Bay State Brick Co.*, 103 Mass. 514; *Morgan v. Palmer*, 48 N. H. 336; *Jenks v. Williams*, 115 Mass. 217; *Walker v. Zorn*, 50 Ga. 370; *Zeigler v. Beasley*, 44 Ga. 56.

2 INTER S.

To prevent a multiplicity of suits. Where numerous actions at law are brought, or are about to be brought, either by the same or by different parties, all involving and requiring the decision of the same questions of law or fact, so that the determination of one would not legally affect the others, a court of equity may, in order to do full justice to all parties interested, award complete relief, no matter how conditional and limited, to all these parties by means of one suit and decree. *Jerome v. Ross*, 7 Johns. Ch. 315; *Huntington v. Nicoll*, 3 Johns. 566; *Eldridge v. Hill*, 2 Johns. Ch. 281; *West v. Mayor of N. Y.*, 10 Paige, 539; N. Y. & N. H. R. Co. v. *Schuyler*, 17 N. Y. 592; S. C. 34 N. Y. 30; *McHenry v. Hazard*, 45 N. Y. 580; *Thompson v. Engle*, 4 N. J. Eq. 271; *Hughtlett v. Harris*, 1 Del. Ch. 349; *Youngblood v. Sexton*, 32 Mich. 406; *Mayor of York v. Pilkinton*, 1 Atk. 282, 283, per *Lord Hardwicke*; *Weale v. West Middlesex W. Co.*, 1 Jac. & W. 358, 369; *Whaley v. Dawson*, 2 Sch. & Lef. 367, 370, per *Lord Redesdale*; *Saratoga County v. Deyoe*, 77 N. Y. 219, 225; 1 Pom. Eq. Jur. 169.

Must be special circumstances in the case. To restrain a mere trespass, there must be something particular in the case, so as to bring the injury under the head of quieting possession or make out a case of irreparable mischief, or the value of the inheritance must be in jeopardy. *Livingston v. Livingston*, 6 Johns. Ch. 497; *Lining v. Geddes*, 1 McCord, Ch. 304; S. C. 16 Am. Dec. 608; *Lyerly v. Wheeler*, *Busbee*, Eq. 270; S. C. 59 Am. Dec. 598; *Bracken v. Preston*, 1 Pinney, 584; S. C. 44 Am. Dec. 420. The facts and circumstances must show that irreparable mischief will be the result of the act complained of, and that the law can afford no legal remedy. *Fort Clark H. R. Co. v. Anderson*, 108 Ill. 68; S. C. 48 Am. Rep. 547; *Goodell v. Lassen*, 69 Ill. 147; *Fox v. Fitzsimons*, 29 Hun, 577. See *Yancy v. Downer*, 5 Litt. 9; *Jerome v. Ross*, 7 Johns. Ch. 315; *Stevens v. Beekman*, 1 Johns. Ch. 319.

railroad commissioners, although the schedule has not yet gone into effect, but the commissioners have begun the publication of notice of the date when it is to take effect.

11. **A communication signed by the secretary of the board of railroad commissioners**, stating that the time for the taking effect of the schedule of rates had been extended, sent to the complainant railroad company in reply to a telegram sent by it to the board, officially requesting such extension, is to be considered as the official act of the board.

(July 27, 1888.)

IN equity. On motion for preliminary injunction. *Granted.*

The defendants are the Railroad Commissioners of the State of Iowa. On June 14, 1888, under Laws 22d General Assembly of Iowa, chap. 28, they made a classification of freight and a schedule of reasonable maximum rates for transportation on the railroads in the State. Under section 17 of said Act, they caused notice of their action and that the schedule established thereby would go into effect on June 28, to be published in two daily newspapers published in Des Moines, for eight consecutive days, beginning on June 14, and ending on June 21.

On June 22 the notice was changed so as to designate July 5 as the date for the taking effect of the schedule established by the commissioners, and a publication of the notice as changed was begun. It was claimed by the defendants that this change of date was the act of one of the commissioners only and not that of the board.

The facts, as printed by affidavits on the motion, are further stated in the opinion.

The bill charges that said chapter 28, Laws 22d General Assembly, under which the commissioners acted in making the schedule of rates, is unconstitutional in that: (1) it seeks to deprive the complainant of its property without due process of law; (2) the power to fix rates for common carriers is a legislative function, and cannot be delegated to commissioners; (3) the provision making the schedule of rates *prima facie* evidence that the rates so fixed are reasonable is unconstitutional, and deprives the complainant of the right of trial by jury; (4) the provisions of the law defining what acts shall constitute extortion are so indefinite and uncertain as to render the law void.

It is further charged that the rates as fixed are not reasonable rates, but that they are unjust and unreasonable, and so low that, if enforced, the complainant will not be able to earn sufficient to pay its operating expenses, fixed charges, and have a surplus left to pay dividends on stock; and that the result will be to render many, if not all, the railroads of Iowa insolvent.

The prayer of the bill is that the railroad commissioners be enjoined and restrained from further publishing notice of said schedule, and also that they be enjoined from instituting or prosecuting any suits for penalties provided for

in said Act, from entering complaint, or making orders thereon, and instituting or causing to be instituted any suits to enforce such orders having for their object the enforcement of said schedule, and asking for a temporary injunction restraining the defendants from continuing the publication of said notice, and from instituting and prosecuting suits during the pendency of this suit.

Upon presentation of the bill to Judge Brewer, in chambers, a restraining order was issued, and the case was set for hearing on the motion for temporary injunction before the Judge at chambers in Leavenworth, Kan., on July 5, 1888. The defendants filed no pleadings at the hearing of the motion, further than a written protest against the jurisdiction of the court to hear and determine the controversy in question, for the reason that, while the suit was nominally against the railroad commissioners, it was in fact a suit against the State, and fell within the prohibition of the Eleventh Amendment of the Constitution of the United States.

Mr. W. C. Goudy for complainant.

Messrs. A. J. Baker, Atty-Gen., and C. C. Nourse, for respondents:

It is competent for the Legislature of the State to fix the rates and classifications which may be charged by railroad corporations or common carriers of any kind in the transportation either of freight or passengers from point to point within the State; it is a valid exercise of the police power so to do.

Munn v. Ill. 94 U. S. 113 (24 L. ed. 77); *Chicago etc. R. Co. v. Iowa*, 94 U. S. 155 (24 L. ed. 94); *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 (24 L. ed. 97); *Stone v. Farmers L. & T. Co.* 116 U. S. 307 (29 L. ed. 636); *Chicago etc. R. Co. v. People*, 77 Ill. 448; *Tilley v. Savannah, F. & W. R. Co.* 5 Fed. Rep. 641; *Ga. R. Co. v. Smith*, 70 Ga. 694.

This power may be delegated to commissioners.

Munn v. Ill., *Stone v. Farmers L. & T. Co.*, *Ga. R. Co. v. Smith*, *Chicago etc. R. Co. v. People*, and *Tilley v. Savannah etc. R. Co.* *supra*; *State v. R. Co.* (Neb.) 35 N. W. Rep. 118, 125, 36 N. W. Rep. 308; *State v. Chicago etc. R. Co.* (Minn.) 37 N. W. Rep. 782.

When the rates have thus been established by the commissioners, the courts cannot interfere therewith; nor can the court limit the board in fixing such rates.

Tilley v. Savannah etc. R. Co. and *State v. Chicago etc. R. Co.* *supra*.

General laws fixing maximum rates do not deprive the corporation of its property without due process of law.

Stone v. Trust Co. and *Tilley v. R. Co.* *supra*; *Barbier v. Connolly*, 113 U. S. 27 (28 L. ed. 923); *Mugler v. Kan.* 123 U. S. 623 (31 L. ed. 205).

The law is not unconstitutional in that it makes the rates fixed by the commissioners *prima facie* evidence that they are reasonable rates.

See *Com. v. Kimball*, 24 Pick. 373; *Johns v. State*, 55 Md. 350; *Ogletree v. State*, 28 Ala. 693; *Com. v. Williams*, 6 Gray, 1; *Com. v. Wallace*, 7 Gray, 222; *Com. v. Rowe*, 14 Gray, 47; *Holmes v. Hunt*, 123 Mass. 505; *Howard v. Moot*, 64 N. Y. 262; *State v. Hurley*, 54 Maine, 562; *State v.*

Cunningham, 25 Conn. 195; *Matthews v. O'fley*, 3 Sumn. C. Ct. 115; *R. R. Comrs. v. N. J. & C. R. Co.* 21 Am. & Eng. R. Cas. 17; *Stone v. Farmers L. & Trust Co.* 116 U. S. 307 (29 L. ed. 636); *Santo v. State*, 2 Iowa, 213; *Chicago etc. R. Co. v. People*, 77 Ill. 443; *Tilley v. Savannah etc. R. Co.* 5 Fed. Rep. 659.

The statute is not void because of the indefiniteness of its provisions in relation to what acts shall constitute a misdemeanor or render the carrier subject to an action for penalty.

See *Stone v. Trust Co. supra*; *Sorrell v. Central R. Co.* 75 Ga. 509; *Chicago etc. R. Co. v. People, supra*.

This is a suit against the State, and not against the defendants named in the petition. *Re Ayres*, 123 U. S. 443 (31 L. ed. 216).

Where it is manifest on the face of the record that the defendants have no individual interest in the controversy, and that the relief sought against them is only in their official capacity as representatives of the State, which alone is to be affected by the decree, the question then arising, whether the suit is not substantially a suit against the State, is one of jurisdiction.

Re Ayres, supra. See also *Hagood v. Southern*, 117 U. S. 52 (29 L. ed. 805); *La. v. Jumel*, 107 U. S. 711 (27 L. ed. 448); *N. H. v. La.* 108 U. S. 76 (27 L. ed. 656).

The State cannot be restrained from enforcing its penal and criminal statutes.

Re Sawyer, 124 U. S. 210, 211, 219 (31 L. ed. 405, 408).

Brewer, J., delivered the following opinion:

This is a bill filed by the complainant, a railroad corporation, organized under the laws of the State of Illinois, against Peter A. Dey and others, they being the Railroad Commissioners of the State of Iowa, and seeks to enjoin them from putting in force a certain schedule of rates prepared by them for all transportation within the limits of the State. The matter is now submitted on an application for a preliminary injunction. The defendants have filed a protest, something in the nature of a plea to the jurisdiction, in which they represent that they have no personal interest in the matter; that all they have done or intend to do is as officers of the State, and that the only party in interest is the State; and they therefore urge that this court has no jurisdiction.

No one can be insensible to the importance of this as well as the other questions in the case. On the one hand are vast properties invested in the legitimate business of railroad transportation, insisting that their rights are threatened with irreparable injury, and that this court alone can afford them adequate protection. On the other hand are defendants, claiming to represent the sovereign State of Iowa, insisting that she should be permitted to enforce her own laws upon property within her jurisdiction, free from any judicial interference. Not only are the interests at stake large, but beyond that the questions discussed are, many of them, of exceeding difficulty, and the paths to be trod in their examination ones upon which the lamps of precedent have as yet thrown but a feeble and glimmering light.

Of course, as jurisdiction is challenged, it

presents the first matter of inquiry. The objection is that the State is really, though not nominally, the defendant, and that under the Eleventh Amendment federal courts cannot take jurisdiction of suits by individuals against States. The records of the supreme court disclose many cases in which this defense has been presented, and to those cases we turn for light upon the question. The early rule of that court was laid down by Chief Justice Marshall in the case of *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 857 [6 L. ed. 232], in which he said:

"It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record."

Similar language is found in *Davis v. Gray*, 83 U. S. 16 Wall. 203 [21 L. ed. 447]. But recent cases set aside that rule and establish a more reasonable one: that that Amendment covers not only suits brought against the State by name, but those against its officers, agents and representatives, where the State, though not named as defendant, is the real party against which relief is asked and the judgment will operate. *Re Ayres*, 123 U. S. 443 [31 L. ed. 216]. In that case the matter is discussed at length, and previous decisions examined and explained.

The State is not here a nominal party. Is it the real party against which relief is asked and upon which the judgment will operate? And here must be noticed the manifest distinction which exists between the State and the citizens of the State. A judgment may affect and operate upon one or more citizens without affecting or operating upon the State in any such direct manner as to make it the real party in interest. It must also be noticed that sometimes the relations of the State to its citizens and others is a purely business relation, while again it is entirely governmental. The State enters into contracts as an individual, both in respect to real and personal property. It issues bonds or other promises to pay, and in these respects the State as a corporate entity contracts as an individual; and when litigation arises in which such contracts are involved directly or indirectly, then this corporate entity—the State—is the real party against which the relief is asked and the judgment operates. And in all the cases in which, where the State was not a party to the record, and yet the judgment of the supreme court was that it was a real party in interest, and therefore the federal court without jurisdiction, it will, I think, be found that some contract of the State was the foundation of the litigation, and that those suits, though nominally against state officers, were construed by that court as in fact suits to compel performance by the State of its contract, or to prevent it from carrying into effect measures intended to work a repudiation. Besides the case *Re Ayres, supra*, may be noticed as leading cases in this line of decision: *La. v. Jumel*, 107 U. S. 711 [27 L. ed. 448]; *Antoni v. Greenhow*, 107 U. S. 769 [27 L. ed. 468]; *Hagood v. Southern*, 117 U. S. 52 [29 L. ed. 805].

On the other hand, the State in its governmental relation to its citizens and others within its jurisdiction enacts laws designed to regulate the dealings of one individual with another, or between corporations and individuals. In these matters, although in a certain sense the State is interested, as it is in all matters affecting the welfare and happiness of the people, yet it is interested only in a general sense, and not in that direct pecuniary sense which makes it, in the language of the law, the real party in interest—the one to be affected by litigation in which the constitutionality of such enactments is challenged. It is not the party against whom relief is asked, or upon whom the judgment operates. The judgment may operate upon or affect few or many of its citizens, and still the State, as a State, is not the party interested.

For instance, the State passes a law in respect to the rate of interest. Such a law may affect the welfare of many citizens, and in a general and remote sense the State is interested in seeing that law enforced; but will it be contended that a suit between individuals, even though one of those individuals be a state officer, in which the constitutionality of such a law is challenged, and rights insisted upon against its validity, is one in which the State is the real party in interest—the one against which relief is asked, and upon which the judgment will operate?

If this be true in the lesser case of interest, is it not equally true in the larger matter of railroad rates? Whether the shipper shall pay to the railroad, and the railroad exact from the shipper ten cents a hundred, or fifty cents a hundred, for the carriage of goods, is not a matter in which the State, as a State, is interested other than in the general sense heretofore mentioned. No contract of the State is involved in litigation; no judgment can be rendered which affects it as a corporate entity, and it is affected and interested only as it is interested and affected by the welfare of its citizens. The legislation which is involved in this inquiry is governmental in its nature, not contractual. No obligation that the State has entered into, no contract or promise that it has made, is challenged. There is no attempt to compel performance of a contract, or prevent repudiation by the State. The real parties in interest are the shippers and the carriers, and the judgment operates in reality upon these parties alone.

Suppose the city council of a city should, as it frequently does, prescribe rates for drayage or hack hire, would it be seriously contended that a suit by a hackman against a passenger to collect his fare, in which the validity of the ordinance was challenged, was one in which the city was the real party against which relief was asked, and upon which judgment would operate? Wherein is the difference, save in magnitude, between that case and this? The fact that these defendants, being merely officers, have no interest, is no criterion. Scarcely does an officer have any personal interest, and yet the records of the supreme court are full of cases in which suits have been maintained against state officers. Oftentimes, when the unconstitutionality of a statute is alleged, the only way in which relief can be obtained is

by suit against the officers—to stay their proceedings under the law.

It is useless to cite the authorities; they are carefully collected, and may be found in the briefs of counsel, and the opinion of the court in *Re Ayres*, *supra*. The defendants claim that they are simply attempting to carry into effect the mandates of the State, as expressed in one of its laws; but if that law be unconstitutional, it is no law, and they have no authority for their actions. This proceeding is a judicial inquiry to see whether they have authority for their actions; whether the law upon which they rely is valid and constitutional, or sufficient to justify the actions which they are taking.

In the case of *Poindexter v. Greenhow*, 114 U.S. 290 [29 L. ed. 192], the court draws a very important distinction between the State and the Government of the State, and shows how an unconstitutional statute is not an Act of the State, and affords no justification for acts done or attempted to be done under it. The discussion of this matter is too long for quotation, but it is forcible and suggestive, and to be commended to the consideration of every thoughtful student of the value of written constitutions in securing protection to person and property. Beyond these general considerations all the adjudications of the federal courts in suits against railroad commissioners makes against the defense of the want of jurisdiction.

In *Peik v. Chicago Railway Company*, 6 Biss. 177, jurisdiction was sustained by the circuit court in a suit similar to this, and perpetual injunction granted against the railroad commissioners of the State of Wisconsin.

A similar ruling was made in the Circuit Court of Tennessee, in the case of *Louisville Railroad Company v. Tennessee Railroad Commission*, 19 Fed. Rep. 679. Also in the Circuit Court of Mississippi, in the case of *Farmers Trust Company v. Stone*, 20 Fed. Rep. 270.

The first and last of these cases were taken to the Supreme Court of the United States, and while the judgments of the circuit courts were reversed, it was not on the ground of a lack of jurisdiction; nothing, indeed, was said by that court as to the question of jurisdiction, but it was assumed to exist, and the judgments were on the merits. See 94 U. S. 164 [24 L. ed. 97]; 116 U. S. 307 [29 L. ed. 636].

Other cases also appear in the Supreme Court Reports in which that court took jurisdiction of cases against officers exercising similar functions.

Neither is there, in sustaining the jurisdiction of this court, any invasion of the powers of the Legislature. Whether the preparation of the schedule was the exercise of legislative power or not is a question for further consideration; but, so far as the Legislature itself is concerned, its action was complete before this suit was commenced. The law had been passed with all the proper forms of legislative proceedings, and had been duly published, and the Legislature had adjourned. So far as the Legislature is concerned, its action was finished, and nothing is here sought in the way of interference with its proceedings or its action. The only question is whether that which it has done—and it has done all that it can do—is valid or invalid in the face of constitutional

provisions. Neither is it any interference with the executive in the discharge of his duties.

Defendants cite the case of *Mississippi v. Johnson*, 71 U. S. 4 Wall. 475 [18 L. ed. 437], in which the supreme court held that the President could not be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional. Giving full scope to the doctrines of that case, it in no manner conflicts with the right to maintain this suit. That case was limited narrowly to the President—the general executive—and it was nowhere intimated in the opinion that subordinate officers of the United States could not be restrained from acts trespassing upon private rights. In that case there was no question of property rights; a mere question in respect to some act of political administration. Here no matter of political administration is challenged, and the bill is rested upon the proposition that the property rights of the complainant are invaded by the threatened action of the defendants, under, as alleged, an unconstitutional law, or beyond the constitutional limits of power.

This is all that I think I need say on the question of jurisdiction. I am aware that some expressions here and there to be found in the opinions of the supreme court, taken apart from the case in which they were uttered, make against the jurisdiction of this court in the present case. Indeed, the question of jurisdiction is a doubtful one, but the fact that it is doubtful is no ground for refusing to entertain jurisdiction. I can close this branch of the case in no better way than by quoting the language of *Chief Justice Marshall*, in the case of *Cohens v. Virginia*, 19 U. S. 6 Wheat. 264 [5 L. ed. 257]:

"The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given; the one or the other would be treason to the Constitution."

I commend these words of America's greatest Judge to the thoughtful consideration of those who, realizing that the primary duty of the courts is the protection of the rights of person and property, nevertheless sometimes hastily denounce their, as supposed, at least, unwarranted interference.

Coming now to the questions other than those of jurisdiction, on April 5 of this year the Legislature of this State enacted a law to regulate railway corporations and other common carriers, and to increase the powers and further define the duties of the board of railroad commissioners in respect to the same, and to prevent and punish extortion and unjust discrimination, etc.

Section 2 declares that all charges made for transportation shall be reasonable and just, "And every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

By section 17 the railroad commissioners are required to make a schedule of reasonable and 2 INTER S.

maximum rates, and such schedule is declared to be *prima facie* evidence that the rates there-in charged are reasonable and just maximum rates and charges for transportation, etc., in all suits brought against the railroad corporations.

Section 23 provides that "If any railroad corporation or common carrier subject to the provisions of this Act shall charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description, or for the use or transportation of any railroad car upon its track or any of the branches thereof, or upon any railroad within the State, which it has a right, license or permission to use, operate or control, or shall make any unjust or unreasonable charge prohibited in section 2 of this Act, the same shall be deemed guilty of extortion, and shall be dealt with as is hereinafter provided; and if any such railroad corporation or common carrier shall be found guilty of any unjust discrimination, as defined in section 3 of this Act, upon conviction thereof it shall be dealt with as hereinafter provided."

Section 26 makes the penalty a fine of not less than \$1,000 nor more than \$5,000 for the first offense, and for each subsequent offense not less than \$5,000 nor more than \$10,000.

By section 9 any person injured by any act of the railroad company in violation of this law is allowed to recover treble damages and a reasonable counsel fee.

Now, the first proposition of counsel for complainant is that the provisions of this law, authorizing the railroad commissioners to make and put in effect a schedule of rates, are unconstitutional, because of an attempted delegation of legislative power. Their argument is brief and clear. It is that the power of fixing rates is purely legislative, and in support of that, several decisions of the supreme court are cited, particularly in what are known as the *Granger Cases*, 94 U. S. 113-187 [24 L. ed. 77-97]. Thus, in *Chicago Railway Company v. Iowa*, 94 U. S. 161 [24 L. ed. 95] the court says: "Railroad companies are subject to legislative control as to their rates of fare and freight."

In the case of *Peik v. Chicago Railway Company*, 94 U. S. 178 [24 L. ed. 98] it is said: "Where property has been clothed with public interest, the Legislature may fix the limit to that which in law shall be reasonable for its use."

And in the *Munn Case*, 94 U. S. 113 [24 L. ed. 77], the court says: "In countries where the common law prevails, it has been customary from time immemorial for the Legislature to say what shall be a reasonable compensation under special circumstances."

The Constitution of the State of Iowa, as those in other States, divides the Government into three departments: the legislative, the executive, and the judicial; and in article 3, § 1, declares that "No person, charged with the exercise of powers properly belonging to one, shall exercise any functions appertaining to either of the others." By another section the legislative power is vested in a General Assembly, consisting of two bodies, the Senate and the House.

No provisions exist in the Constitution for a railroad commission; hence, counsel conclude

that the Legislature is the only body which can fix rates, and that it may not abdicate its functions and delegate this legislative power to another body. Of course, this question is pivotal; for if the Legislature alone can fix rates, the railroad commissioners are exercising functions which do not belong to them; and if the rates proposed infringe upon the property rights of the complainant, it may insist that such unauthorized action of the commissioners be stayed.

It is not always easy to answer an argument so simple and clear, where each of the propositions is, in a general sense, at least, confessedly true. I concede the force of the argument, and yet I do not think I should be warranted in sustaining the claim, and for these reasons:

First. It is elemental that a law will not be declared unconstitutional unless its vice is obvious. As said by *Chief Justice Waite* in the *Munn Case*, *supra*: "Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the express will of the Legislature should be sustained." Or, as has been elsewhere epigrammatically said: "A doubt sustains the law."

Second. There is no inherent vice in such a delegation of power; nothing in the nature of things which would prevent the State, by constitutional enactment at least, from intrusting these powers to such a board; and nothing in such constitutional action which would invade any rights guaranteed by the Federal Constitution. So that, after all, the question is one more of form than of substance. The vital question with both shipper and carrier is that the rates shall be just and reasonable, and not by what body they shall be put in force.

Third. While in a general sense, following the language of the supreme court, it must be conceded that the power to fix rates is legislative, yet the line of demarkation between legislative and administrative functions is not always easily discerned. The one runs into the other. The law books are full of statutes unquestionably valid, in which the Legislature has been content to simply establish rules and principles, leaving execution and details to other officers. Here it has declared that rates shall be reasonable and just, and committed what is, partially at least, the mere administration of that law to the railroad commissioners. Suppose, instead of a general declaration that rates should be reasonable and just, it had ordered that the rates should be so fixed as to secure to the carrier above the cost of carriage 3 per cent upon the money invested in the means of transportation, and then committed to the board of railroad commissioners the fixing of a schedule to carry this rule into effect, would not the functions thus vested in such a board be strictly administrative? While, of course, the cases are not exactly parallel, yet the illustration suggests how closely administrative functions press upon legislative power, and enforce the conviction that that which partakes so largely of mere administration should not hastily be declared an unconstitutional delegation of legislative power.

Fourth. The reasonableness of a rate changes with the changed condition of circumstances. That which would be fair and reasonable to-

day, six months or a year hence may be either too high or too low. The Legislature convenes only at stated periods, in this State once in two years. Justice will be more likely done if this power of fixing rates is vested in a body of continual session than if left with one meeting only at stated and long intervals. Such a power can change rates at any time, and thus meet the changing conditions of circumstances. While, of course, the argument from inconvenience cannot be pushed too far, yet it is certainly a matter of inquiry whether in the increasing complexity of our civilization, our social and business relations, the power of the Legislature to give increased extent to administrative functions must not be recognized.

Fifth. The decisions of the supreme court of the State as to whether such a delegation of power conflicts with the State Constitution must be accepted in the federal courts as final; and a federal court should not hurry to declare that unconstitutional which the state court may hold to be valid—especially when the supreme courts of some sister States have already upheld similar enactments.

Finally, whatever of direct authority upon the question exists sustains this delegation of power.

In the recent case of *State v. Railroad Company*, 37 N. W. Rep. 782, the Supreme Court of Minnesota considered this question, and sustained a similar enactment. See also the case of *State v. Railroad Company*, 35 N. W. Rep. 118, and 36 N. W. Rep. 308, decided by the Supreme Court of Nebraska.

In the case of *Tilley v. Savannah Railroad Company*, 5 Fed. Rep. 641, *Mr. Justice Woods*, of the Supreme Court of the United States, sitting on the circuit, also considered the question in a carefully prepared opinion, and sustained a similar enactment. See also other cases cited in the opinion of the Supreme Court of Minnesota, *supra*.

Beyond that, in the case of *Stone v. Farmers Trust Company*, 116 U. S. 307 [29 L. ed. 636], the validity of the Act of the State of Mississippi, delegating like power to a board of railroad commissioners, was before the Supreme Court of the United States; and though this specific objection was made by counsel to its validity, the Act was sustained. True, no special reference was made to this question in the opinion, and it was intimated that there might be questions arising under portions of the Act thereafter to be determined, so that possibly that case cannot be taken as an authoritative determination by that court of this question; still, as I said, all the authorities that have been cited, or that I have been able to find, bearing upon this precise question, are in favor of the constitutionality of such a delegation of power.

For these reasons I conclude that this contention of the complainant cannot be sustained.

The next proposition of complainant is that the law is a penal one; that it imposes enormous penalties without clearly defining the offenses. It will be observed that section 2 requires that all charges shall be reasonable and just. Section 23 provides that if any railroad company shall charge more than a fair and reasonable rate of toll, or make any unjust charge prohibited in section 2, it shall be deemed guilty

of extortion, and by section 26 be subject to criminal prosecution, with a large penalty.

Now the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate, it shall be deemed a criminal, and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is, or what any jury will find to be, a reasonable charge. If this were the construction to be placed upon this Act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it.

In *Dwarris*, Statutes, 652, it is laid down "That it is impossible to dissent from the doctrine of Lord Coke, that Acts of Parliament ought to be plainly and clearly, and not cunningly and darkly, penned, especially in legal matters." See also *U. S. v. Sharp*, Pet. C. Ct. 122; *The Enterprise*, 1 Paine, 34; Bish. Stat. Cr. § 41; Lieber, Hermeneutics, 156. In this the author quotes the law of the Chinese Penal Code, which reads as follows:

"Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished at least forty blows; and when the impropriety is of a serious nature, with eighty blows."

There is very little difference between such a statute and one which would make it a criminal offense to charge more than a reasonable rate. See another illustration in *Ex parte Jackson*, 45 Ark. 158. On the other hand, it is contended by defendants that the law, taken as a whole, makes the commissioners' schedule the test, and that the State is estopped to say that any charge equal to or less than that prescribed in the schedule was unreasonable. With such a construction there is definiteness and certainty, and the other provisions are a mere act of favor to the railroad companies, enabling them, in case a charge above the schedule rate is made, to show that such higher charge was in fact reasonable, and therefore the party guilty of no crime. *Chicago, B. & Q. R. Co. v. People*, 77 Ill. 443; *Sorrell v. Central R. Co.* 75 Ga. 509.

Another proposition of complainant is that the provisions making the schedule *prima facie* evidence in all suits is an infringement of the right to trial by jury guaranteed by the Constitution of Iowa, and those provisions of the Iowa and Federal Constitutions to the effect that no person shall be deprived of property without due process of law; the argument being that in trials by jury all questions of fact are to be determined by a jury, and should not be prejudged by the action of any other board or officer; that the State should be compelled to prove that the charge was unreasonable, and not compel the defendant, after this *prima facie* evidence, made by strangers to the litigation, and not from examination of the facts in the particular case, had been received, to prove that the charge was reasonable. In support of this contention the cases of *Plimpton v. Somerset*, 33 Vt. 283; *Francis v. Baker*, 11 R. I. 103; *State v. Beswick*, 13 R. I. 213, are cited.

On the other hand, it is contended by the

defendants that the Legislature has power to change the rules of evidence, and that that is all that is done by this provision, and that even in the absence of such express language in the statute, the fact that the schedule had been established by competent authority as a schedule of reasonable maximum rates would make it *prima facie*, if not conclusive, evidence.

Another proposition of complainant is that the penalties are so excessive that the Act cannot be sustained—\$1,000 to \$5,000 for the first offense; \$5,000 to \$10,000 for each subsequent offense—and the statement is made that a single day's business, if the charge for each shipment should turn out to be, in the judgment of the jury, an unreasonable charge, would accumulate penalties from a half a million to two and one half millions.

On the other hand, it is insisted by the defendants that obedience to the law brings no penalty; that the wealth and power of these large railway corporations justify large penalties; and that any way it would be an anomaly for a court of equity to restrain the operation of a penal law in behalf of one purposing to violate it, on the mere ground that the punishment for such violation is excessive.

These three questions were argued at length by counsel, but, in the view which I have taken of the case, I deem it unnecessary, at least on this application for a preliminary injunction, to decide either. I shall assume, for the purposes of this motion, that the complainant's construction is wrong, or, if right, that it furnishes no basis for the exercise of the restraining power of injunction; and with these comments pass to the third principal question.

Complainant claims that the schedule of rates prescribed is unreasonable. Defendants insist that the courts may not inquire whether it be reasonable or not; that the power of the State is absolute, and without limit; that when it is once determined that the State has acted in accordance with the form of law, all inquiry in the courts is at an end. Reliance is placed by them upon the decisions of the supreme court in the so called *Granger Cases*, 94 U. S. 113-187 [24 L. ed. 77-97].

It is not open to question that some expressions in the opinions fully sustain their contention. Thus, in the first case (*Munn Case*) Chief Justice Waite, after holding that the power of fixing the rates is vested in the Legislature, uses this language:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."

In the next case he uses this language:

"It was within the power of the company to call upon the Legislature to fix permanently this limit, and make it a part of the charter; and, if it was refused, to abstain from building the road and establishing the contemplated business. If that had been done, the charter might have presented a contract against future legislative interference. But it was not; and the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation."

And in the third case this language is found: "Where property has been clothed with a public interest, the Legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change."

But this language must be construed in connection with the question at issue. That question was this: the railroads were insisting that the Legislature was without power; that the question of what were or not reasonable rates was purely a judicial question, and to be determined by the courts alone. The court overruled the claim of the companies and sustained the power of the Legislature. What was the power accorded to the Legislature? Simply the power to fix reasonable rates. That it was not intended to decide that the Legislature had power to fix any rates, reasonable or unreasonable, is obvious from the subsequent language of the same Chief Justice in the later case of *Stone v. Farmers Trust Company*, 116 U. S. 307 [29 L. ed. 626], in which, delivering the opinion of the court, he says:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language is quoted with approval by *Mr. Justice Gray* in delivering the opinion of the supreme court in the case of *Dow v. Beidelman*, 125 U. S. 689 [31 L. ed. 843].

It is obvious from these last quotations that the mere fact that the Legislature has pursued the forms of law in prescribing a schedule of rates does not prevent inquiry by the courts, and the question is open, and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or mere proceedings which in the end, if not restrained, will work a confiscation of the property of complainant. Of course, some rule must exist, fixed and definite, to control the action of the courts, for it cannot be that a chancellor is at liberty to substitute his discretion as to the reasonableness of rates for that of the Legislature. The Legislature has the discretion; and the general rule is that where any officer or board has discretion, its acts within the limits of that discretion are not subject to review by the courts.

Counsel for complainant urge that the lowest rates the Legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 3 per cent. Decisions of the supreme court seem to forbid such a limit to the power of the Legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward, and the right of judicial interference exists only when the schedule of rates established will fail to secure to

the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the Legislature is the sole judge.

The question is then one alone of policy. Whether, by reducing the compensation to a minimum, railroad enterprises shall be discouraged, or, enlarging, encouraged, is a matter for legislative, and not judicial, determination. Take a kindred matter: it is within the power of the Legislature to prescribe the rate of interest and to punish by severe penalties the exaction of larger than the legal rate. What that legal rate shall be is not for the courts, but the Legislature, to determine. Suppose the Legislature of Iowa should reduce the legal rate of interest to 1 per cent; although such legislation would prevent capital from coming into the State, would the courts have power to declare the law unconstitutional? In like manner the rulings of the supreme court imply that the Legislature may reduce railroad rates until only a minimum of compensation is secured to the owner. The rule, therefore, to be laid down, is this: that where the proposed rates will give some compensation, however small, to the owners of the railroad property, the courts have no power to interfere. Appeal must then be made to the Legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere, and protect the companies from such rates.

Compensation implies three things: payment of cost of service, interest on bonds, and then some dividend. Cost of service implies skilled labor, the best appliances, keeping of the roadbed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and the shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, roadbeds, etc.; and it may be doubted whether even the Legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public.

The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and vested interest, which cannot be taken away. I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest, but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead.

The Legislature cannot destroy my property in my homestead, simply because it is mortgaged; neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract between the

company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagors' rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the Legislature has no compulsory power in the matter.

While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible—and that power of the Legislature over property is conceded—yet, if the rates are so reduced that no dividends are possible, and especially if they are such that the interest on the mortgage debt is not earned, then the enforcement of the rates means either confiscation, or compelling, in the language of the supreme court, the corporation to carry persons or property without reward.

Let me notice some objections which are made to this limit of the power of the Legislature, both generally and as applied to the present case. It is said that the complainant is a foreign corporation, permitted simply as an act of grace to do business in this State, and that the Legislature may therefore impose such terms and conditions upon its doing business in the State as it sees fit; that the carrier is not bound to continue in business, and if he finds the rates imposed by the State not remunerative may abandon the business. Whatever of force there may be in such arguments, as applied to mere personal property capable of removal and use elsewhere, or in other business, it is wholly without force as against railroad corporations, so large a proportion of whose investment is in the soil and fixtures appertaining thereto, which cannot be removed.

For a government, whether that government be a single sovereign or one of the majority, to say to an individual who has invested his means in so laudable an enterprise as the construction of a railroad, one which tends so much to the wealth and prosperity of the community, that, if he finds that the rates imposed will cause him to do business at a loss, he may quit business and abandon that road, is the very irony of despotism. Apples of Sodom were fruit of joy in comparison.

Reading, as I do, in the preamble of the Federal Constitution, that it was ordained to "establish justice," I can never believe that it is within the power of State or Nation thus practically to confiscate the property of an individual invested in and used for a purpose in which even the Argus eyes of the police power can see nothing injurious to public morals, public health or the general welfare.

I read also in the first section of the Bill of Rights of this State that "All men are by nature free and equal, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety and happiness;" and I know that while that remains as the supreme law of the State, no Legislature can directly or indirectly lay its withering or destroying hand on a single dollar invested in the legitimate business of transportation. Nor is it certain that the owner can abandon his business of transportation, even if he wishes. More than once

a party receiving such a franchise has been compelled by the courts, by the summary remedy of mandamus, to continue his business, and to perform the duties of the franchise which he has received.

Again; it is said that this complainant's road runs through other States; these States may impose no schedule of rates; part of its business is interstate, and only Congress can limit that; so that from the business elsewhere revenues may be earned which will enable it to make up any deficiency in this State. But the invalidity of this schedule does not depend upon legislation or action elsewhere. If this schedule may be put in force here, a similar one may be in Illinois, Minnesota, and other States through which the company's road runs. For some purposes its property in this State is separate and distinct from its property elsewhere, and out of this property within this State it is entitled to receive some compensation. Robbing Peter to pay Paul has never received judicial sanction.

Again; it is said that it cannot be determined in advance what the effect of the reduction of rates will be. Oftentimes it increases business; and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? But speculations as to the future are not guides for judicial actions; courts determine rights upon existing facts. Of course, there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether upon that basis such rates will be remunerative, or compel the transaction of business at a loss.

Coming now to the question of the schedule as presented, I remark that the schedule as a whole must control, and its validity or invalidity does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation; *second*, the fact that it is higher or lower than other schedules in force elsewhere, or at other times in this State, does not necessarily determine its validity.

I have had presented to me a volume of testimony in the way of affidavits, schedules and comparisons, much of which testimony in my mind has only an indirect bearing upon the question. It is not established clearly that this schedule will deprive the complainant of compensation, and yet it seems probable that it will. Confessedly, the schedule is a reduction from that heretofore in force in the State. It is undoubtedly less than that in force in the neighboring States.

The affidavit of Henry C. Wicker, the traffic manager of complainant, shows that he has made examinations of the gross earnings of the road in several States on local and also on part of the interstate business during the year 1887, and from such comparison finds that the reduction in revenues, if this schedule be applied uniformly to all business of the company, would be a sum exceeding the amount paid out in dividends in each of the three preceding years, and that the effect would be to prevent the railroad company from declaring any dividends. Other affidavits are filed showing the amounts

of dividends heretofore paid, and the difference between the schedule of the commissioners and those heretofore in force.

Of course I know that affidavits are unsatisfactory testimony, and that it would be the height of folly to say that this testimony clearly shows that such would be the effect of this schedule. But this is an application only for a preliminary injunction, and upon such application probabilities are to be considered, and the injuries which would result to either of the parties by the granting or refusing of the injunction. Certainly, it would be a great hardship to the complainant for this schedule to be put in force, if its effect was to deprive it of compensation.

On the other hand, what injury would result to the defendants or the shippers, the parties really interested on that side of the controversy, if the enforcement of the schedule be temporarily stayed? Besides the common-law remedies for unreasonable charges, this law, in sections which are unchallenged, forbids a carrier to demand or receive any unreasonable charge, and by section 9 gives to any shipper from whom any unreasonable charge is exacted the right by suit to recover treble damages and his counsel fees. Surely that appears reasonable protection against overcharges. Under those circumstances it would seem no more than fair that the restraining order be continued in a preliminary injunction. Certainly, if on full investigation it appears that the schedule of rates will not secure to the complainant some compensation for its investment, some income from its business, neither these defendants as officers or individuals, nor the people of this State, would wish to see it enforced. Every man's sense of justice says this, and no one ought to hesitate to have such a question fully heard and determined.

I have endeavored in this case to discuss only the three most important questions, those which seem to me vital to the controversy. Before closing, I must, however, notice two objections made by defendants: first, that the publication of this schedule is, of itself, no invasion of complainant's rights; that no immediate trespass is threatened, and therefore no injunction should issue. But equity interferes to prevent a multiplicity of suits, and where one act may be the foundation of many suits, courts have a right, and it is their duty, in the first instance, to stay that act if unlawful. Take this illustration: Suppose a board of assessors was charged with a duty of assessing property of the complainants, and that after such assessment was made, an apportionment of the property between a hundred different townships was to follow, and then warrants

of collection be issued and served by officers of these townships. Now, if the property of the company was in fact exempt from taxation would it be contended that it might not have injunction to stay the assessment, rather than wait to litigate with the hundred different collectors the validity of their warrants? And in this case, beyond the mere matter of multiplicity of suits, is the fact that the penalties imposed are large, and, while that of itself might not justify interference, it certainly adds force to the argument of multiplicity of suits.

Another matter is this: Defendants say that publication of the schedule was in fact complete, and, therefore there is nothing for the court to act upon. The law requires publication of notice for two successive weeks. As a matter of fact, a notice was published on June 14 and June 21 that the schedule would go into effect on the 28th day of June. On June 21 the complainant and three other corporations telegraphed to the defendants requesting that the date for taking effect for the schedule of Iowa rates be deferred from June 28 to July 5, to which this answer was sent: "Answering your message of last evening, time extended to July 5. W. W. Ainsworth, Sec'y," and a new notice designating July 5 was sent to the papers for publication, which notice was published once before the restraining order of this court was served upon defendants, and then the publication was discontinued.

It is insisted by defendants that this action was taken, not by the board, but by one commissioner acting independently, the others neither consenting nor being present or aware of it. Upon this matter there was considerable discussion, both as to the sufficiency of the notice, the number of times publication was required, the fact of the two publications of the first notice, the power of one commissioner to make the change, etc. I deem it unnecessary to consider these, nor do I express any opinion upon the rights of any other corporations than the four who united in the telegram to defendants. An official board acts through its secretary. This complainant, with others, addressed an official communication to the board. It received an answer in the regular way, one signed by the secretary as secretary. Equity and good faith forbid going behind such official notification.

These are all the matters that require notice.

A preliminary injunction will issue in accordance with the terms of the restraining order, and complainant will give bonds in the sum of \$50,000 to answer for all damages which the defendants or any persons injured by this restraining order may sustain if it shall turn out finally to have been improperly issued.

TEXAS SUPREME COURT.

GULF, COLORADO & SANTA FÉ R.
CO. *et al.*, *Appts.*,
v.
STATE OF TEXAS.

(From Lawyers' Reports, Annotated.)

1. An agreement between several rail-

road companies, some of which own and control competing lines, for the appointment of a common governing committee, or an association (composed of one member from each company) to fix the rates for which freights should be carried to and from points within the

NOTE.—Constitutional and statutory provisions affecting combinations between railroads to prevent competition: *Alabama* (Code 1886, vol. 1, § 1586, p. 2 INTER S.

389); *Arizona* (Rev. Stat. 1887, § 318, p. 113); *Arkansas* (Const. 1874, art. 17, § 4; Act March 24, 1887, § 2; Laws, p. 114); *Colorado* (Const. 1876, art. 15, § 5; Rev.

State of Texas, is illegal because contrary to article 10, § 5, of the Constitution of Texas, which provides that "No railroad . . . or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line."

2. The language of this provision of the Constitution of Texas evinces that control in any manner and to any extent was intended to be prohibited—provided it was such as is calculated to enable one railroad, by means of a contract or agreement for interference in the other's affairs, to keep down competition between them.

3. Even in the absence of such constitutional provision,—*quare*, whether action under the agreement could not be enjoined as being in restraint of competition and contrary to public policy.

4. Judicial notice may be taken by the court, of the fact that two railroads touching the same points are parallel and competing lines.

5. Such agreement is not relieved from illegality by the fact that any company party to the agreement has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, or that it has not been shown that the companies have made charges in excess of the limits allowed by law.

6. The State of Texas has the right to prohibit and interfere with a contract in restraint of competition, some of the parties to which are corporations created by the State, although it regulates charges upon freight carried to and fro between Texas and other States. The agreement, being illegal as to some, is illegal as to all.

(December 21, 1888.)

APPEAL by defendants from a judgment of the Travis County District Court in favor of the plaintiff in a bill in equity in the name of the State to restrain certain railroad companies from carrying out an agreement entered into by them. *Affirmed*.

The facts, and questions presented, are stated in the opinion.

Messrs. George W. McCrary, Baker, Botts & Baker, and J. W. Terry, for appellants.

Mr. J. S. Hogg, Atty-Gen., for appellee.

Gaines, J., delivered the opinion of the court:

This suit was brought in the name of the State, by her Attorney-General, to restrain certain railroad companies engaged in operating lines within the State from carrying out an agreement, entered into by them, by which they committed to a body of representatives of the companies the power to fix the rates for which freights should be carried to or from points within the State.

The theory of the State's case is that the parties to the agreement are parallel and competing

Stat. 1883, § 353, p. 211; Rev. Stat. 1883, § 300, p. 213). The meaning of the last clause of article 15, section 4, of the Constitution of Colorado, which provides that "Every railroad company shall have the right with its road . . . to connect with . . . any other railroad," is that such roads are to be connected physically, as distinguished from the business connection between roads which have approximate termini. *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 13 Fed. Rep. 546. Where two railway companies agree that they shall accept no freight for certain places, except to be carried over the road of the other, it is a conspiracy to grasp commerce, and suppress the building of railroads in two great States. A contract of this kind is against public policy, and therefore void. *Denver & N. O. R. Co. v. Atchison etc. R. Co.* 15 Fed. Rep. 650, 4 McCrary, 325, 16 Cent. L. J. 209; reversed on another point in 110 U. S. 667 (28 L. ed. 291). A contract by which one railroad company agrees with another upon a division of territory and traffic between them, and that one will not "do any through business to and from New Mexico via Trinidad or El Moro," amounts to an express renunciation of a duty of transportation enjoined by the State, and is therefore void. *Denver & N. O. R. Co. v. Atchison etc. R. Co.* (Colo.) 15 Fed. Rep. 650.

Connecticut (Act April 17, 1883, § 1; Laws, p. 267); see *Stat. v. Hartford and N. H. R. Co.* 29 Conn. 539; *Dakota* (Civil Code 1883, § 473, 1, p. 830); *Florida* (Act June 7, 1887, § 1; Laws, p. 117); *Georgia* (Const. 1877, art. 4, § 2, par. 4; Act Sept. 27, 1881, § 15; Laws, p. 165). Where a railroad corporation is about to purchase a controlling interest in the stock of a rival railroad, the sale would be invalid, and would be restrained. *Central R. Co. v. Collins*, 40 Ga. 582; *Havemeyer v. Havemeyer*, 11 Jones & S. 506, 515. Acts consolidating the Central Railroad & Banking Company with the Macon & Western Railroad Company construed. *Central R. & Bkg. Co. v. State*, 54 Ga. 401; followed in *Savannah, G. & N. A. R. Co. v. State*, 55 Ga. 557.

Illinois (Const. 1870, art. 11, § 11). Under the Act of February 12, 1885, all railroad companies have power to make contracts and arrangements with

each other for leasing or running their respective roads, or any part thereof; and a plea to an information, in the nature of a *quo warranto*, charging one company with usurping the powers and franchises granted to another, which sets up a contract between it and the other company authorizing it to operate the road of such other company, and that it is operating the road under such contract, is a good plea. *Illinois Midland R. Co. v. People*, 84 Ill. 426.

Indiana (Rev. Stat. 1883, § 3951). There being no statute in Indiana which in terms forbids or prohibits railroad corporations of that State from executing leases of their property, a lease made by such a corporation, and which is neither in violation of any statute nor against the public policy of the State, is valid. *Pittsburg etc. R. Co. v. Columbus etc. R. Co.* 8 Biss. 456. Where several insurance companies equalize rates of insurance in a large city, and agree not to insure themselves under penalty, the agreement is void. *Metzger v. Cleveland*, Marion Sup. Ct. (Ind.) 3 Ind. Law Mag. 42 (1883).

Iowa (Rev. Code 1884, § 1297, p. 341). The power to declare contracts void as against public policy should only be exercised in cases that are free from doubt. *Richmond v. Dubuque & S. C. R. Co.* 25 Iowa, 191.

Kansas (Comp. Laws 1885, § 5221, p. 778; § 5222 p. 779); *Maine* (Rev. Stat. 1883, chap. 51, § 54, p. 480); *Maryland* (Rev. Code 1878, p. 359); *Michigan* (Const. 1850, art. 19, § 2; How. Ann. Stat. 1882, § 3343, p. 854); *Minnesota* (Gen. Stat. 1878, p. 381; Act March 3, 1881, § 3; Laws, p. 110). By virtue of Special Laws 1870, chap. 57, § 4, and Special Laws 1871, chap. 71, § 1, the Minneapolis Railroad Company has authority to make a valid lease to another company of this State of rights which it has acquired since the passage of said chapter 71, by condemnation of land. *Pence v. St. Paul, M. & M. R. Co.* 28 Minn. 488.

Missouri (Const. 1875, art. 12, §§ 17, 18; Act March 30, 1887, § 1; Laws, p. 102; Id. § 2; see *Wiggins Ferry Co. v. Chicago & A. R. Co.* 73 Mo. 589; 5 Mo. App. 347; *Nebraska* (Const. 1875, art. 11, § 3; Laws, 1887, chap. 60, § 5, p. 543); *New Hampshire* (Gen. Laws 1878, p. 377). *Currier v. Concord Railroad Corpora-*

lines, and that the association formed by it is prohibited by section 5, article X., of the Constitution, which provides that "No railroad . . . or managers of any railroad corporation shall consolidate the stock, property or franchises of such corporation with . . . or in any way control any railroad corporation owning or having under its control a parallel or competing line."

The first assignment of error is that "The court erred in finding that many of the railroad companies defendant own and control parallel and competing lines; because, as defendants claim, there is no such admission in the answers, nor is there such an allegation in the State's petition, except that defendants are averred to be made parallel and competing lines by the action of said Texas Traffic Association." Under this assignment we will first consider the allegations in the petition:

The petition alleges the authority by which the respective charters of the defendant corporations were granted, and defines the lines of railroads respectively operated by them, and then charges "that the lines so owned and operated by the defendants are the main trunk lines and leading railways in Texas, and so traverse the State as to touch and penetrate her commercial centers, and become and are lawful competitors for the country's traffic, concentrated in the cities aforesaid." After alleging the formation of an executive committee of the traffic association, by the agreement, the carrying out of which is sought to be restrained, the petition also avers "That each of said executive committee and each of the employees of said association is an officer of each and all the defendants . . . and are in common employed and paid by them, and that

each of said railroad companies is a competing line for Texas traffic and trade."

Also, referring to the association formed by the agreement, the petition charges "That said railway companies by their said conspiracy, contract, combination and copartnership, have formed a consolidation of parallel and competing lines," etc.

The exceptions to the petition are upon grounds that would have been raised by a general demurrer. There is no exception on account of vagueness or indirectness of the allegations. In the absence of such an exception, every reasonable intendment must be indulged in favor of the sufficiency of the petition. See District Court Rules, 17, 18, 47 Tex. 619; *Burks v. Watson*, 48 Tex. 105.

We think it sufficiently appears from the allegations quoted above that the defendant companies are alleged to be owners and operators of parallel and competing lines of railroad; but the further question is presented whether, from the admissions in the pleadings and facts of which the court could take judicial notice, it was authorized to make the finding complained of in the assignment of error.

The case was submitted to the court for final disposition upon the petition, the answers and the supporting affidavits. The answers of the Gulf, Colorado & Santa Fé Railway Company, and of the Fort Worth & Denver City Railway Company, formally admit all allegations of the petition which are not therein specifically denied. The St. Louis, Arkansas & Texas Railway Company adopts the answer of the Santa Fé Company.

The answers of these defendants do not deny that the roads of the defendant companies are parallel or competing lines; therefore the fact

tion, 48 N. H. 321, 325, says: "The object of the law is to prevent the consolidation of rival and competing lines of railroad by contracts or arrangements between them, by means of which competition is removed; the purpose being to prevent the increase of the charges of such railroads beyond what might be expected under the influence of a free competition." *Greenhood, Public Policy*, §63-673.

New Jersey (Act 1880; P. L. 1880, 231), authorizing railroads to lease roads, etc., simply confers a right to exercise the power given after consent of those affected thereby, or payment of satisfactory compensation. *Mills v. New Jersey Cent. R. Co.* 2 Cent. Rep. 239, 41 N. J. Eq. 1. The Act providing for the consolidation of railroads does not give by implication the power to lease. *Mills v. New Jersey Cent. R. Co. supra*. Whether a provision in the charter of a railroad company authorizing it to lease or consolidate with any other railroad, and authorizing any company to take such lease and operate the same, would be sufficient to confer such authority upon any railroad of the State, does not arise in the present case, where the title of the Act incorporating the Railroad Company does not indicate such subject, and such provision of its charter is therefore void. See *Camden & A.R. Co. v. Mays Landing etc. R. Co.* 4 Cent. Rep. 801, 48 N. J. L. 539.

New York (Rev. Stat. 1882, p. 1592). Under the Statutes of New York railway lines cannot be consolidated unless they are substantially continuous lines, or running in the same general direction. 2 Rev. Stat. 7th ed. 1590; *People v. Boston, H. T. & W. R. Co.* 12 Abb. N. C. 230. The proprietors of five lines of boats, engaged in the transportation of persons and freight, combine, and stipulate that they all shall charge certain prices, the net earnings of all to be divided according to certain fixed proportions. The agreement is invalid. *Hooker v. Vandewater*, 4 Denio, 349. The proprietors of all boats on the Erie and Oswego Canals enter into an agreement to establish a uniform scale of prices of freight and passage, and to divide the profits arising therefrom proportionately, according to the num-

ber of boats employed, with a provision preventing the members from engaging in similar business outside of the combination. The contract is illegal. *Stanton v. Allen*, 5 Denio, 434, 435; *Transportation Cases*, Whart. Prec. No. 658. A contract by the owners of a railroad to be made, under an Act of incorporation, with the owners of a rival railroad, not to continue such road beyond a certain point, is void as contravening public policy. *Hartford & N. H. R. Co. v. New York & N. H. R. Co.* 3 Robt. 411. The acquisition of lands to prevent interference of competing lines, or for purposes of speculation, cannot be consummated under the statutes authorizing the taking of private property for public use. *Rensselaer & S. R. Co. v. Davis*, 43 N. Y. 137. Public policy is opposed to any infringement of the rights of travel, or of any of the facilities which competition may furnish, and the law will not uphold any agreement which does or may injuriously affect such rights or facilities. *Hartford & N. H. R. Co. v. N. Y. & N. H. R. Co.* 3 Robt. 411. See *People v. Boston & A. R. Co.* 70 N. Y. 569, 570; *Chicago etc. R. Co. v. Atty-Gen.* 9 West. Jur. 347 (1875). A contract made by a corporation in violation of the terms of its charter is *ultra vires*, and void as against public policy. *Union Bridge Co. v. Troy & L. R. Co.* 7 Lans. 240. A railway company cannot transfer or lease its line unless authorized by statute. *Troy & B. R. Co. v. Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Hinckley v. Gildersleeve*, 19 Grant, Ch. (U. C.) 212. See also *Atty-Gen. v. Niagara Falls Int. Bridge Co.* 20 Grant, Ch. (U. C.) 34; *Pittsburgh & C. R. Co. v. Bedford & B. R. Co.* *81 Pa. 104; *Woodruff v. Erie R. Co.* 25 Hun, 246; *Abbott v. Johnstown G. & K. Horse R. Co.* 80 N. Y. 27; *Archer v. Terre Haute & I. R. Co.* 102 Ill. 493. By chapter 444 of 1859, the Long Island Railroad Company was authorized to take a lease of any railroad that might be connected therewith. Held, that under this provision of the statute, a lease might be taken of a competing road, provided that, when united, the two roads were capable of forming continuous lines. *Wallace v. Long Island R. Co.* 12 Hun, 490. The manner

may be considered established as to them. On the other hand, the other defendants in their answers deny all the allegations of the petition not specifically admitted in such answers; and we find in their pleadings no admission that any one of the railroads is parallel to or a competitor for traffic with any other. Unless, therefore, the court could know judicially that two or more of the roads which were operated by the members of the association were parallel or competing lines, the finding was not warranted against the last named defendants.

In Wharton on Evidence, it is said: "Our own law . . . adopts the position that reason and evidence are the co-ordinate factors which go to make up proof, and that a judge in trying a case must not only exercise his own logical faculties in construing and applying evidence, but must draw on his own sources of knowledge for such information as is common to all intelligent persons of the same community. Such information must not only be thus common, but must be of undisputed truth. When it becomes disputable it ceases to fall under the head of notoriety." 1 Wharton, Ev. § 329.

The Supreme Court of the United States says: "It certainly cannot be laid down as a universal, or even as a general, proposition that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with respect to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice. Thus in the case of *U. S. v. La Vengeance*, 3 U. S. 3 Dall. 297 [1 L. ed. 610], the court judicially noticed the geographical position of Sandy Hook, and it may certainly take notice judicially of like notorious

facts, as that the Bay of New York, for instance, is within the ebb and flow of the tides." *Peyroux v. Howard*, 32 U. S. 7 Pet. 324 [8 L. ed. 700].

"A court is bound to take judicial notice of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to distance." 1 Wharton, Ev. § 339.

The principle has been applied in various ways, as the following cases will show: *Trenier v. Stewart*, 55 Ala. 458; *Gibson v. Stevens*, 49 U. S. 8 How. 399 [12 L. ed. 1123]; *Vanderwerker v. People*, 5 Wend. 530; *Pearce v. Langfit*, 101 Pa. 507; *Steinmetz v. Versailles & O. Turnpike Co.* 57 Ind. 457; *Tecksbury v. Schulenberg*, 41 Wis. 584; *Walker v. Allen*, 72 Ala. 456; *Oppenheim v. Les Wolf*, 3 Sandf. Ch. 571; *Nead-erhouser v. State*, 28 Ind. 257.

In *Railway Company v. Rushing*, 69 Tex. 306, Chief Justice Willie says: "It may be that this court judicially knowing the geography of the State might take notice of the general direction of these two roads as fixed by the statutes under consideration; that their lines must necessarily cross each other, and could therefore treat them as connecting lines and not parallel to each other; but as to whether they are competing lines, we can have no judicial knowledge whatever."

This latter proposition as a general rule and as applied to the case then before the court is undoubtedly correct. Whether two roads which intersect each other at a certain point are competitors for freight or not must depend upon a variety of circumstances not known to the court; but the authorities cited show that we must take notice of the geography of the State and at least of its navigable streams. It is a

of procedure against a consolidated corporation determined in *Prouty v. Lake Shore & M. S. R. Co.* 6 Hun, 246, 64 N. Y. 641. An agreement by a steamship corporation to buy out a competing line which, in consideration of a monthly payment, agrees to discontinue running vessels between ports mentioned, and not to charter or sell its vessels for use on that route, and not to become in any way interested in the running of steamships between those places, is not void as in restraint of trade. *Leslie v. Lorillard*, 1 L. R. A. 456. An agreement between plaintiff and defendant, each being a railroad company, that plaintiff would at all times deliver to defendant for transportation all the freight and passengers that it could lawfully control or influence, and that it would use its influence to promote the interests and business of defendant company as far as it could properly; that defendant would use its influence and exercise its control to promote plaintiff's interest; that it would make good any deficiencies of plaintiff to meet the interest upon its present bonded indebtedness; that plaintiff should cause to be deposited with defendant a majority of its capital stock; and that, so long as the management of the plaintiff company should be satisfactory to defendant, the latter would give to the representative of plaintiff the right to vote upon the stock so deposited,—is not *per se* void on the ground that it is contrary to public policy. *Tonawanda Valley & C. R. Co. v. N. Y. etc. R. Co.* 42 Hun, 496.

North Carolina. The North Carolina Railroad Company is invested by its charter with full authority to lease its road, with power to the lessee to change the gauge thereof. *State v. Richmond & D. R. Co.* 72 N. C. 634, 73 N. C. 527.

Ohio (Rev. Stat. 1884, p. 674, § 3300; Act April 22, 1885; Laws, p. 150). The lines of two railway companies, which are in their general features parallel and competing, cannot be connected for the carriage of freight and passengers over both "continuously," within the meaning of Revised Statutes, § 3379; and hence such companies cannot become consolidated into one corporation under 2 INTER S.

that section. *State v. Vanderbilt*, 37 Ohio St. 590.

Pennsylvania (Const. 1874, art. 17, § 4). The Lateral Railroad Act is constitutional. *Harvey v. Lloyd*, 3 Pa. 331; *Schoenberger v. Mulholland*, 8 Pa. 134; *Hays v. Risher*, 32 Pa. 169. The Act of March 29, 1840, is a supplement to the Act of May 5, 1832, is *in pari materia* with it, and should be so construed; and neither Act authorizes the connection of a lateral road, except with a public improvement. *Keeling v. Griffin*, 56 Pa. 305. Two railway companies owning lines of railroad connected only by other railroads which such companies hold by lease are not authorized to become consolidated into one corporation under Pennsylvania Revised Statutes, § 3379. Id. The lease of a railway is held invalid in *Kersey Oil Co. v. Oil Creek & A. R. Co.* 12 Phila. 374. Where a corporation authorized to make purchases and sales of and investments in the bonds and securities of other corporations, contracted for the purchase of a controlling interest in the stock and securities of a projected line of railroad, and the consideration coming from another railroad company; the projected railroad having a traffic contract with such other railroad company, by which the former, when completed, would be a parallel or competing line with it, the corporation in whose name the contract of purchase was made not owning a parallel or competing line,—transfer of the property, or any of it, will be enjoined as coming within Pennsylvania Constitution, art. 17, § 4, which prohibits any railroad from acquiring or consolidating with a parallel or competing railroad. *Pennsylvania R. Co. v. Com. (Pa.)* 4 Cent. Rep. 495, 501.

South Carolina (Gen. Stat. 1882, § 1425, p. 416); *Tennessee* (Act March 28, 1887; Laws, p. 329). A preliminary injunction was granted to restrain the withdrawal of railway connection with an old established stock yard, the withdrawal being attempted to aid in the erection of a monopoly at another point. *Coe v. Louisville & N. R. Co. (Tenn.)* 3 Fed. Rep. 775.

Texas (Const. 1876, art. 10, §§ 5, 6; Civil Stat. 1888,

matter of history that important lines of railroad once established have remained as fixed and as permanent in their course as the rivers themselves; they supersede in the main all other modes of travel between the points which they touch, and become as well if not better known than any other geographical feature of the country. Their locality becomes "notorious and indisputable." For instance: Can we doubt that the Houston & Texas Central Road runs from Houston to Dallas, and that the Gulf, Colorado & Santa Fé touches with its lines the same points? Can we doubt that they run during a considerable portion of their lines practically parallel to each other, and that they must necessarily compete for the traffic lying between them?

We think we must take judicial notice that these two roads are parallel and competing lines; and this is sufficient, so far as the disposition of this case is concerned. We are of opinion that the finding would have been sufficient to support the judgment if it had been that but two of the defendants were competitors with each other for traffic. The same may be said as to portions of the lines of the Texas & Pacific Company and of the St. Louis, Arkansas & Texas Company, which extend from Sherman to Texarkana. We cannot shut our eyes to the notorious and indisputable facts that these parts of the respective lines touch at the same points, and that they are natural competitors for the traffic of a large scope of country.

Under the next succeeding assignments of error it is insisted by counsel for appellants that the agreement in controversy which established the "Texas Traffic Association" is not in violation of section 5, article X., of the Constitution. In order to determine this question, we will give briefly some of the prominent provisions of the articles of agreement by which the association is created. Among its purposes,

stated in the preamble, is that "of preventing sudden and extreme fluctuations in Texas rates, alike injurious to the public and the transportation companies." Article I. provides that the "Traffic subject to this agreement shall be all freight and passenger business, except express and mail, carried by lines, parties hereto, which has origin or destination within the State of Texas, other than business to or from El Paso, Eagle Pass and Laredo proper."

The managing body of the association is an executive committee, composed of one member from each party to the agreement. They are to elect a commissioner, who is chief executive officer. "The executive committee shall agree upon the classification and rates covering the traffic subject to this agreement. No member shall directly or indirectly reduce rates," etc. Any violation of the agreement is to be reported to the commissioner, who shall "check the irregularity if he can." "All rates, rules, regulations and divisions when adopted by agreement or by arbitration, shall be simultaneously furnished by the commissioner to the traffic departments of all members of the association for the guidance of all the parties in interest," etc.

Without quoting further we think it apparent that a leading object, if not the sole object, of the association is by the appointment of a common governing committee to fix rates of transportation, so as to prevent competition among the several parties to the contract. We think it also apparent from the language of the section of the State Constitution, that its leading object was to prevent competing lines of railroad in the State from so fettering themselves by consolidation, lease or other agreement, by which one should in any way subject itself to the control of another, so as to stifle competition for the traffic of the State. The section prohibits any railroad company, or the

vol. 2, p. 442, art. 42, 46); *West Virginia* (Const. 1872, art. 11, § 11; Code 1887, p. 521); *Wisconsin* (Rev. Stat. 1878, § 1833, p. 536).

Such combinations are illegal at common law, because contrary to public policy. Agreements for such combinations and promises founded thereon will not be enforced (*Hooker v. Vanderwater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434; *Sayre v. Louisville Union Benev. Asso. 1 Duvall* (Ky.) 143; *Morgan v. Donovan*, 58 Ala. 241; *Hartford & N. H. R. Co. v. N. Y. & N. H. R. Co.* 3 Robt. 411; *State v. Hartford & N. H. R. Co.* 29 Conn. 538; and the carrying out of the combinations will be enjoined. *Central R. Co. v. Collins*, 40 Ga. 582; *Elkins v. Camden & A. R. Co.* 36 N. J. Eq. 5. Unless specially authorized by statute to lease its road, a railroad cannot, by so doing, defeat its obligations to the public, or escape the liability which the law imposes for torts, although committed by its lessee. *Lakin v. Willamette Valley & C. R. Co.* 13 Or. 436; *Balsley v. St. Louis etc. R. Co.* 6 West. Rep. 469, 119 Ill. 68. Where several common carriers combine as an association, the object of which is to reduce competition between them, and to provide a uniform charge for carriage, and fix upon such a rate, each member to pay a fine for carrying freight for less than the same, the agreement is void, and the association cannot recover the fine. *Sayre v. Louisville Union Benev. Asso. 1 Duvall* (Ky.) 143. A railroad company without statutory authority cannot guaranty the covenants of another company in the lease of a railroad, merely because of an anticipated increase of its own business in consequence of such lease. *Pennsylvania R. Co. v. St. Louis etc. R. Co.* 118 U. S. 290 (30 L. ed. 83).

Interstate and foreign commerce; state jurisdiction. The charter of a railroad company is—outside the limits of the rule against impairing the obligation of contracts—subject to the Constitution, statutes and public policy of the State by which the corpora-

tion was created. If the Constitution, statutes or public policy of the State forbid the company from entering into combinations to prevent competition, the act of the company in entering into such a combination is *ultra vires* even though the combination involves interstate traffic; and the state courts have jurisdiction to enjoin the act or to forfeit the charter of the company therefor. *Tippecanoe County v. Lafayette, M. & B. R. Co.* 50 Ind. 85 (competitive traffic between Lafayette, Ind. and points in Ill.); *State v. Vanderbilt*, 37 Ohio St. 590 (competitive traffic between Cincinnati, Ohio, and points outside Ohio reached through ports on Lake Erie); *Pennsylvania R. Co.'s App.* (Pa.) 4 Cent. Rep. 495 (competitive traffic between Pittsburgh and points reached through New York City); *State v. Atchison & N. R. Co.* (Neb.) 32 Am. & Eng. R. R. Cas. 388 (competitive traffic between Lincoln, Neb., and points in Kansas); *Thouiron v. East Tennessee, V. & G. R. Co.* (Ch. Ct. Tenn.) 5 Ry. & Corp. L. J. 77 (competitive traffic between points in Tennessee and points in adjoining States). See also *State v. Hartford & N. H. R. Co.* 29 Conn. 538; *Hartford & N. H. R. Co. v. N. Y. & N. H. R. Co.* 3 Robt. 411 (competitive traffic between New Haven, Conn., and points in Massachusetts); *Morgan v. Donovan*, 58 Ala. 241 (competitive traffic between Mobile, Ala. and New Orleans, La.). As to foreign commerce, see *Murray v. Vanderbilt*, 39 Barb. 140.

Contracts in restraint of trade. For the cases on contracts in restraint of trade generally, see *Leslie v. Lorillard*, 1 L. R. A. 456, note; *People v. North River Sugar Refining Co.* 2 L. R. A. 33; 5 R. R. Corp. L. J. 56. Combinations of corporations and firms in the nature of conspiracies, and against public policy, are illegal. See *People v. North River Sugar Ref. Co.* 2 L. R. A. 33. That contracts in restraint of trade are void, see *Leslie v. Lorillard*. 1 L. R. A. 456.

managers of any such company, from controlling in any way another company owning a competing line. If one is prohibited from making such a contract, we think two or more are so prohibited, and that when one company enters into an agreement with others, any one of which owns or controls a competing line of railroad, by which it subjects itself to the government of a body appointed by all parties to the agreement, then such company places itself under the control of the other to a definite extent, and acts in violation of the Constitution of the State. The manner and extent of the control are immaterial. The language of the Constitution clearly evinces that control in any manner and to any extent was intended to be prohibited; provided, it was such as is calculated to enable the one railroad, by means of a contract or agreement for an interference in the other's affairs, to keep down competition between them.

But it is insisted that because a unanimous vote of the committee is required to adopt any proposition involving revenue; because the rates are subject to be changed in a certain manner pointed out in the agreement; because any member may withdraw upon giving ninety days' notice; and because no penalty is prescribed for a violation of the articles,—the agreement does not subject one road to the management, or control of another; but it is apparent that as long as one company remains a member of the association, it is controlled as to rates by the executive committee, and is not free to enter into competition with its associates for freights. It may be that by its representative refusing its assent to any proposition—fixing rates in the first instance—it could not be controlled in this respect; but when once fixed, it would be powerless to secure a change without the consent of the representatives of the others; besides, the executive committee, upon its appointment, are made, to the extent of their powers, managers of all the companies, and hence, when a company subjects itself to the power of the committee by entering the association, it places itself under the control of managers of other railroads.

We cannot see that the fact that a member has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, can make any difference as to this question. If any one of defendants had withdrawn when this suit was filed, the allegation of that fact would have been an answer, as to that company, to the State's petition.

But it is further argued that because it has not been shown that they have made charges for freight or passengers in excess of the limits allowed by law, their action is not illegal. But we do not understand that the State seeks to restrain them for illegal charges made under the direction of the association, but for doing an illegal thing in entering into and carrying

out the terms of the agreement for the association. It is not quite clear to our minds that even in the absence of the constitutional provision we have had under discussion, the defendants' association could not be enjoined as being in restraint of competition and contrary to public policy.

But it is further insisted that because the agreement in question concerns interstate commerce, neither the State in its political capacity nor its courts have any jurisdiction over the matter. We understand the agreement to embrace both commerce within the State and commerce between this State and other States. The former might be enjoined if the latter could not. We are inclined to the opinion that if none of the corporations composing the association owed their existence to our laws, the State would have no power to prohibit or interfere with a contract of this character in so far as it regulated charges upon freight carried to and from between this and other States. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244].

But we think we have here a very different question. Several of the defendant corporations are chartered under the Laws of this State, notably the Gulf, Colorado & Santa Fé Railway Company and the Houston & Texas Central Railway Company. If we are correct in our conclusions we think it follows that the defendant corporations who derive their charters from this State are acting in violation of law in entering into this contract of association, some of the members of the association being competing lines of road. We think that the association, being illegal as to some of the defendants, is illegal as to all. It may be that should the companies which have their charters from the United States or from other States, come into this State and enter into a similar arrangement among themselves, the State would be powerless to interfere, because of its being a matter within the exclusive jurisdiction of the United States. Their contract might not be in violation of our laws, because we could make no laws interfering with interstate commerce; but it does not follow that they would enjoy the immunity of entering into contracts with our own corporations, which are prohibited to the latter, and thus enable them to set at naught the limitations upon their powers. There are certainly many things the State may do in exercise of its police powers, which may affect commerce between the States or between this State and foreign countries; but how far the police power of the State may extend, so far as it affects the question before us, we need not inquire. We are of opinion that the association under consideration is clearly illegal, as to some of the parties to it, and that being illegal as to some, it is illegal as to all, and may be restrained.

The judgment is therefore affirmed.

THE INTERSTATE COMMERCE COMMISSION.

Re PASSENGER TARIFFS AND RATE WARS.

(No. 162.)

1. Reduction of passenger rates without consent of connecting lines over
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which tickets are sold, and without filing schedules thereof with the Commission, held, to be in violation of section 6 of the Act to Regulate Commerce.

2. A passenger rate war in which rates were repeatedly reduced by several com-

peting lines to an exceedingly low basis on a particular class of traffic, without any filing of tariffs, was contrary to the requirements of law, as well as against the true interest of each party thereto.

3. **Reductions in competitive passenger rates** cannot legally be made without at the same time reducing intermediate rates, as required by section 4 of the Act.
4. **No necessity or compulsion is created** by a war of rates which justifies disobedience of the statute.
5. **The employment of ticket brokers and scalpers** for the sale of railroad tickets placed in their hands, to be disposed of at reduced rates under the pretense of paying commissions thereon, *held*, illegal.
6. **Rates** lower than the established tariff are prohibited by law.
7. **Rates** obtained from ticket brokers lower than those offered at the regular offices of the company effect unjust discrimination.
8. **The business of ticket brokers and scalpers** investigated and described.
9. **Existing methods respecting excursion and milage tickets** considered and found to lead to various abuses.
10. **Recommendations** made for amendment of the Law.

(Memorandum Filed January 25, 1889.)

MEMORANDUM BY THE COMMISSION.

Cooley, Chairman :

In September 1888 first class limited fares from St. Louis to New York City, according to the tariffs on file in the office of this Commission, were, and now are, as follows:

| | |
|---|---------|
| Vandalia Line and Pennsylvania Railroad..... | \$23 50 |
| Bee Line and New York Central & Hudson River R. R. | 22 00 |
| Wabash, Michigan Central and West Shore..... | 21 00 |
| Ohio & Mississippi and N. Y. L. E. & W. | 20 00 |
| Ohio & Mississippi, via Louisville | 19 00 |
| Chicago & Alton, via N. Y. L. E. & W. | 20 00 |
| Indianapolis & St. Louis, via N. Y. L. E. & W. | 20 00 |
| Wabash, via N. Y. L. E. & W. | 20 00 |

The considerable differences in these rates, are noticeable: the highest is seen to be 23 per cent above the lowest. They are understood to have been made by express or tacit assent of the managers of the respective lines, and it may be assumed that the differences in the price of tickets were expected to equalize the advantages of the respective routes in competing for business, so that each would be likely to secure an equitable proportion of the traffic competed for. The Ohio & Mississippi, having by way of Louisville the most circuitous route, offered to those would take it the cheapest ticket.

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Rates corresponding to these were made from St. Louis to Philadelphia, Baltimore and Washington. A so called rate war suddenly broke out, in the course of which large reductions in the through rates were repeatedly made. The Commission has given to officials of the leading roads an opportunity for explanation, and the course taken while the war lasted has been described by them as follows:

By one: "An unfortunate controversy with competing lines leading east from St. Louis compelled this company to make daily reductions in the rates named in our joint tariffs now on file in the office of your honorable Commission. These reductions were made, however, without any arrangements having been entered into with the several other carriers operating lines of railroad east of Indianapolis. It was impossible, under the circumstances, to establish any joint tariffs, and none therefore were made.

"Agents at local points between St. Louis and Indianapolis were instructed from day to day to sell tickets from their respective stations to New York and other eastern terminals at the same rates prevailing at the time of sale for tickets to such terminals from East St. Louis; and during this same period our agents at St. Louis and other stations between that city and Indianapolis, where tickets of the proper form were kept for sale, were instructed from day to day to sell tickets to noncompeting and all other points situate upon the direct through line, between St. Louis and New York, over which rates less than the joint tariff rates prevailed, and which were east of Indianapolis and west of New York and other eastern terminals, at the same rates or at rates not higher than those prevailing at the time from East St. Louis to such eastern terminals. The rates from East St. Louis referred to in these instructions were uniformly the prevailing rates from St. Louis, less twenty-five cents per ticket. The lowest rates at which we sold tickets from St. Louis to eastern terminals referred to were as follows: to New York, and to Philadelphia, \$10 each; to Baltimore and Washington, \$6.50 each. These prices were reached, by almost daily reduction, between September 20 and October 8, 1888. So frequent were the changes that it would have been impossible for us to have agreed with our eastern connections upon each change, and filed with your honorable Commission a joint tariff therefor; nor did we publish or file any local tariffs showing these reduced rates. Our eastern connections honored the tickets sold by us at the rates above mentioned."

The most noticeable feature of this historical statement is the assumption of the writer that because of "an unfortunate controversy" he suddenly found himself in circumstances where he was at liberty to discard all thought of what the Law required of him, and all regard for the rights of connecting lines or of ticket buyers, in order that he might take an effective part in the contention. He therefore proceeded to make rates which were not notified to the Commission or to the public in any regular way, to issue tickets for other carriers at rates not assented to by them, and to sell tickets to parties who might for aught he knew find them rejected before their journey, begun

in reliance upon them, was completed. "It was impossible under the circumstances," we are told, to do otherwise. The writer would have expressed the exact meaning more accurately had he said it was impossible to plunge into the fray in the manner customary in such cases and at the same time observe the requirements of the Law and the rights of ticket purchasers and of connecting lines, and therefore law and right were put aside until the fray was over.

By another it is said: "Rates in several instances were reduced even during one day's sales; besides this, rates were reduced daily, for quite a number of days, to less than the rates in effect for the preceding day, and that to quite a number of eastern points; the rates from St. Louis to different points reached figures stated below, viz.: New York, \$6.50; Philadelphia, \$6.75; Baltimore, \$6.50; Washington, \$6.50. Reduced rates were made on account of reductions made by competing lines. As a rule instructions were given our agents at points east of St. Louis, during the period referred to, to make corresponding reductions to points east as were made from our western terminal. There may possibly have been instances where this rule was not fully apprehended, but the general instructions were to follow the line of policy indicated above. The tickets which were issued from St. Louis to any eastern point were good to any intermediate point, so that in fact it was not regarded as necessary to give a rate to every intermediate point, though, as a matter of fact our rates were less in most instances to intermediate points than they were to extreme eastern points."

Here is a like assumption of an overruling necessity to that noted above. The writer apparently hopes that the instructions to subordinates which "as a rule" were given, though perhaps not "apprehended" were nevertheless observed, and that the "line of policy indicated" was followed. But whether this was so or not, the one necessity of striking effective blows in the controversy was paramount.

By a third the facts are thus stated: "It is true that during the so called rate war, in which we were forced to become unwilling parties, passenger tickets were sold at reduced and varying rates from St. Louis to New York, and these prices changed daily for some time. I do not understand, however, that rates so made came within the Interstate Commerce Act so as to require us to file copy of the same with the Commission, as no general tariffs were agreed upon, and could not well be, on account of the changes which were too frequent to admit of general agreement."

Here again an imperative necessity is encountered. The writer is "forced to become an unwilling party" to a controversy in the course of which he makes changes in his rates with such rapidity that the Law has no opportunity to attach to them its commands. The Law must be silent while the fray is on.

As a matter of fact none of the parties to this "war" gave any notice to the Commission of any one of these changes, nor did it have from any one of them the least information on the subject until, in consequence of reports of what was going on, a call was made for it.

The regular passenger fare from St. Louis to

Indianapolis immediately preceding this war was and now is \$7.50; to Cincinnati, \$10; to Louisville, \$8; to Chicago, \$7.50. Rates from St. Louis to all points east of those named were and are higher than rates given to New York City and other eastern terminals while the "controversy" was in progress.

It would be interesting to ascertain, if it were possible to do so, what the real cause for this controversy was; what in other words it was that created this imperative and overpowering necessity under which for the time the carriers acted. No one of the carriers assumes the responsibility of having begun the reduction of rates; evidently the party who began it has no reason, upon which he is content to stand, to assign therefor. No specific act of wrong doing by competitors is named as a reason, and if any one had a grievance, it is not known that any attempt was made to obtain redress by peaceful means. It has been intimated to the Commission that hostilities had their origin in a belief on the part of the official who inaugurated them that his line was not getting the proportion of business that was expected when the rates were arranged; a belief that on investigation proved to be unfounded. We have no evidence that this intimation is accurate, but the fact seems to be unquestionable that the ordinary precautionary steps that in other lines of business would be taken before converting a state of amicable rivalry among competitors into a state of destructive warfare, were omitted altogether.

Notice was taken of this subject in the Second Annual Report of the Commission [*ante*, 260], as follows:

"Steadiness of rates, then, is an object to be kept in view in the public interest. In a recent passenger-rate war between roads extending east from St. Louis joint rates were in some instances reduced several times in the course of a single day, until they were made absurdly low—the reduction being sometimes made without even waiting for the consent of connecting roads, so that parties who had purchased tickets would have found them not honored before they reached their destination, and been subjected to great annoyance before redress could be obtained, had the connecting roads declined, as they might have done, to accept the tickets and share the losses. When the general passenger agents had sufficiently subdued their belligerent mood, the rates were suddenly advanced, with the inevitable result that parties who had calculated on the low rates and been enticed from their homes or seduced into taking any action in reliance upon them, found themselves compelled to pay more than they had reason to expect; they doubtless felt something the same sense of being wronged that the people of a neutral territory may be expected to feel when it is overrun by the armies of belligerents."

It is impossible to read the correspondence from which quotations are above made without a conviction that while hostilities were in progress not one of the parties paused to consider whether that which was being done was in conformity with the Act to Regulate Commerce. It seems quite clear that in several respects the Act was violated by some of the

carriers, and in some particulars by all of them. The tickets in question necessarily all contemplated continuous trips over the lines of connecting carriers, and were issued as entitling purchasers to transportation accordingly. But in some instances if not in all they appear to have been sold without obtaining consent from the connecting lines. Nevertheless if purchasers accepted them as contracts according to the terms on which they were sold, the initial carriers thereby assumed in their dealings with the public to have the right to make them, and took the risk of their patrons being imposed upon in case remote carriers should refuse to honor them. Such a contract for joint transportation involves a joint tariff. Interstate commerce cannot be taken out of the provisions of the Act by the assumption that the initial carrier issues contracts without authority. There is at least an implied authority; and actual authority in the present case was shown by the fact that the tickets were honored. Every reduction involved a new joint tariff; and it is therefore seen that the provisions of section 6 of the Act to Regulate Commerce which require the filing of joint rates with the Commission were utterly ignored by the carriers. Nor will it escape observation that the reason for ignoring them was that they constituted an impediment to the sudden and rapid changing of rates which was indulged in while what the parties call the "unfortunate controversy" was pending.

Moreover, although the correspondence exhibits an effort to convey the impression that the provisions of the 4th section of the Act were not violated during the period in question, it is difficult for the Commission to accept what is said as proof of an actual belief. This is especially difficult in view of the guarded manner in which one of the writers states his supposition that his rule was observed and his policy carried out. But violations of this section have been distinctly charged. One complaint made to the Commission states facts as follows: The complaining party was aware of the fact that on a day named the recognized rate from St. Louis to New York by one of these roads was \$6.50. On the following morning he took the cars for New York at an intermediate station and was charged by the same route \$16. This would seem to show either that the 4th section of the Act was violated, or that the rates were suddenly advanced without notice. But whichever may have been the case it is perfectly manifest that for the time being the carriers engaged in the controversy paid no attention whatever to the question whether any of the parties concerned, themselves included, were or were not conforming to the Law. Apparently they devoted their whole energies to making rates from hour to hour that should at least preserve the relative advantages which had been held by them respectively under the prior arrangement of rates. In other words they disregarded altogether such protection as the Law would have afforded, and devoted themselves to methods which they were accustomed to see employed for the redress of violations of similar understandings before the Law, which should now control them, was enacted.

After the parties had thus for a time indulged

their belligerent propensities, the rates were again restored by all the competing routes to the figures before prevailing. These rates may for all present purposes be assumed to be reasonable; the carriers had established them and the Commission is not advised that the public had been complaining of them. It is fair to conclude that they resulted in satisfactory revenue. The restoration was necessarily matter of agreement, either express or implied, so that in the end after suffering considerable losses, the belligerents came back to exactly the positions, in all respects, except as to the losses, which had been occupied by them respectively before the war began.

Assuming that the rates are reasonable, it is pertinent now to ask: What is the significance of such an outbreak, and what good or even plausible reason can be assigned by any of the parties for engaging in it? As usual in such cases each carrier claimed that it was forced to do what it did by the action of competitors, and now relies for a justification of its conduct upon an overruling necessity which took away all free will. The very excuse admits that there must have been at least one offender, but no one admits itself to be the one, or points to another as the guilty party. The conclusion of the carriers thus presented to the public is that the action of some one not identified absolved all the others from obligation to observe the Law.

We cannot admit this conclusion. We cannot agree that even if the facts were as they were assumed to be, the act of one carrier forced upon the others the conduct they indulged in. The compulsion, if there was one, must have arisen from either an open or a secret reduction of the agreed rate. This is supposed to have created the necessity of unhesitatingly meeting the cut rate at all hazards. But from what does any such necessity arise?

It certainly does not arise from any requirement of the Act to Regulate Commerce. That Act does not require one carrier to gauge its rates by those charged by another, but when its rates are reasonable, allows them to be maintained. The necessity, if any, must therefore spring from considerations of business prudence and policy.

What is commonly said on behalf of the carriers in such cases is that unless the cut rate is met, traffic, which the line making the rate would not under normal conditions obtain, would flow to it, and be permanently lost by others which are better entitled to it. We concede the likelihood that a temporary loss would be suffered, but that it would be permanent we do not think at all probable.

It is well known that travel has its convenient and its favorite routes, and that it cannot be altogether diverted from these by mere cheapness of rates. The very rates established by the carriers for travel between St. Louis and the Atlantic cities recognized this fact, for as is shown above, the less desirable routes made considerably lower rates than others. It is also well known that frequently there are exceptional reasons for a traveler's taking a particular route though some other may be cheaper and in general more convenient. It is not to be assumed or believed, therefore, that any cut made by one line could have altogether taken the

travel away from the others. But if it did, there would be no reason to suppose the loss would be permanent. Travel is by individual persons, attracted to particular routes by the advantages which at the time are offered; and the effect of a rate which is so low that it is impossible to maintain it, must cease immediately or very soon after it ceases to be given. It is only where the cut rate is not too low to be made profitable by the increased business it may bring that the carriers can expect anything more than a temporary advantage, since it is only under such circumstances that it can be long continued. And in the case under consideration no one pretends that the low rate which was reached could possibly have been long maintained. The cut was obviously a temporary expedient; a war measure to be retreated from when the immediate object was accomplished.

In this case, then, if the several carriers had not met the cut rate, they would for the time being have suffered some loss of passenger traffic; probably the major part of that which was competitive from St. Louis with the line reducing the rate. There are no facts in possession of the Commission which show that they would have lost anything more. How long the cut rate would have been maintained if not met we cannot know, but it is not by any means certain that meeting the rate hastened its withdrawal. If the cut began in misapprehension, the obvious remedy was to remove the misapprehension by friendly conference; to retort with hostile action was more likely to imbitter the difficulties than speedily to remove them.

We may go farther, and say that in all cases where arrangements are broken up under which parties have been competing for business with maintenance of reasonable and steady rates, and when obviously only mutual assent can restore the former relations, ordinary business prudence will dictate that the first step taken should be in the line of an attempt to bring about a better understanding. Unfortunately in these cases instead of being the first step it is very apt to be the last step thought of; the first energies are devoted to the infliction of mutual injuries.

Sometimes these are continued until the parties reach the point of exhaustion; sometimes their folly is made apparent sooner; but in cases like the present, where agreement express or implied at length restores precisely the state of things existing before hostilities began, the intermediate injuries are by the very restoration shown to have been needless, if not positively wanton.

What a competitive line loses by making an unreasonably low rate is not readily computed. In the case before us the losses must have been considerable. These would include first the direct loss on tickets sold at lower rates; next the loss suffered from making the rates between intermediate points and the same terminals conform to the requirements of section 4 of the Act to Regulate Commerce. On a long line like that between St. Louis and New York the losses on intermediate traffic, if that section were observed, would have considerably more than offset all possible losses that could have come as a consequence of a steady observance

of the through rate. But the reductions would not be restricted within the express requirements of section 4; for rates must have some regard for relative equality, and the effect upon other classes of tickets than those issued for the competitive traffic might have been very considerable.

Judging from the facts before us, there would seem to be no avoiding the conclusion that the dictates of reasonable prudence were disregarded by every one of the carriers that met the cut rates. The losses from meeting them, if the other reductions were made which an observance of the Act to Regulate Commerce would render necessary, must have been much greater than any which would have been at all likely to result from maintaining the previous rates. But this is not all; it was perfectly apparent from the first that the only effectual and permanent remedy that the parties could have for the difficulty which had arisen was to come to a better understanding; and a prudent regard to their own interest would have dictated that the steps taken should have been chosen from their probable tendency to bring it about. Hostile and retaliatory action naturally led in the other direction.

It is not for a moment to be conceded that any one of the carriers involved in this controversy acted under any such compulsion as their agents now bring forward in order to excuse themselves. The imperative necessity under which they claim to have acted was matter of pure assumption. Some one of them voluntarily began to cut the rates, and all the rest hastened to follow the example. Every one could have abstained from doing what he did, and have continued to observe the established rates if he had not chosen to do the contrary. Each one, on a calculation of interest and to the disregard of everything else, decided not to do so. But when he chose to take part in reducing the rates, as he had an unquestionable right to do, there was nothing in reason or in the nature of things to preclude the reductions being made in conformity with the Law. All the parties however elected the more reckless course. Had the Law been observed in the making and filing of joint rates, the process would necessarily have been more slow and deliberate, and the reductions it may be assumed would not have been likely to reach the very low figures they finally attained. The disregard of legal requirements was therefore apparently injurious to the carriers as well as illegal; and not one of the agents who took part in this reckless warfare, and while it lasted made everything else yield to the supposed interest of his employer, is now able to show that even when considered from the point of view of selfish interest the action he took was excusable. In any light in which it may be viewed it deserves to be designated unwise, and as coming under the condemnation, not only of the Law, but of selfish policy also.

A still more extraordinary war in passenger rates was found raging in the territory west, northwest and southwest of Chicago at the beginning of December, 1888.

The roads in that section of the country had for several months been disagreeing over freight rates, and there had been such reductions as brought them to very low figures. The reduc-

tions were openly made, and called for no intervention on the part of the Commission until the action of the Chicago, St. Paul & Kansas City Railway Co., in reducing the through rates from Chicago to St. Paul below those to intermediate stations, seemed to demand its interference. (See *Re Chicago, St. Paul & Kansas City R. Co.* 2 Inters. Com. Rep. 137, 2 Inters. Com. Com. Rep. 231).

For a considerable time there was no change in the passenger tariffs, but it was perhaps inevitable that the difference in respect to freight rates should, with no great delay, extend to passenger rates also. There were besides some special causes for disturbance in the passenger traffic. The Wisconsin Central, which is a less direct line between Chicago and St. Paul than some others, and cannot offer equal inducements to travelers, claimed the privilege of making a somewhat lower rate; in other words, insisted that the other lines should concede to it what is known as a differential; and one or two of the other lines, which are similarly circumstanced, were dissatisfied with their share of the traffic under equal rates, and showed an inclination to make the like claim. The differential was not conceded, and it was soon suspected and charged that one or more of what were considered the weaker lines in the competition for Chicago and St. Paul traffic were secretly cutting the rates. The charge was denied, but the denial was apparently not credited, and measures of retaliation were resorted to which after a time involved all the roads engaged in the passenger traffic between Chicago and St. Paul, Minneapolis, Council Bluffs and Omaha, and also those engaged in the like traffic between Chicago and St. Louis and between Chicago and Kansas City, with the exception of the Illinois Central. This last company is not, to the knowledge of the Commission, charged by any one with participation in the discreditable proceedings which for a time took place.

The war between the roads continuing, and no one appearing inclined to invite the intervention of the Commission, two of its members, at the beginning of December, proceeded to Chicago to investigate what was fast becoming a public scandal.

When the Commissioners arrived in Chicago they found that the business of selling tickets for passenger transportation between the cities named was being conducted almost exclusively by ticket brokers, who were evidently reaping enormous profits out of it. For the purpose of the sale of tickets the city offices of the several roads, and the general offices also, might almost as well have been closed. The brokers sold the tickets, and they did this in their own discretion for such prices as they could obtain. The evidence was abundant that there was no uniformity in the prices whatever.

This state of things seemed to call for some investigation into the business of these brokers. It was found that there were twenty-three offices kept by them in the City of Chicago and a great many others in other parts of the country. Some of these were handsome offices, prominently located, expensively fitted up and supplied with a force of clerks exceeding that required in the regular city ticket offices of the roads. The proprietors call themselves "ticket

brokers," and they repel the appellation of "scalpers," which is very generally applied to them by the public, and sometimes by railroad men. Those in the leading cities of the country have formed themselves into an association and interchange business. One of the Chicago brokers has three offices in that city and interests in offices elsewhere, and the evidence taken by the Commission fairly tended to show that his annual profits must exceed, perhaps considerably, the salary which the people of the United States pay to their President. These great profits are a drain upon the resources of the carriers; and as those resources are wholly derived from the rates and fares levied upon the public for services rendered, it becomes of the utmost importance to ascertain, if we can, what legitimate reason there can be for this business existing.

The ticket "scalper" as he first makes his appearance in the railroad business appears as a person engaged in imposing upon the public something as evidence of a right to transportation which is only apparently so, and which will only be used through deceiving the conductor upon the train, or through the conductor's dishonest or careless connivance. Tickets not transferable but which have nevertheless passed from the hands of the person to whom they were issued, tickets limited in time and not made use of until the time has expired, tickets partly used, and not by the conditions of issue capable of further use, are all dealt in by such persons; and it is frequently charged that they are sold by first erasing dates or conditions that show them to have ceased to be operative. This sort of business has always been accounted thoroughly disreputable, and as it could only be made profitable through frauds upon either the carrier or the purchaser of the ticket—who often found what he had bought refused on the train—the State Legislature in some cases interfered and passed laws which were designed to bring the business to an end. The chief difficulty in the way was the fact that there were often valid tickets out which for various reasons were not fully used; such, for example, as a round trip ticket which had been used one way only. Such tickets, if not made nontransferable, had a commercial value, but as the holder might not know of persons desiring to use them, or might not have the time or opportunity to find such persons, he naturally sold to any one who would buy, and the tickets were sufficiently numerous to tempt persons to engage in the purchase and sale as a business. The Legislature of Illinois undertook to overcome the difficulty by requiring the railroad companies to redeem the unused part of a ticket by paying for it a sum equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which a portion of said ticket was actually used; but where, as very frequently happened, especially in the case of round trip tickets, the sale was at a considerable reduction from the regular tariff, the unused portion had a commercial value exceeding the sum the railroad company was required to pay to redeem it. The scalpers therefore continued to buy and to sell, and when they were guilty of no fraud or deception they were either not prosecuted for violations of law, or, if prosecuted, were not con-

victed, and the law became a dead letter. How bold these people have at length become in their disregard of right and of law may be seen from the paper, the body of which is here given, which in printed form is sent to persons supposed to have in their possession evidences of a right to transportation. The paper is issued from offices of ticket brokers in Memphis, Tenn., and New Orleans, La., and with the omission of the heading and signature is as follows:

"Dear Sir:—As our facilities are such that we can handle editorial mileage and passes without risk on your part, on our part, or on the part of the party that is traveling—if you desire to sell your mileage or pass, by your filling out the blank below, we will give you one and one half (1½c.) cents per mile on passes or mileage for any number of miles on any railroad. We never care to buy passes or mileage unless the blank below is properly filled out; which is to insure us against risk. When the party we sell to has the blank filled out, he knows just when to present his pass or book for passage. You are aware that most of the editorial mileage and passes expire January 1, 1889, therefore if you have anything you would like to sell, send it in at once. The passes and books read 'not transferable'—but you are aware that the courts have decided that all railroad tickets, passes, and mileage are good and transferable until used. So you can sell your book with safety, and we can guarantee you no trouble. We refer you to any business house or bank where we are doing business.

"Hoping you will send in your pass and whatever mileage you may have on any railroad, or call upon us personally,

We remain,

Very Respectfully Yours," etc.

The blank which is referred to is as follows:

"Enclosed you will find Mileage Book No. _____ on _____ Railroad, No. of miles _____. What conductors are you acquainted with and on what division do they run from _____ to _____ Address _____ Name _____ Town _____ County _____ State _____"

A very slight inspection of this paper is conclusive of the fact that it contemplates frauds upon the railroad companies, to be accomplished either by deceiving conductors or by their connivance or acquiescence. Passes and mileage tickets are believed to be always made non-transferable, and are therefore not salable unless a fraud is intended. But, as one of these brokers told the Commissioners, a new conductor sometimes enforced the restriction and refused to permit anyone except the original party to travel upon the ticket; in a little time he ceased to be particular, and the tickets were received from anyone.

It might be reasonably inferred that the railroad managers, knowing the disreputable nature of the business such men are engaged in and the injury to their roads therefrom, would

endeavor to bring the business to an end, or at least to put such restraints upon it as a reasonable and prudent management of their own business would render practicable. It was found, however, that in the country west and northwest of Chicago the fact was quite otherwise. In some respects the railroad business seemed to be managed with special reference to advancing the interest of these persons, as if they were objects of consideration who must be made to prosper whether the roads did or not. In other particulars the methods of the roads, though adopted in supposed advancement of their own interest exclusively, nevertheless tended in the same direction. The statement of a few facts will render this plain:

It has been the practice of many railroad companies, instead of paying money for advertising and other printing, to pay where they could in mileage tickets. It is not to be supposed they expect that these will all be used by the persons to whom they are issued, and they must therefore contemplate their being sold. If sold, they naturally to some extent at least would pass to the hands of persons making the purchase and sale a business. Mileage tickets are also largely sold by railroad companies to anyone calling for them, and the price put upon them is so much below the price charged for other tickets entitling the holder to a corresponding transportation that a person desiring to take a short journey by rail may find he can save money by purchasing a thousand mile ticket and selling it at the end of his journey instead of buying the customary ticket for that journey alone. A mileage ticket issued with a restrictive clause to one person might thus be used for a number of trips by different persons, each one of whom would get his transportation at something less than the regular rate, and in addition one or more brokers would have a small profit out of the ticket also. This misuse of mileage tickets is so easy and the prevention so difficult, that the question seems a pertinent one, whether it is or not unwise for the companies to make so great a difference as they do between the mileage and other tickets, thereby inviting the purchase of the former for fraudulent use. If the mileage tickets as now sold, and now used and abused, can be afforded, a strong presumption arises that, with the abuses cut off, a less rate for the ordinary tickets could be accepted without the carriers incurring loss thereby.

Mileage tickets, however, could not by themselves afford a large source of income to ticket brokers. Other exceptional tickets are also used very extensively, and some of these the brokers are able to handle in ways that result in large profits. The carriers west of Chicago appear to do a large business in the issue of what they call excursion tickets. Some of these are tickets to public gatherings, such as agricultural fairs, Grand Army gatherings, religious and political conventions, etc., or they are tickets for students gathered in educational institutions to go home and return when the vacations occur. But the issue of these exceptional tickets is not confined to such gatherings; it seems to be supposed that under the provision in section 22 of the Act to Regulate Commerce, "that nothing in this Act shall apply to the issuance of mileage, excursion or commutation passenger

tickets," the companies are at liberty to issue almost anything which they see fit to designate an excursion ticket, and that in issuing it they are free from the obligation to publish rates or otherwise observe the requirements of the Act. And having that liberty, investigation seemed to show that they had exercised it on various excuses and on all possible occasions. "Harvest Excursion tickets" have been issued for travel into sections where important crops were coming to maturity or were being gathered, as have also holiday excursion tickets, and tickets for pleasure excursions of various sorts. When the officers who issued these tickets were asked for their definition of an "excursion ticket," they for the most part answered that it was a ticket issued for a round trip at a reduced rate; but it was sometimes found that they were not even round trip tickets in the ordinary sense, for they were issued for trips about the country not contemplating a return by the same route. The only characteristic feature of the tickets then seemed to be that they were issued at a reduced rate; and if this fact relieved the carrier from the obligation imposed by the Act, it was easy for it to rid itself, so far as passenger traffic was concerned, from those obligations altogether. But clearly this practice was an abuse, and in some particulars an evasion of the Law. It is not believed that Congress ever intended that the words "excursion tickets" in the Act should be given this broad and irresponsible construction.

The surprising fact to be mentioned in this connection is that the railroad companies should be solicitous or even willing to evade the Act in this way, or so greatly to stretch its construction in order to cover doubtful cases. Many of the so called excursion tickets are issued at one fare for a round trip, and the result of their being offered is that large numbers of people buy the tickets with no thought of making use of them for any such occasion as that for which they are nominally issued, but in order to make use of them as a means of cutting the regular rates. If, for example, an excursion is advertised from Chicago to St. Louis at one fare for the round trip, a resident of St. Louis who happens to be in Chicago, or any party having occasion to pass from Chicago to or through St. Louis, may purchase one of these tickets, use it for his own passage, for which he should have paid the regular rate, and at St. Louis sell it to be used for a passage from St. Louis to Chicago by some one else who also should have paid the regular rate, and would have done so had not this return ticket been in the market. The road thus loses one fare, and as such tickets at St. Louis would naturally fall into the hands of brokers, their issue tends to supply this class of people with business. But the evidence showed that the brokers themselves purchase these tickets, in blocks of five or ten, perhaps, at a time, so that during the time they are being sold nominally for a special occasion, and also for an indefinite period afterwards, the regular travel is supplied, not at the ticket offices of the companies, but at the offices of ticket brokers. This class of tickets thus becomes a great demoralizer of rates at all periods; their existence on the market is conceded to be a great evil. Nevertheless, railroad managers, instead of taking steps to reduce the evil

to a minimum, as they might naturally be expected to do, seem more inclined to multiply excuses for issuing them, and to embrace all possible occasions. Commonly the tickets are issued on conditions which to a large extent would preclude the abuses if the conditions were rigidly enforced; but the great disparity between the excursion and the normal rates would naturally lead to the taking of risks and would invite falsehood and equivocation to secure the acceptance of the excursion tickets by conductors if strict enforcement of conditions were attempted.

The Commission cannot believe that the railroad companies are consulting their true interest in perpetuating this condition of things. Many of the tickets, as has already been intimated, are not believed to be excursion tickets in any proper sense. But if they were properly such, and the right to issue them were undoubted, the duty to provide against the abuses practiced by means of them would seem to be clear. The abuses are seen to be facilitated and increased by the great difference made in price between these and the ordinary tickets; and the question again arises, as in the case of mileage tickets, whether this difference cannot prudently be reduced, perhaps by some increase on the one side, and a corresponding reduction on the other. At the same time the carriers ought to give thought to the devising of a scheme for the redemption by themselves of the unused portions of tickets. A scheme for that purpose ought certainly to be possible, and if possible ought to be devised and put in force without delay.

But we have not as yet enumerated all the improper sources of income of the ticket brokers. Indeed, it is not probable that the large number now prospering on railroad revenues could make a living at all if they were not directly aided by the railroad officials. It seems to be almost a matter of course that when a war of rates begins, regular tickets shall be put into the hands of the brokers to be sold at such cut rate as shall be agreed upon. During the last fall it was well known that the roads leading out of Chicago had done this to a very large extent. The rates were thereby cut between Chicago, St. Louis and Kansas City, and also between Chicago and the cities to the Northwest, nearly one half. The war carried on in part by this means nearly broke up the Western States Passenger Association, and by November the roads seemed to be all tending to a condition of exhaustion.

Efforts were made to bring this state of things to an end, and in the last week in November representatives of the roads came together and made, under oath, a report of the number of tickets thus put into the hands of brokers and still remaining out. The whole number was then found to be about 12,000. Quite a number, however, had been recalled from the brokers before the report was made, but how many was not reported and not known. A gentleman having considerable expert knowledge testified that in his opinion the number then out would supply the market about three months. He had made investigation as to the prices at which the tickets had been put into the hands of brokers, and gave the result of his investigation as follows: the tickets reading

over the lines from Chicago to Council Bluffs would average a rate of \$8.10 as against a tariff rate of \$12.50; those over lines to Minneapolis and St. Paul would average first class \$6.60 as against a tariff rate of \$11.50 and second class \$4.67 as against a tariff rate of \$9; those over lines to Kansas City and Atchison would average \$6.42 and \$7 respectively as against a tariff rate of \$12.50; and those over lines leading to St. Louis would average \$5 as against a tariff rate of \$7.50. Some of the roads "protected themselves" against the action of others—to use a favorite expression—by supplying the brokers from day to day with tickets to be sold at what were believed to be the current rates; in that way escaping being caught with any considerable number out. When that method was adopted, the broker would be allowed as a "commission" a sum measured by the difference between the cut and the tariff rate—which might be \$2, \$3, or \$4 or more. One company at least put tickets into the hands of brokers to be accounted for weekly, after deducting the allowances. But the allowances were not restricted to brokers; they were made to others who brought purchasers of tickets to the regular offices, and the purchaser by taking a friend along with him could have had no difficulty in obtaining the allowance himself; in other words, in obtaining a rebate.

This was done in the face of the provision of section 6 of the Act, which explicitly provides that when any common carrier shall have established and published its tariff of fares it shall be unlawful for it to "charge, demand, collect or receive from any person or persons a greater or less compensation . . . than is specified in such published schedule of rates, fares and charges as may at the time be in force," and also it was done in entire disregard of section 2 of the Act, which prohibits unjust discrimination, and defines it as charging to one person a greater or less sum than is charged to another for a like service in the transportation of passengers or property, under substantially similar circumstances and conditions.

In respect to all these remarkable performances one thing can be said to the credit of the railroad agents; they made no attempt to conceal from the Commission what they had done, but exposed their folly freely, and in general admitted that it was folly. In one case, but only one, an agent who had testified in part was instructed by counsel not to appear further unless counsel was present to protect him against admissions of criminality. The precaution was wholly needless in his case, as the fact was sufficiently brought out in the testimony of others; as it was also again when it became necessary for the principal to resort to legal proceedings in order to get back from the supposed friendly broker the tickets confided to him.

Of course some legal shield was needed for these dealings with brokers, and it was supposed to be found in the right to pay commissions. One railroad manager in a communication on the subject, addressed to a member of the Commission, expressed views which may perhaps be taken as the same with those held by others. He said:

"In thinking over what was said yesterday afternoon in regard to the passenger situation 2 INTER S.

among the western roads, if I remember rightly, it was tacitly assumed by all that the placing of tickets in the scalpers' hands, and paying a commission to them for their sale, was illegal, and I think you gave an explicit opinion to this effect. But, on reflection, it appears to me that we perhaps arrived at this conclusion too hastily. Is it illegal for any road to remunerate any agency for selling its tickets that it may choose, by paying a commission on each and every ticket sold? If this may be done is there any practical way of putting a limit on the size of the commission? Many things enter into the expenses of maintaining a ticket office, for example: the rent of a well situated office in a large city is of necessity high. The office must be kept pleasant and attractive for the public. Courteous and skillful attendance must be secured. All of these things cost money. At their regular ticket offices the railroads pay these expenses themselves, putting their men on a salary; but at the outside offices, of ticket brokers or scalpers as they are called, all these expenses are paid by the proprietor of the office, the railroad reimbursing him once for all by the payment of a commission."

This presentation of excuse has a certain air of plausibility, and one almost feels as he peruses it that the scalper must somehow be doing the railroad company a great favor by living upon its revenues, and by keeping an office for the exhibition of courteous deportment to the public. We shall certainly make no mistake in assuming that for that part of his business which consists in the sale of tickets which are to be made use of by fraud and trickery, he needs "courteous and skillful attendance," if he is to be successful. Courtesy and skill we can well believe have a marketable value in the offices of this class of persons beyond what they have in most others.

But we discover in this communication what we often meet with when parties are detected in the old abuses: they indulge their passions first, and look about afterwards for some legal pretense which they can plausibly put forward as a protection. The pretense in this case was a very shallow one. The Commissioners asked several experts, who were brought before them for the purpose of giving evidence, what would be a reasonable commission to allow on the sale of tickets, and not one of them named an allowance exceeding 10 per cent. When more than that is allowed, therefore, we must assume that the allowance is made for some other purpose than to make payment for services. Whatever name shall be given to the purpose it is clear that an evasion of the Law which requires tickets to be sold at a uniform rate is intended. The broker is expected to sell at less than the regular rate, and he would not make sales unless he did.

The Commissioners also inquired of the experts whether in their opinion if all the companies allowed commissions equally any one of them would receive benefit therefrom, and with one exception they answered No, and that the payment of commissions is unjustifiable. The one exception was a ticket agent who declared that the brokers would push his tickets and not those of other roads even when acting for all, and at the same commission. As this

would manifestly be dishonest, we may say that the testimony against commissions was unanimous, and that they constitute an unwarrantable drain upon the corporate resources.

One of the extraordinary facts connected with such rate wars has already been noticed in the preceding part of this paper, namely: that the parties engaging in them know from the first that they cannot continue indefinitely, and must finally be settled on some basis which includes rates mutually accepted or acquiesced in. Nevertheless, the attempt at a friendly understanding is very apt not to be made until after, for a period more or less protracted, the carriers have inflicted mutual injuries. The blows must come first and attempts at reason be made later. In this case the Wisconsin Central was charged with cutting the rates in order to obtain a differential. The charge was denied, the denial was not credited; and other roads, instead of causing an investigation to be made, proceeded to cut the rates themselves. Now the cutting of rates would have no value whatever, except to show that the differential would not be conceded; and one would suppose that this determination might be manifested in some way which would be a good deal less destructive. But even if a cutting of rates below what it would be reasonable to charge were found to be necessary there can be no excuse for a carrier making it the first resort; it should manifestly be resorted to only after other means of redress had been tried and had proved ineffectual.

But what is specially inexcusable is the enlistment of the ticket brokers and of other outsiders in the war which is thus inaugurated. In all that has been said thus far about ticket brokers, only the most responsible portion of them is spoken of; the portion composing the American Ticket Brokers' Association. These persons, as has been said already, repel the appellation "scalper," and apply it themselves to irresponsible parties whom the Association will not receive as members. Whether this is for any other reason than the want of such pecuniary responsibility as will render it safe to do business with them, the Commission is not advised, nor for the purposes of this paper is it at all important. The fact—which is all we care to mention here—is that besides the brokers who compose the Association, there are also less reputable scalpers and runners who all find their profit in the fray. Why it is that, when the managers cannot come to an agreement by themselves, they enlist and subsidize all these parties, and give them standing and strength which enables them to prey upon the roads at other times, instead of calling in the chairman of some of the railroad associations, or some other party mutually trusted and relied upon, or, if a violation of law is supposed to have been committed, bringing it to the notice of the Commission or of the courts, is a question to which no one has attempted an answer. And why, especially, the roads should engage in the course of action above described, which is at once harmful to themselves and an evasion of the Law, when a strict observance of the Law in the making and publishing of rates would to a large extent have protected them, is equally unexplained. These are questions which are becoming of vital interest to the

stockholders in the roads. The Commission has failed to obtain satisfactory answers to either of them.

It may be said in this case, on behalf of the roads which met the supposed cut of the Wisconsin Central, that if the cut had not been met it would have established, in favor of that company, the differential demanded. This excuse is plausible, and is perhaps as good an one as can be suggested for such a case. But it does not answer the objection that the cut is made as the first resort instead of the last, as, if made at all, it should be. Nor does it constitute a defense for resorting to the brokers instead of making the cut rate the open and published rate as it should be.

The Commissioners were not informed by any of the warring roads that they were pushed into the struggle by local interests. How such interests may operate to influence carriers engaged in such a warfare may be understood from the following telegram sent and received on December 10:

"Sioux City, Dec. 10, 1888.

A. H. Hanson, Illinois Central Railway:

Reduced passenger rates still continue between Chicago and St. Paul; also between Omaha, Kansas City and Chicago. What is the matter with the Illinois Central? Are you willing to see all favors go to these other cities and travel and business go to them while Sioux City is neglected? We cannot understand why you stand idly by under these circumstances."

The matter with the Illinois Central was that it was doing exactly what it ought to do when it thus stood "idly by," and declined to take part in a disreputable struggle. It was not responsible for the injury which any town might suffer by reason of the misconduct of others. It is no doubt the case, however, that local appeals like this are sometimes yielded to when they ought not to be. In fact it requires some considerable firmness to resist them. The Illinois Central is to be commended for its resistance in this instance.

The sale of tickets at reduced rates through brokers while the regular rates are nominally sustained, almost necessarily results in a violation of the spirit if not of the letter of the long and short haul clause of the Act to Regulate Commerce. For some considerable time it must have been possible to buy tickets from Chicago to Minnesota cities at rates less than the open rates to some of the intermediate stations. If during that time there were any purchases of tickets at the open rates to such intermediate stations, the Act was violated. If there were no such purchases it must have been because all who had occasion to make use of the tickets knew they could procure the through tickets for a less price, and went to the brokers and procured and used them. But it would be very remarkable if all persons who wanted such tickets were possessed of this knowledge and acted upon it; we may indeed fairly consider it incredible. Large classes of people who are steadily employed at regular labor, and who have little time for either reading or gossip, if they had occasion to make a journey would be altogether unlikely to know of these chances to obtain cut rates, and would buy their tickets at the regular offices, thus losing the benefit of the reductions which others,

better informed, but also better able to pay, would obtain. This is a common result of rate wars; there is no equalizing the benefits of the reductions while they continue, and the parties who chiefly appropriate them are those having large interests in transportation, and others who habitually are on the lookout for special opportunities and advantages.

Two facts which the managers engaged in these transactions do not seem to have considered it may be well for them to give some attention to:

The first of these is that by their conduct they are admitting that the price they consent to receive for their tickets from brokers and others is a fair price and a reasonable compensation for their services. If such transactions continue the Commission may feel obliged to take notice of and act upon this admission; and should the open rate be reduced in consequence, the difficulty in getting back to the old rates might be much more serious than it is when the roads make the reductions themselves.

The second is that they are at the same time creating a public opinion and belief that the regular open rates are higher than they ought to be. If the opinion is erroneous but nevertheless results in legislation injurious to the roads, the owners of stocks have their servants who have been put in charge of the roads to thank for it. It may be quite worth the while of the stockholders to consider whether it would not be wise to insist that these servants shall give more attention to obeying the Law and less to contrivances whereby they may evade it. The Act to Regulate Commerce is on the whole conservative and beneficial, and its most rigorous provisions cannot inflict upon the carriers subject to it so much mischief as the managers voluntarily bring upon them by resorting to the old abuses in these rate wars.

In view of the facts above stated, and of facts somewhat similar coming to the attention of the Commission from other parts of the country, the Commission feels constrained to recommend that the Act to Regulate Commerce be so amended as—

First. To define what shall be considered excursion and commutation tickets, and to so restrict their issue in interstate commerce as to prevent the abuses now so common.

Second. To prohibit all payment of commissions on the sale of tickets for the transportation of persons by railroad in interstate commerce, and all sale of such tickets except by the regular agents of the carriers.

Third. To require the carriers to provide for the speedy and convenient redemption of the whole or any parts or coupons of any ticket or tickets which they may have sold, as the purchaser for any reason has not used and does not desire to use, at a rate which shall be equal to the difference between the price paid for the whole ticket and the cost of a ticket between the points for which the proportion of said ticket was actually used.

The Commission also deems it proper, in this connection, to repeat what it has said in its Second Annual Report, that the provision in the Act to Regulate Commerce against the sudden raising of rates without notice ought to be clearly made applicable to rates jointly made by two or more carriers, and that notice of in-

tention to reduce any rate which any carrier subject to the Act makes or joins in making, ought to be required to be given a specified number of days before the reduction should have effect.

MINNESOTA RAILROAD & WAREHOUSE COMMISSION

v.

CHICAGO & NORTHWESTERN R. CO.
et al.

(No. 158.)

COMPLAINT filed January 12, 1889, charging violations of sections 2, 3 and 6 of the Act to Regulate Commerce, and requesting an investigation.

To The Interstate Commerce Commission:

The Railroad & Warehouse Commission of the State of Minnesota respectfully represents that the people of Minnesota are to a large extent dependent for their interstate transportation by railways upon the following railway companies, which are engaged in interstate traffic and are subject to the "Act to Regulate Commerce," to wit:

The Chicago & Northwestern Railway Company; Chicago, St. Paul & Kansas City Railway Company; Chicago, Milwaukee & St. Paul Railway Company; Wisconsin Central Railroad Company; Chicago, Burlington & Northern Railroad Company; Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island & Pacific Railway Company; Minneapolis & St. Louis Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Burlington, Cedar Rapids & Northern Railway Company.

That your petitioners understand the object and purpose of the "Act to Regulate Commerce" to be to prevent all kinds of unjust discriminations by railways in conducting interstate commerce and believes that if its provisions are fully enforced it will result in equity to the people and the railways alike, and be of great public benefit.

That for some months after it was first enacted the Law seemed to be effectual in stopping many of the most glaring discriminations which had existed prior thereto and was to that extent beneficial; but that for some time past, and more especially since the first day of July, 1888, charges have frequently been made through the public press and otherwise, that the railway companies before named have ignored the provisions of the Law in the following respects:

That each and every of said corporations has, and is now directly and indirectly, by special rates, rebates, commissions and other devices, charging and collecting from some persons greater compensation for its services in the transportations of passengers and property than it charges or collects from other persons for like and contemporaneous services under substantially similar circumstances and conditions, in violation of section 2 of said Act.

That each and every of said corporations has and is now giving undue and unreasonable preference and advantage to particular persons,

firms and corporations, and to particular localities, and to particular descriptions of traffic, and is subjecting other particular persons, firms and corporations, other particular localities and other particular descriptions of traffic to undue and unreasonable prejudice and disadvantage in violation of section 3 of said Act.

That each and every of said corporations has and does fail and neglect to print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property and plainly stating the places upon its railroad between which property and passengers will be carried, containing the classification of freight in force upon such railroad; and do not keep such printed schedules in every depot on said road or any of them in such places and such form that they can be conveniently inspected, as required by the 6th section of said Act.

That among the special violations and evasions of said Law in a multitude of cases, too numerous to specify, each of said corporations, notwithstanding the Law, has and continues to pay rebates, under the names of commissions, to some persons, firms and corporations, for their business, both passenger and freight. That each of said corporations sometimes claims that said rebates are paid to all persons, firms and corporations alike, without discrimination; but your petitioners are advised that such is not the fact and that even where such is the fact the payment of such rebates is a violation of law, in that it constitutes a transportation at less than the published and posted tariffs. Your petitioners are advised that each of said corporations has carried and continues to carry certain goods at a loss or without profit, while at the same time making charges on other classes of goods which are unreasonable by comparison. That in numerous instances each of said corporations has made and continues to make tariffs on certain classes of goods for one or several distances lower than on other classes for the same distance, while at other distances they charge and collect a higher tariff on the first mentioned classes than on the last. These charges have been made so frequently that they have created distrust and alarm, and as this commission has no jurisdiction in the premises it has thought it to be its duty to call the attention of your Commission to the facts alleged and to respectfully petition to have the charges investigated, to the end that if proven they may be corrected, and if not, the facts may be made known and the people advised that their rights are being protected.

This commission is unable to make specific charges because the unlawful practices herein

complained of are done in secret and the evidence thereof is concealed in the records and accounts of the companies, which your Commission, under the Law, have full power to examine, and in the knowledge of their officers and employees whom the Law gives you authority to examine upon their oaths. But this commission has no hesitation in saying that it is informed and believes that the violations and evasions of law hereinbefore referred to are numerous and diversified and are alike detrimental to the interests of the owners of the railways and of the people of the State of Minnesota.

Your petitioners further pray that an inquiry be instituted by the Interstate Commerce Commission, into the manner and methods of doing interstate business, by each of the corporations herein named, in respect to the particular matters herein set forth, to the end that the facts in relation thereto may be established and made public alike for the benefit of the owners of railways and for the people; and for that purpose your petitioners pray that a time and place for such investigation be appointed of which all parties in interest shall have due notice, and that the Interstate Commerce Commission subpoena the respective auditors of said companies to bring with them their books, records and papers relating to and showing the earnings and disbursements of each of said companies, respectively, so far as it relates to traffic, both passengers and freight, since the first day of July, 1888. That the proper officers of each of said corporations be required to show what passes and free tickets have been issued and commissions paid to "scalpers" or others by such companies, since July 1, 1888, and that the several traffic managers, freight and passenger agents of each of said companies be required to appear at the hearing with their books, tariffs and papers for the same time and give evidence respecting the matters aforesaid to the end that said abuses and violations of law may be corrected in such manner as may seem best upon such investigation, and that the Act of Congress entitled "An Act to Regulate Commerce," may have a full authoritative construction of its several provisions, and the same may be obeyed by the corporations hereinbefore named in respect to the matters herein contained, so that the district of country served by such corporations may receive the full benefits which the Law was intended to confer.

Geo. L. Becker,

R. R. & W. H. Commissioner of the State of Minnesota.

Dated January 2, 1889.

St. Paul, Minn.

UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY.

KENTUCKY & INDIANA BRIDGE CO.

v.

LOUISVILLE & NASHVILLE R. CO.

*1. **Constitutional law; constitutional tenure of office of federal judges.** Congress, in establishing "inferior courts," and prescribing their jurisdic-

tion, must confer upon the judges, appointed to administer them, the constitutional tenure of office, that of holding "during good behavior," before they can become invested with any portion of the judicial power of the government.

2. **Constitutional law; Interstate Commerce Commission; judicial powers.** The Act to Regulate Commerce does not

*Head notes by the COURT.

undertake either to create an "inferior court," or to invest the Commission, appointed thereunder, with judicial powers, or functions.

3. **The Interstate Commerce Commission; judicial powers.** The Interstate Commerce Commission is invested with *only* administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial, in the proper sense of the term. Its action, or conclusion, upon matters brought before it for investigation, is neither *final*, nor *conclusive*. Nor is it invested with any authority to enforce its decision, or award. It hears, investigates, and reports upon complaints made before it, but *subsequent judicial proceedings* are contemplated, and provided for, as the remedy for the enforcement of the order or report of the Commission, in all cases, where the party against whom its decision is rendered, does not yield *voluntary* obedience thereto.

4. **Interstate Commerce Commission; its duties and functions.** The Commission is charged with the duty of investigating and reporting upon complaints; and the facts, found or reported by it, are only given the force and weight of "*prima facie*" evidence, in such judicial proceedings, as may thereafter be had, for the enforcement of its recommendation, or order. The functions of the Commission are those of referees, or special commissioners, appointed to make preliminary investigation of, and report upon, matters for subsequent judicial examination, and determination. In respect to interstate commerce matters, covered by the Law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred, of enforcing the rights, duties, and obligations, recognized and enforced by said law.

5. **Constitutional law; Interstate Commerce Commission; evidence.** Congress, under its sovereign and exclusive power to regulate commerce among the several States, has the power to create a commission, for the purpose of supervising, investigating, and reporting upon, matters or complaints, connected with, or growing out of, interstate commerce. And no valid constitutional objection can be urged against making the findings of the Commission "*prima facie*" evidence, in subsequent judicial proceedings. Such a provision, merely prescribes a rule of evidence, clearly within well recognized powers of the Legislature, and in no way encroaches upon the court's proper functions.

6. **Constitutional law; jurisdiction of United States Circuit Court, under the Act to Regulate Commerce.** The Act does not make the circuit court the mere executioner of the Commissioners'

order, or recommendation, so as to impose upon the court a *nonjudicial* power. The court is not restricted to the mere *ministerial duty* of enforcing an order of the Commission. The suit in this court is, under the provisions of the Act, an *original* and *independent* proceeding, in which the Commissioners' Report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case, as heard and reported by the Commission; but hears and determines the cause *de novo*, upon proper pleadings, and proofs; the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy.

7. **Jurisdiction of the United States Circuit Court, independent of citizenship.** The right asserted by petitioner arises, and is claimed, under a law of the United States, which relates to a subject, over which Congress has exclusive control; and this is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties to the controversy, since it involves a federal question.

8. **Common carriers; bridge companies.** Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for the engines, cars and trains of the railway company, the first section of the "Act to Regulate Commerce," regards the railway company as the owner, or operator of the bridge and approaches, for the time being, as to all freight transported by the railway company over the bridge. And as to all such traffic, the railway company, and not the bridge company, must be regarded as the common carrier. Such a bridge company is not, either in law or in fact, a common carrier of interstate traffic, within the scope and meaning of said section; and it cannot invoke the provisions of said Act, to compel railway companies to transact business with, or through such bridge company. Between such a bridge company, and the railway carriers of the country, the Act establishes no such reciprocal relations, duties, and obligations, as require the latter to form business connections with the former.

9. **Common carriers; transfer companies; switching cars.** Where a corporation which is under no legal obligation to do so, voluntarily contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported, or transferred, in the cars, such corporation, in the performance of such service, assumes none of the responsibilities of a common car-

- rier, but only those of a switchman. In respect to cars or traffic, thus handled, such corporation can only be regarded as a switchman, or transfer company; and it is no more a common carrier of interstate commerce, or traffic, within the provisions of the Law, than a city transfer company, which checks a passenger's baggage at the hotel where it is received, and carries it, for an agreed compensation, to the station of the railway, over which it is to be transported into another State.
10. **Common carriers; bridge companies; soliciting agents.** When a bridge company, owning no freight cars of its own, solicits freight for railway companies, who will furnish the cars, and over whose lines the freight is to go, and merely transfers such cars over its bridge, delivering them to the railway companies furnishing the same, and charging for its service its regular bridge toll, but making no charge for transporting the freight contained, or carried, in the cars, such a bridge company is not a common carrier of such interstate freight. The object and purpose of the bridge company, in thus constituting itself the soliciting agent for the railway companies, who are willing to provide the cars for the freight it may secure, is manifestly to obtain *tolls* for the use of its bridge; and the Law does not require the railway companies to keep up such an arrangement with the bridge company, in order to protect its interest in securing tolls for its bridge.
11. **Bridge companies; construction of charters; common carriers.** Where the charter of a bridge company makes its bridge and approaches thereto, such as it had authority to construct, a public thoroughfare, or highway, for the use of which, by railroads, or street cars, wagons, vehicles, animals, and foot passengers, it was authorized to charge "*reasonable tolls*," for the collection of which, suitable *toll gates* could be established; the word "*tolls*," as used in such a charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services which the bridge company may perform, or be permitted to render.
12. **Bridge companies; construction of charters; common carriers.** Where the charter of a bridge company confers upon it the franchises and powers of building, maintaining, and operating, its bridge and approaches, designated as its terminal facilities, such franchises and powers do not, in and of themselves, constitute the bridge company a common carrier of property; on the contrary they are appropriately confined to the erection, operation, and maintenance of a thoroughfare or public highway, open to the use of others, common carriers, and private parties, upon making compensation therefor, in the shape of "*reasonable tolls*."
13. **Kentucky & Indiana Bridge Company; construction of charter; common carrier.** The charter powers of said company neither expressly, nor by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor;" nor do they, in any way, constitute said company a common carrier—the rule of construction applicable to such charters being, that "No power is conferred upon a corporation, which is not given expressly, or by clear implication."
14. **Rights of connecting railroads; interchange of traffic.** Where the charter of a railroad company provided "that any and all such railroad, or railroads, hereafter constructed, *may connect and join* with the road, hereby contemplated," the connection thus authorized is a *physical*, and not a *business* connection, and it does not require an interchange of traffic at the point of junction.
15. **Act to Regulate Commerce; combinations to prevent the carriage of freight from being continuous; connecting railroads; through routes and through rates.** The seventh section makes it unlawful for any common carrier, subject to the provisions of the Act, "to enter into any combination, contract, or agreement, express, or implied, *to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination,*" etc. It is no violation of said section, for a railroad company to enter into contracts with other companies for the establishment of through routes, and through rates, for the continuous carriage of interstate traffic. Such contracts are in no wise inconsistent with the things forbidden by said section.
16. **Act to Regulate Commerce; reasonable, proper, and equal facilities; common carriers; connecting railroads.** The second clause of the third section, provides that "Every common carrier subject to the provisions of this Act, shall, according to their respective powers, afford all *reasonable, proper, and equal facilities*, for the interchange of traffic, between their respective lines, and for the receiving, forwarding and delivering of passengers and property, to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges, between such connecting lines, etc.;" but neither this, nor any other provision of the Law, requires of the common carrier of interstate commerce, the duty of either forming *new connections*, or of establishing *new stations* for the reception and delivery of freights. The Act to Regulate Commerce deals with such common carriers as it finds them, and leaves to them full discretion

as to what extensions they will make of their lines, the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample, stations and depots, for the accommodation of their business, the Law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or of other carriers—Congress has certainly not undertaken, even if it possessed the power, to deal with such matters.

17. Act to Regulate Commerce; reasonable, proper, and equal facilities; connecting railroads.

When a new railroad makes a physical connection with an old railroad, at a point other than the established yard or depot of the old road, but neither company has any yard, station, depot, or ground, at the point of connection; nor any buildings, sheds, or platforms there, for the reception and accommodation of freights, to be handled and exchanged at that point; nor any clerks or employes, stationed there for the inspection of cars, reception of freights, etc.; an interchange of traffic at such a point cannot be made in a proper and convenient way to either company; and no authority is conferred upon the Commission, or upon this court, to compel the old company to provide at said point of connection the *same* or *equal* facilities, which it had previously provided at its regular, established, yards and depots.

18. Act to Regulate Commerce; reasonable, proper, and equal facilities; connecting railroads; receiving, forwarding and delivering freight.

Where a new railroad makes a physical connection with an old railroad, at a point other than the established yard, or depot of the old road, and there are no facilities at said connection, for receiving, forwarding, or delivering freight, individual shippers, or consignees of freight, have no right to require the old company to receive or deliver their traffic, at such point of connection; and the new company, or other companies using its tracks, cannot properly demand, or require of the old company, to concede to it, or them, rights and facilities, which the old company is under no obligation, or duty, to grant, or provide for individual owners or shippers of interstate commerce. This would be conferring upon common carriers, engaged in transporting interstate traffic, rights and privileges superior to those intended for the benefit of such commerce itself. The Law was not designed to advance the interests of carriers; but was intended for the benefit and advantage of the *commerce* they

transported; and the provisions of the Act all look to that as its object and purpose.

19. Act to Regulate Commerce; discrimination; undue or unreasonable preference or advantage; facilities for interchange of traffic; connecting railroads.

The fact that a railroad company interchanges traffic with certain railroads, at its regular established yard or depot (where it has provided all reasonable, proper, and equal facilities for that purpose), and refuses to interchange traffic with a new road, at a point of connection where no such facilities exist, does not constitute any "discrimination," or any "*undue, or unreasonable preference or advantage,*" in favor of the railroads, with which such interchange is made. The third section of the Act does not mean that whatever facilities a railroad company may furnish, or provide, for the interchange of business with connecting lines, *at any one place* (such as its regularly established and properly equipped depot), it is bound to provide for any, and all other railroads, at such *other and different points* as they may select in making their connection. On the contrary, said section means, that where a railroad subject to the provisions of the Act has provided and established, *at any given place*, its facilities, in the shape of yards, stations, and depots, for the interchange of traffic, or for the receiving, forwarding, and delivering of passengers and property, and *there* affords such facilities to *some* of its connecting lines, it shall not deny to *other* connecting lines *at that point*, the same proper, reasonable, and equal facilities.

20. Act to Regulate Commerce; facilities for interchange of traffic; connecting railroads.

It by no means follows because certain facilities for the interchange of freight are furnished by a railroad to another connecting line or lines at *one* point, upon certain terms, conditions and considerations, and where ample accommodations for the transaction of such business are provided and maintained at the joint expense of the companies using them, that another company, making a physical connection with the road (furnishing such facilities) at another, different, and distant place, is entitled to demand at said different point of connection, the same, or equal facilities. The company making the physical connection, at a point *other than that at which the established road has already provided its facilities*, and conducts its interchange, with other connecting lines, cannot demand or require an interchange at such point of physical connection, without first furnishing at such point, reasonable, and proper facilities, for the interchange sought. It cannot rely upon the terminal facilities at another point of the road, with which it has formed the

physical connection; nor can it compel the road, with which the connection is made, to join with it, in the expense of providing at that point, the facilities necessary and proper for the interchange.

21. **Act to Regulate Commerce; dissimilar circumstances and conditions; discriminations; preferences; connecting railroads.** No provision of the Act confers *equal* facilities upon connecting lines, under *dissimilar circumstances and conditions*. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the Law, between discriminations and preferences which are just and reasonable, and those which are unjust and unreasonable, according as they are made, or given, under *similar* or *dissimilar* circumstances and conditions. All discriminations and preferences are not forbidden, or made unlawful; but only such as are *unjust*, or *undue*, or *unreasonable*. In each, and every case, therefore, the question whether a discrimination is *unjust*, or a preference is *undue*, or *unreasonable*, either as to the common carrier, or the commerce it may transport, involves a consideration of the circumstances and conditions, under which such discrimination, or preference, is made or given.

22. **Act to Regulate Commerce; use of tracks and terminal facilities; connecting railroads.** An interchange of traffic at a new point of connection between railroads, where there are no buildings, sheds, platforms, or other facilities, for the proper care, protection, and handling of freight, and no clerks, or employés, stationed there to look after, and attend to the business, cannot possibly be carried on, without requiring the old road to concede the use of its track and terminal facilities to the new road, or without imposing upon the old road the trouble, inconvenience, and expense of handling the traffic interchanged between them; and neither the Commission, nor this court, has any authority to require the old road to concede the use of its tracks and terminal facilities, in order to accomplish an interchange of traffic; nor can this court, or the Commission, impose upon the old road the duty of making such interchange, at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employés. Such interchanges between railroads are arranged by mutual agreements, fixing the compensation to be paid for services, and for the use of improvements, and providing for "prorating," the expense incident to such interchange. But if the parties cannot themselves agree upon such terms, neither this court nor the Commission can make an agreement for them, under the existing Law, and under circumstances such as exist in this case.

23. **Act to Regulate Commerce; use of**

tracks and terminal facilities; connecting railroads; discrimination. The provision in the third section of the Act, to the effect that a common carrier shall not be required "to give the use of its tracks and terminal facilities, to another carrier engaged in like business," is a limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities, for the interchange, or for the receiving, forwarding, and delivering, of traffic to, from, and between, connecting lines; and therefore it is left open to any common carrier to contract, or enter into arrangements, for the use of its tracks and terminal facilities, with one or more connecting lines, without subjecting itself to the charge of giving an undue, or unreasonable preference or advantage to such lines, or of discriminating against other carriers who are not parties to, or included in such arrangements. No common carrier can, therefore, justly complain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same or like terms and conditions, which, under private contract or agreement, are conceded to other lines.

24. **Act to Regulate Commerce; rates for transportation of interstate traffic.** The first section of the Act provides that all charges for services, rendered by common carriers subject to the provisions of the Law, "*shall be reasonable and just*," and prohibits and declares unlawful, "*any unjust and unreasonable charge*." This is the sole requirement of the Law, upon the subject of rates, which common carriers subject to the provisions of the Law may demand for the transportation of interstate traffic.

25. **Through routes and through rates.** Arrangements in respect to through freight traffic, and joint through rates or charges, as well as the forms of bills of lading, and the apportionment to be made of such joint traffic rates, and of losses or damage to freight in course of transit, are all matters of private arrangements. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines, they might be prejudicial, and injurious to the interest of one, or both; and companies in the latter situation cannot properly claim, as matter of right, what the former have acquired under, and by virtue of, private contract or arrangement.

26. **Through routes and through rates; discrimination in charges or facilities.** At common law, the refusal of a common carrier to make through traffic

arrangements, at, or upon joint through rates, with one connecting railroad company, such as it makes, or enters into, with another connecting line, does not constitute any undue or unreasonable discrimination in charges or facilities.

27. Through routes and through rates; discrimination in charges or facilities; U. S. Rev. Stat. § 5258. Section 5258 of the U. S. Rev. Stat. (embracing the Act of June 15, 1866) imposes no duty; it merely permits, or authorizes, the carriage of traffic from one State to another, and to that end, the formation of continuous lines, by mutual agreement. It confers no power to compel a railroad company to make through routes and through rates with one connecting line, because it has, by agreement, made them with another.

28. Through routes and through rates; Act to Regulate Commerce. It is clear that from the provisions of section six of the Act, two or more common carriers, may lawfully enter into contracts, or agreements for the establishment of through routes at or upon joint through rates; because copies of such contracts and agreements, and of the joint tariffs of such carriers, are required to be filed with the Commission. If, in the exercise of the right, thus impliedly, if not expressly recognized, a common carrier, by private arrangements forms a through route, and establishes joint through rates, with certain connecting lines, it cannot be compelled to concede to all other connecting railroads the same or equal through rates, on traffic which the latter may offer for transportation.

29. Through routes and through rates; Act to Regulate Commerce. The Act does not undertake to create between connecting lines such an *agency*, or "*quasi*" *partnership relation*, as is necessarily involved in agreements, or arrangements, for the establishment of through routes, and the making of through rates; as such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier, the duty, or obligation, to make the same or like contracts, with all other lines.

30. Through routes and through rates; Act to Regulate Commerce. No authority is conferred upon common carriers of interstate commerce, to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies.

31. Through routes and through rates; Act to Regulate Commerce; English Acts of 1854 and 1873. The Commission is not invested with authority to establish through routes, nor to fix through rates, between connecting lines. The English Act of 1873, amendatory of

the Act of 1854, did confer such authority upon the English Commission; but our Act to Regulate Commerce contains no such provision, and confers no such authority.

32. Through routes and through rates; rights of consignors to route their shipments. An individual shipper, or consignor, cannot legally require a railroad company, to send a shipment by a particular route, beyond the company's line, at the same, or equivalent through rates, which such company may have established with other connecting lines; and what the individual shipper of interstate commerce may not lawfully demand, common carriers engaged in transporting such commerce may not lawfully require of connecting lines.

33. Through traffic, and local traffic; discrimination in rates. In the absence of through traffic arrangements between two railroad companies, the one has the right to treat freights tendered to it by the other as local business, and to charge for the transportation thereof its local rates to destination; and in doing so, no discrimination is made against the other company, on the traffic it carries. Nor does the company, charging local rates on such freights, make, or give, any undue or unreasonable preference to other lines, or to the traffic they handle, with whom it has agreements for through routeing, and at through joint rates which may be lower than its local rates to the same points; because the service in the two cases is not the same, or identical.

34. Act to Regulate Commerce; U. S. Rev. Stat. § 5258; effect upon existing contracts. Neither the Act to Regulate Commerce, nor the Act of June 15, 1866 (U. S. Rev. Stat. § 5258), was ever intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the Law. The observance of good faith between parties, the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the States, which the Act of June 15, 1866, aimed to promote.

35. Act to Regulate Commerce; rule of construction in contests between common carriers. The Law should be as liberally construed, in favor of commerce among the States, as its language will permit; but when complaint is made, or relief is sought, solely or mainly, in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or con-

ferred. And where the complaining carriers are not in a position to commend themselves to the favorable consideration of a court of equity, no strained construction of the Law should be made, in order to afford them, or either of them, the relief they seek at the hands of the court.

36. Act to Regulate Commerce; reasonable, proper, and equal facilities; abandonment. Under the terms and operations of a contract, made by a bridge company and three railroad companies, the railroad companies secured and enjoyed all reasonable, proper, and equal facilities, for the interchange of cars and traffic, between them, which interchange was conducted for many years at the regular, established, yard or depot of one of them, and the expenses of such interchange was shared by them, in certain proportions fixed by contract. After the passage of the Act to Regulate Commerce, one of the railroad companies voluntarily abandoned those facilities, and changed its business to another bridge—not in the interest of the public, nor of the interstate commerce if handled, but for its own private benefit and advantage; and then sought to compel the company (at whose yard the interchange of traffic had been conducted), to allow such interchange at a new point of connection, and to afford at such point, facilities equal to those which the applicant had voluntarily abandoned. *Held:* that the application ought not to be granted.

37. Constitutional law; Act to Regulate Commerce. Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate, in respect thereto, to the same extent, both as to rates, and all other matters of regulation, as the States may do in respect to purely local, or internal commerce; but the court is not called upon in the present case to say what would or would not come within this regulating power, for the existing Law does not undertake to prescribe any thing more upon the subject of rates, than that they shall be reasonable and just; and it does not undertake to require a common carrier subject to its provisions to establish through routes and through rates with all connecting lines merely because it may have done so with one of them.

(Decided January, 1889.)

PETITION to the United States Circuit Court for the District of Kentucky, by the Kentucky & Indiana Bridge Company, under section 16 of the Act to Regulate Commerce (known as the Interstate Commerce Act), to compel the Louisville & Nashville Railroad Company to obey an order of the Interstate Commerce Commission requiring it to furnish to the Bridge Company (which owned and operated a railroad track) the same equal facil-

ities for connection and interchange of traffic at a certain point which it furnished to certain railroad companies, at another point. *Petition dismissed.*

On final hearing before Howell, *Circuit Judge*, and Barr, *District Judge*, on petition, answer, referee's report, and exceptions.

The report, opinion, and order of the Interstate Commerce Commission in question, are reported in 2 Interstate Commerce Reports, pages 102—125.

The facts and questions presented are set forth in the present opinion.

Messrs. Ramsey, Maxwell & Ramsey, Bullitt & Shield, and *E. F. Trabue*, for petitioner.

Mr. Edward Baxter with *Mr. Lyttleton Cooke*, for respondent.

The Act to Regulate Commerce is unconstitutional.

I. The power to regulate commerce among the States does not include the power to destroy it.

Though the power to regulate commerce "with" Foreign Nations, and "with" the Indian Tribes, is given to Congress in the same clause with the power to regulate commerce "among" the States, and though Congress may, by embargo, and nonintercourse laws, destroy all commerce between this country and Foreign Nations, or the Indian Tribes, it cannot pass any such prohibitory laws in regard to commerce among the States.

See *Groves v. Slaughter*, 40 U. S. 15 Pet. 505, 506 (10 L. ed. 800); *Federalist* (ed. 1888) p. 555; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 572 (30 L. ed. 249); *Stone v. Farmers Loan & Trust Co.* 116 U. S. 331 (29 L. ed. 644).

II. The power "to regulate" commerce among the States does not include the power to create it.

The power to regulate commerce cannot be more extensive than the power to tax. It is said that, subject to certain limitations, the power to tax "reaches every subject, and may be exercised at discretion. But it reaches only existing subjects. Congress cannot authorize a trade or business within a State, in order to tax it."

License Tax Cases, 72 U. S. 5 Wall. 471 (18 L. ed. 500).

If Congress cannot authorize a business within a State in order to tax it, Congress cannot force a citizen of a State to engage in the business of interstate commerce in order to regulate his business.

III. The power delegated to Congress was the power to regulate commerce "among the several States;" the power has never been delegated to Congress, to regulate commerce among the people of the States.

The history of this clause of the Constitution conclusively proves, that its sole object was to confer upon Congress the power to prevent, by appropriate regulation, such action by the several States, as might have a tendency to prefer their own commerce, over that of their sister States; and that it was never intended to authorize Congress to interfere with the commercial transactions of private citizens, whether such transactions related to matters wholly confined to a single State, or to matters which extended to several States.

See *The Federalist*, Nos. 7, 22, 42; *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 224, 225, 231 (6 L. ed. 23); *Southern Steamship Co. v. New Orleans Port Wardens*, 73 U. S. 6 Wall. 33 (18 L. ed. 750); *Veazie v. Moor*, 55 U. S. 14 How. 574 (14 L. ed. 545); *Passenger Cases*, 48 U. S. 7 How. 394, 445 (12 L. ed. 702); *State Freight Tax Case*, 82 U. S. 15 Wall. 275 (21 L. ed. 161); *State Tonnage Tax Cases*, 79 U. S. 12 Wall. 214 (20 L. ed. 373); *License Cases*, 46 U. S. 5 How. 595 (12 L. ed. 256); *Welton v. Missouri*, 91 U. S. 280 (23 L. ed. 349); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204 (29 L. ed. 162); *Brown v. Maryland*, 25 U. S. 12 Wheat. 438, 440 (6 L. ed. 678); *State Tax on R. R. Gross Receipts*, 82 U. S. 15 Wall. 297 (21 L. ed. 169); 5 Elliott, Debates (ed. of 1881), pp. 112, 119.

IV. The cases, involving a construction of the clause of the Constitution conferring upon Congress the power to regulate commerce among the States, which have come before the supreme court for decision, have all arisen upon state legislation, where some State has attempted to discriminate against the commerce of other States; or to impose a tax, or other burden upon it; or to oppose some obstruction to it.

The cases decided prior to 1876 are summarized by Justice Field as follows: Upon an examination of the cases, it will be found that the legislation involved, imposed a tax upon some instrument or subject of commerce, or exacted a license fee from parties engaged in commercial pursuits, or created an impediment to the free navigation of some public waters, or prescribed conditions in accordance with which commerce in particular articles, or between particular places, was required to be conducted. In all the cases the legislation condemned operated directly upon commerce, either by way of tax upon its business, license upon its pursuit in particular channels, or conditions for carrying it on.

Sherlock v. Alling, 93 U. S. 102 (23 L. ed. 820).

The cases decided since 1876 can all be divided into the same classes.

In the following cases, a State by its legislation, attempted to impose a tax upon commerce:

Cook v. Pennsylvania, 97 U. S. 569, 570 (24 L. ed. 1016); *Guy v. Baltimore*, 100 U. S. 434 (25 L. ed. 743); *Webber v. Virginia*, 103 U. S. 350 (26 L. ed. 567); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067); *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59 (27 L. ed. 383); *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888); *Philadelphia & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200); *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411 (32 L. ed. 229).

In the following cases a State, by its legislation, attempted to require a license for carrying on commerce:

Moran v. New Orleans, 112 U. S. 75 (28 L. ed. 655); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158); *Walling v. Michigan*, 116 U. S. 446 (29 L. ed. 691); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29 L. ed. 785); *Robbins v. Shelby County Taxing Dist.* 120 U. S. 489 (30 L. ed. 694); *Corson v. Maryland*, 120 U. S. 502 (30 L. ed. 699); *Leloup v. Mobile*, 127 U. S. 640 (32 L. ed. 311); and *Asher v. Texas*, 128 U. S. 129 (32 L. ed. 368).

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In the following cases a State, by its legislation, attempted to impose conditions for carrying on commerce:

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470 (24 L. ed. 529); *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 10 (24 L. ed. 710); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 224); *Western U. Teleg. Co. v. Pendleton*, 122 U. S. 347 (30 L. ed. 1187); *Bozeman v. Chicago & N. R. Co.* 125 U. S. 465 (31 L. ed. 700).

In all cases referred to above the action condemned by the court was state action, and not the action of private citizens. In no case has the court held that the actions or contracts of individuals were illegal or void, simply because they may have amounted to burdens upon, or discriminations in regard to, commerce passing between the States.

V. There is nothing in the Constitution that requires the regulating power of Congress to be exercised by legislation.

"This power of regulation may be exercised without legislation as well as with it."

Hall v. De Cuir, 95 U. S. 490 (24 L. ed. 548).

Inaction by Congress on this subject is equivalent to a declaration that interstate commerce shall be free and untrammelled," so far as state action is concerned.

Welton v. Missouri, 91 U. S. 282 (23 L. ed. 350).

It is conceded, however, that congressional regulation is not limited to inaction. Congress may regulate state action by legislation, as well as without it; and many cases may arise where legislation by Congress may be necessary.

But when Congress attempts to regulate by legislation, or otherwise, the acts or contracts of private citizens, merely because they may amount to commerce passing between the States, then it assumes to exercise a power which the framers of the Constitution never dreamed of conferring.

VI. While laws affecting steamboats, steamships, and other vessels upon navigable waters, have at all times been regarded as commercial regulations, such has not been the case in respect to laws affecting roads.

See *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 235 (6 L. ed. 23); *Baltimore & O. R. Co. v. Maryland*, 88 U. S. 21 Wall. 470, 471 (22 L. ed. 683); *Veazie v. Moor*, 55 U. S. 14 How. 574 (14 L. ed. 545).

VII. The rights of commerce delegated to Congress by the Constitution, give to it no authority to invade the rights of private property. The franchise to charge tolls, fares and freights is a valuable property interest, conferred upon the turnpike and railroad companies by the States; and while such franchises are subject to public use, upon payment of lawful charges, they are the private property of the companies, and cannot be taken by the United States without due compensation.

Conway v. Taylor, 66 U. S. 1 Black, 632, 634 (17 L. ed. 202, 203); *State Freight Tax Case*, 82 U. S. 15 Wall. 277, 278 (21 L. ed. 162); *Passenger Cases*, 48 U. S. 7 How. 403 (12 L. ed. 702); *Searight v. Stokes*, 44 U. S. 3 How. 179 (11 L. ed. 537).

VIII. The "Act to Regulate Commerce" confers upon the Interstate Commerce Commission

judicial powers, in violation of the Constitution.

See U. S. Const. article 3, § 1; Act to Regulate Commerce, §§ 12, 13, 14, 15, 16, 17, 18; Rules of Practice of Commission, 1 Inters. Com. Rep. Appendix I, 1 Inters. Com. Com. Rep. p. 4; *United States v. Ferreira*, 54 U. S. 13 How. 46 (14 L. ed. 42); *United States v. Arredondo*, 31 U. S. 6 Pet. 708, 709 (8 L. ed. 547); *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 718, 750, 751 (9 L. ed. 1233).

The Interstate Commerce Commission is authorized to exercise every judicial power known to a court, except the power to issue effective process to enforce its decrees.

The members of the Commission hold office for the term of two, three, four, five, and six years respectively (sec. 11); and none of them hold "during good behavior." Congress must not only ordain and establish inferior courts within a State and prescribe their jurisdiction, but the judges appointed to administer them must possess the constitutional tenure of office [Const. art. 3, § 1] before they can become invested with any portion of the judicial power of the Union. There is no exception to this rule in the Constitution.

Benner v. Porter, 50 U. S. 9 How. 244 (13 L. ed. 119).

IX. The Act of Congress "to Regulate Commerce" confers upon this court nonjudicial power.

See *Murray v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 284 (15 L. ed. 377); *Rhode Island v. Massachusetts*, 37 U. S. 12 Pet. 718 (9 L. ed. 1233).

"Federal courts, under the Constitution, cannot be made the aids to any investigation by a commission or committee into the affairs of anyone."

Re Pacific Railway Commission, 32 Fed. Rep. 258.

Jackson, C. J., delivered the opinion of the court:

On February 10, 1888, the Kentucky & Indiana Bridge Company, a corporation created by the laws of Kentucky and Indiana, owning and operating a bridge across the Ohio River between Louisville and New Albany, and claiming to be a common carrier of interstate commerce, filed its petition before the Interstate Commerce Commission, against the Louisville & Nashville Railroad Company, alleging, as the ground of its complaint, that said Railroad Company, in violation of the provisions of the Act to Regulate Commerce, approved February 4, 1887, and in combination and conspiracy with the Louisville Bridge Company, a corporation owning and operating the only other bridge across the Ohio River at Louisville, and with other railroad companies interested in, and using, said last named bridge, for the purpose of preventing or obstructing the transfer of traffic and freight over petitioner's bridge, had refused, and was still refusing, to interchange traffic with, or to receive from petitioner, or the railroad companies using its bridge, cars, or freight, tendered said Louisville & Nashville Railroad Company, for transportation over its line or lines southward, or to deliver to petitioner, or any railroad company using its tracks and bridge, freights arriving by the Louisville &

& Nashville Railroad at Louisville, for, or consigned to points on petitioner's said railway, or to any railroad connecting therewith at New Albany; although said Louisville & Nashville Railroad Company afforded such facilities for the interchange of traffic, to said Louisville Bridge Company, and to the railroads north of the Ohio River using that bridge. The point of connection between petitioner's track and that of the Louisville & Nashville Railroad, at which said interchange of traffic was demanded and refused, was at Seventh Street and Magnolia Avenue, in the City of Louisville. The prayer of the petition was "that the defendant (the Louisville & Nashville Railroad Company) be required, by the order of the Commission, to interchange traffic with the petitioner, and with the railway companies using its railroad, at said point of connection at Seventh Street and Magnolia Avenue, and to receive from petitioner, and said railway companies using its railroad, all freight tendered by it or them to said defendant for transportation to points on, or beyond, and by way of its railroad or railroads, and to deliver to petitioner, and to the railroad companies using petitioner's railroad, at said point of connection, all freights arriving at Louisville, over defendant's railroad, and consigned to petitioner, or to railroad companies using petitioner's railroad, or to points on the line of petitioner's railroad, or the railroads using its track."

In its answer to said petition, the defendant did not concede that the petitioner was a common carrier of interstate commerce. It admitted the physical connection of its own and the petitioner's tracks, at Seventh Street and Magnolia Avenue, which connection, under its charter, it could not prevent; but denied that such connection imposed upon it either by the state or federal law, the duty of making a business connection, for the interchange of traffic at that point.

It denied that said connection was a suitable and convenient place for the interchange of cars, or freight, with the petitioner, or railroads using its tracks and bridge, for the reason that neither itself nor the petitioner had any depot, platforms, buildings or other suitable facilities there, for the interchange of traffic, and because defendant had no clerks, agents, car inspectors, repairers or other employes at that point, to attend to the business of such interchanges.

It further denied that such interchange at said point could be made without the use of its tracks and terminal facilities by the petitioner. It further claimed that the requirement to interchange traffic at said point of connection would be unreasonable and improper, because the defendant already had, in the City of Louisville four regular yards and depots, with ample facilities and accommodations for the handling and interchange of traffic arriving at or going from said city. That its main yard and depot for the reception and delivery of freight was at Ninth Street and Broadway, in the City of Louisville, where it interchanged traffic with the Louisville Bridge Company, and the railroads north of the Ohio River using that bridge, and where it had ample accommodations, and an adequate force of clerks, agents and employes to transact the business, and to make

all exchanges of traffic. The defendant further set up the fact that, in 1872, it had entered into a written contract with said Louisville Bridge Company, and with the Jeffersonville, Madison & Indianapolis Railroad Company, and the Ohio & Mississippi Railroad Company, under and by virtue of which it had agreed to interchange freights and traffic with said railroad companies, and any other company using said bridge, upon certain terms more favorable to itself than the Kentucky & Indiana Bridge Company had, or could offer, and which contract (hereafter fully set out) defendant felt was still obligatory and binding upon it. For these and other reasons set forth in its answer, the Louisville & Nashville Railroad Company claimed that it was not discriminating against petitioner, and was justified in not acceding to its demand for an interchange of traffic at the Seventh Street and Magnolia Avenue connection, as such interchange with petitioner at that point would entail upon it extra expense, inconvenience, and trouble, and compel it to violate its contract and obligations with the Louisville Bridge Company.

On the issues thus made, testimony, oral and written, was presented, and arguments were heard, before the Interstate Commerce Commission, which, on August 2, 1888, rendered its decision in the premises as follows:

"This case having been heretofore submitted on the evidence, and on written and printed briefs, and having been maturely considered, and the Commission now finding that complainant is a common carrier, and that, as such, defendant is bound and obliged by law to give to it equal facilities for the interchange of traffic, to those it affords to other common carriers; that defendant cannot lawfully refuse to receive traffic which is brought to it over the bridge of the complainant, on the ground that the railroad company bringing it had contracted with defendant to bring all its traffic across the Ohio River at this point on the Louisville bridge; and that the point of connection of complainant's line with defendant's road, in the City of Louisville, is a suitable point at which defendant should receive traffic for and from complainant—it is now ordered that the complaint be, and the same is hereby sustained, and that defendant cease from refusing to receive from complainant, and the carriers using its track, the traffic brought and offered to it at the point of connection aforesaid. It is further ordered that defendant allow and afford to complainant, as a common carrier, at that point, the same equal facilities which it affords to other common carriers at the points of connection with their lines respectively. And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the Commission herein, in conformity with the provisions of the fifteenth section of the Act to Regulate Commerce."

Notice, embodying the order of the Commission, together with a copy of its report and opinion in the premises, was promptly sent to, and received by, the Louisville & Nashville Railroad Company; and thereafter, on the 12th day of September, 1888, the Kentucky & Indiana Bridge Company tendered to the Louis-

ville & Nashville Railroad Company, at said point of connection (Seventh Street and Magnolia Avenue in the City of Louisville), a Cincinnati, Hamilton & Dayton car, No. 13082, from Cincinnati, Ohio, via the Ohio & Mississippi Railway, loaded with machinery, consigned to Columbia, Tenn., a point on the Nashville & Decatur division of the Louisville & Nashville Railroad—which the latter declined to receive. The general freight agent of the Kentucky & Indiana Bridge Company, in making tender of this car, addressed to T. J. Kean, the agent of the Louisville & Nashville Railroad Company, under date of September 12, 1888, the following note:

"Dear Sir—Cincinnati, Hamilton & Dayton car 13082, from Cincinnati, via Ohio & Mississippi Railroad and the Kentucky & Indiana Bridge Company, containing machinery for Columbia, Tenn., is now standing on track, connecting Louisville & Nashville Railroad and the Kentucky & Indiana Bridge Company's belt line, at Seventh Street and Magnolia Avenue, and convenient for your engine to get hold of it. The regular billing for this car has been sent to your office, by the Ohio & Mississippi people, in the usual manner. Please say if you will accept and forward this freight."

The billing referred to in said letter, which was sent by the Ohio & Mississippi Railway to the Louisville & Nashville Railroad, was in the following form:

(FORM 1829.)

L. & N.—Louisville, Sept. 12, 1888.

M. Harry Smythe, Columbia, Tenn.,
No. 1442.

To Ohio & Mississippi Railway Co. *Dr.*

For transportation of merchandise from Cincinnati, 9, 12, 1888,

W. B. Mem. car 13082, C. H. D.

| Address | Pack- age. | Description of Property. | Weight. | Rate. | Charges. |
|---------|---------------|------------------------------------|---------|-------|----------|
| | | Machinery, O. R., C. H. & D. | 6960 | 15 | \$10 44 |
| | | L. & N. Through | | 12 | 8 35 |
| | | | | 53 | \$18 79 |
| | | | | 80 | |

Received payment:

_____, Cashier.

Way-bill, Mem. car 13082. From Cincinnati, O., 9, 12, 1888.

No. 1442.—C., H. & D.

Louisville, 12th, 1888.

Received of Ohio & Mississippi Railway, the following described property, in good order except as noted:

| Address. | Description of Property. | |
|-----------------------------------|-----------------------------|------|
| Harry Smythe, Columbia, Tenn., | Machinery, O. R. | 6960 |

C., H. & D.
Charges, \$18.79.

The car thus tendered having been declined, the agent of the Louisville & Nashville Railroad Company returned said billing to the agent of the Kentucky & Indiana Bridge Com-

pany, on the same day of the tender. Thereupon, the Kentucky & Indiana Bridge Company, on the 13th of September, 1888, filed its bill, or petition in this court, against the Louisville & Nashville Railroad Company, under the provisions of the sixteenth section of the Interstate Commerce Act, setting out and reciting therein the said proceedings had before the Commission, together with its report and order in the same, alleging that the findings of fact by said Commission were correct and true, and charging that, since the order of the Commission in the premises was made, and notice thereof delivered to defendant, complainant had, on its own behalf, and on behalf of other common carriers using its tracks, requested said defendant to make interchange of freight with it and with said carriers at the point of connection (Seventh Street and Magnolia Avenue), between petitioner's line and defendant's road, in the City of Louisville, and had brought and offered to defendant, at said point of connection, freight in car loads, coming from points beyond the State of Kentucky and north of the Ohio River, and destined to points beyond and south of the south line of the State of Kentucky, and had requested defendant to receive and forward the same, and had further requested defendant to afford petitioner as a common carrier, and to the common carriers using its tracks, the same facilities for the interchange of freight which defendant afforded to other common carriers in the City of Louisville, with their lines respectively; but that defendant had refused, and was still refusing, to interchange interstate freight of any sort, or under any circumstances, with it at said point of connection, or elsewhere in the City of Louisville, or to so interchange with any common carrier using its tracks; that defendant refused and was still refusing, either to receive or to deliver at said point of connection, or elsewhere in the City of Louisville, any freight whatever from or to petitioner, or any common carrier using its tracks; and in all respects had violated, refused and neglected, and would continue to violate, refuse and neglect to obey, in any respect, the lawful directions and requirements of said Commission as set forth in its said report and order, and would continue its refusal, in any manner, to interchange freight with, or to afford any facilities whatever to, petitioner, or to said common carriers using its tracks, for such interchange of traffic, or for receiving, forwarding and delivering passengers and property between the connecting lines of the petitioner and defendant. Wherefore the petitioner prayed "that by the writ of injunction, or other proper process issuing from this court, the defendant, the Louisville & Nashville Railroad Company, may be restrained from further continuing to violate or disobey said order and requirement of said Commission, and may be enjoined to render obedience to the same; and that the defendant may be so enjoined, and required to interchange traffic with your petitioner, and with the railway companies using your petitioner's railroad, at the said point of connection, at Seventh Street and Magnolia Avenue, in Louisville, Ky., and to receive from your petitioner, and said railroad companies using petitioner's railroad, all freight tendered by it, or them, to the said defendant

for transportation to points on, beyond and via defendant's railroad or railroads, and to deliver to the petitioner, or railroad companies using petitioner's railroad at said point of connection, all freight arriving at Louisville on defendant's railroad and consigned to the petitioner, or to said railroads using petitioner's railroad, or to points on the line of petitioner's railroad, or of railroad companies using petitioner's tracks, and for such other and further relief in the premises as to this honorable court may seem just, proper and equitable."

Upon the filing of said petition, this court, in conformity with the provisions of the sixteenth section of the Interstate Commerce Act, and to the end that a speedy hearing and determination of the matter in controversy might be had, issued its order directing defendant to be served with a copy of said petition, and requiring it to make its response or defense thereto on the third day of October, 1888, at which time the defendant appeared and filed its answer, which is quite lengthy and sets up various matters and grounds of defense, to the relief sought.

Respondent, after admitting petitioner's corporate capacity, sets out the Acts of Kentucky and Indiana, under and by virtue of which it was organized, and certain provisions of its amended and original charter showing the extent and character of its corporate powers and franchises, which respondent alleges constitute petitioner nothing more than a bridge company, having no right as a common carrier whatever, and only authorized to demand and receive tolls for the use of its bridge and terminal tracks connected therewith. Respondent denies that petitioner is, either *de jure* or *de facto*, a common carrier of interstate commerce, and disputes the correctness of the Commission's finding of fact, or conclusion of law, on that question. Respondent denies that petitioner, as such carrier, had tendered it any interstate freight or passengers for transportation over respondent's road since the order of the Commission.

In that connection, and as showing the character in which petitioner handles the freight or traffic which it sought to have interchanged at said point of junction in Louisville, respondent states that petitioner, on September 29, 1886, entered into a written contract with the Ohio & Mississippi Railroad Company, whose road enters Louisville from the north side of the Ohio River, under and by the terms of which the latter was allowed, for a period of twenty years, and upon the payment of an annual rental by way of toll, "to run its locomotives, cars, and trains over petitioner's bridge and approaches;" said Ohio & Mississippi Railroad Company agreeing, on its part, "to carry and transport over the said bridge, approaches and railway tracks, all of its locomotives, cars, freight, passengers, mail, express matter, and everything else carried or transported by it on its own line of railroad, destined, or consigned to or from Louisville, and to or from points which require their passage over the Ohio River at or near Louisville;" "the interchange of freight business at Louisville, and New Albany, between said (Ohio & Mississippi) railway company, and any connecting road, shall be done over the tracks of the bridge company, between

the south approach to its bridge, and the tracks of such connecting road;" and that, by the fourth clause of said contract, petitioner agreed to transfer cars from the Ohio & Mississippi Railway Company's transfer yard south of Bank Street, in Louisville, to respondent's railroad, or the Chesapeake, Ohio & Southwestern Railroad, at a switching charge of \$1 per car.

Respondent further states that on June 21, 1887, the petitioner made and entered into a written contract with the Louisville Southern Railroad Company, whose road enters Louisville from the south, by the terms of which petitioner had leased to said railroad company, for the period of ninety-nine years, the equal right to possess and own, in common with petitioner, for railroad purposes, the railroad right of way, roadbed, main and side tracks, and switches, appurtenances, and fixtures, possessed or owned, or hereafter possessed or owned, by petitioner, on the south side of the Ohio River, between Magnolia Avenue and the yard of said Louisville Southern Railroad Company in Louisville; that by said contract it was further agreed that petitioner and said railroad company should construct a line of track, with the necessary switches and sidings, eastwardly along Magnolia Avenue to a connection with the track of respondent at or near the intersection of said Magnolia Avenue and Seventh Street, said connection to be constructed and maintained, at the joint expense of petitioner and said Louisville Southern Railroad Company, and to be operated by the latter in the manner stipulated; that by the eighth clause of said contract, the Louisville Southern Railroad Company agreed to provide and keep a sufficient number of suitable switching engines on hand, and to handle promptly all freight cars, to be moved between petitioner's transfer tracks in Louisville and the railroads of respondent, and the Chesapeake, Ohio & Southwestern, at a charge or switching rate to be fixed by the parties to said contract, which charge, or the gross revenue thus obtained, was to be divided between petitioner and the said railroad company, in the proportion of 55 per cent to the latter, and 45 per cent to the former, except as to the switching charges on cars of the Ohio & Mississippi Railway Company, which petitioner had, by its contract of September 29, 1886, agreed to transfer at \$1 per car. The Louisville Southern Railroad Company was to make no charge for switching such cars of the Ohio & Mississippi Railway Company, but the switching charge of \$1 for transferring the cars of that company was to be paid wholly to petitioner.

Under the operation of said contracts with the Ohio & Mississippi and the Louisville Southern Railroad Companies, respondent insists that petitioner had nothing to do with the carriage or transportation of any interstate freights coming from, or destined to, said Ohio & Mississippi Railway Company, except the duty of transferring the cars of said railway company between certain points south of the Ohio River, for an agreed switching charge of \$1 per car; and that by its contract with the Louisville Southern Railroad Company petitioner had assigned and transferred to the former the right to do all the switching business passing over petitioner's tracks; so that, as the

result of the two contracts, petitioner had nothing at all to do with interstate freight, carried either by the Ohio & Mississippi Railway Company or the Louisville Southern Railroad Company, and in respect to said freights was neither *de jure* nor *de facto* a common carrier. Respondent further states that petitioner owned no freight cars; that it had five engines and ten passenger cars, and assumed to transfer passengers between the Cities of Louisville and New Albany, but had never tendered respondent any passengers for transportation; that petitioner also assumed to carry freight locally between said cities, but has tendered none of such freight, to respondent, for transportation on its road.

Respondent also states that petitioner has on several occasions procured freight cars from railroad companies, and having loaded them, on some one of the five side tracks in Louisville, connected with petitioner's track, assumed to issue bills of lading therefor, to points beyond Louisville or New Albany; but in all such cases the freight charges are paid to the railway companies, from whom the cars were ordered or procured, and that petitioner's only charges in the matter were for bridge tolls, and for its terminal services, in switching the loaded car; said bridge tolls varying from one and one fourth to six cents per hundred pounds, according to classification of freight, and the switching charges varying from \$1 to \$3 per car.

Respondent admits that it is a common carrier of interstate freight and passengers between points situated upon its railroad, but denies that it is a common carrier of such interstate traffic to or from points beyond its own railroad, or that it holds itself out to the public as a common carrier, undertaking to transport beyond its own lines.

Respondent avers that it has at all times refused to engage in the transportation of either freight or passengers to or from points beyond its own lines, except where certain agreements or arrangements had been made between itself and the other railroad companies, whose roads were part of the through routes under which agreements or arrangements certain through rates were established, and the proportions of these rates to be received by the different companies, whose roads formed the through routes, were agreed upon; also the proportion in which losses resulting from such through business should be borne by said companies; also the terms and conditions to be inserted in the through tickets and bills of lading—but that respondent had never entered into any such agreement or arrangement with petitioner, and was unwilling to do so, or to act under through tickets or through bills of lading, which petitioner might see proper to issue, in the absence of such agreement, fixing and defining the terms and conditions of through traffic received from or to be delivered to petitioner.

Respondent admits the proceedings had before, and the report and order made thereon by, the Commerce Commission, as alleged in the petition; admits that since said Commission's order was made, and said notice thereof was delivered to respondent, petitioner had, on its own behalf, and, perhaps, assuming to act on behalf of the Ohio & Mississippi Railway

Company, requested the respondent to make interchange of freight with it, and with carriers using its track, at the point of connection between petitioner's track and respondent's track, at Seventh Street and Magnolia Avenue in the City of Louisville; that petitioner had requested respondent to afford it and the common carriers using its track the same facilities for the interchange of traffic at said point of connection which respondent affords to other common carriers in the City of Louisville, at other points where their connections are made, and that respondent had refused, and was still refusing, to interchange interstate freight of any sort, or under any circumstances, with petitioner, or with any common carrier using its track at petitioner's said point of connection. Respondent states that to accommodate certain local shippers at Louisville, whose establishments are located upon side tracks connected with the track of petitioner at Louisville, it has been, and is still willing, without being legally bound to do so, to accept at said point of connection, car load freights, destined to points south of Louisville, on or reached by, respondent's railroad system, and to transport the same at Louisville rates proper, provided such car load freights originate at or on local Louisville sidings, except a certain siding claimed to be owned by the Kentucky & Indiana Stock Yard Company; that since the order of said Commission, the petitioner had not brought or offered to respondent, at said Seventh Street and Magnolia Avenue connection, any freight, in car load lots, coming from points beyond the State of Kentucky, and north of the Ohio River, and destined to points beyond and south of the south line of the State of Kentucky, or any other interstate freight, which it had requested respondent to receive and forward, except in one instance, viz.: the car containing machinery, as above described, tendered on September 12, 1888, which respondent declined to receive; and respondent insists that in declining to receive said car, and in refusing to interchange traffic with petitioner, at said point of connection, it has not violated any lawful order or requirement of said Commission.

Respondent claims that the order of said Commission in petitioner's favor is not lawful, and it is not therefore bound to obey the same. Respondent denies the truth and correctness of said Commission's findings of fact, in several material particulars. It denies that petitioner is either *de jure* or *de facto* a common carrier of interstate commerce, as found and reported by the Commission. It denies that petitioner, as such carrier, has tendered respondent any interstate freight or passengers for transportation over its road since the order of the Commission. It denies that petitioner, even as a *de facto* common carrier, is now, or was, at the time of instituting said proceedings before the Commission, engaged in interstate traffic between points south or east of Louisville, or north of New Albany, and avers that the Ohio & Mississippi Railway Company was the only common carrier, engaged in said interstate traffic, handled or switched over petitioner's track.

In this connection, respondent says "that wherever petitioner has undertaken to load cars upon its sidings, either in New Albany, or Louisville for points in other States, it has pro-

cured the cars from railroad companies owning the lines for which said freight was destined; and the charges for the transportation of such freight were and are paid to said railroad company or companies furnishing the cars, the said bridge company (petitioner) rendering no service, and making no charge, in regard to said cars (or freight), except charges for switching them," and receiving its regular bridge toll, if the cars passed over its bridge.

Respondent denies that petitioner's connection with its track at Seventh Street and Magnolia Avenue, in Louisville, is a proper, suitable, and convenient point for the interchange of traffic, between respondent and petitioner, or with common carriers using the latter's tracks, as found by the Commission. Respondent states that there are no buildings at that point for clerks, porters or other employes, needed and required in carrying on an interchange of traffic there; that such interchange at that connection would entail extra expense and trouble upon respondent, would involve the use of its terminal facilities, as all cars interchanged at that point would have to be hauled from there over respondent's main track to its yard and freight depot at Ninth and Broadway, in Louisville; and if all the common carriers who might choose to use petitioner's tracks were to have an interchange of traffic at that point it would be very inconvenient and unsuitable, etc.

Respondent denies the correctness of the Commissioners' finding—that it refuses to afford petitioner, or common carriers using its bridge, all proper, reasonable and equal facilities for the interchange of traffic, such as respondent furnishes to other carriers of interstate commerce, at the City of Louisville—and states that "Respondent is, and has always been, willing to receive from, and deliver to, petitioner, at respondent's regular freight depot at Ninth and Broadway Streets, in Louisville, any freight that may be consigned to or by petitioner, upon being paid therefor Louisville rates proper;" and further says that "The facilities afforded by respondent at said depot are reasonable and proper in themselves, and are equal to the facilities which respondent affords to all other Louisville consignees or consignors; and as petitioner and respondent have made no agreements, or arrangements, for doing through business of any kind, petitioner is a mere local Louisville customer, so far as respondent is concerned, and is therefore entitled to no other facilities than those which respondent furnishes to all of its other Louisville customers."

Respondent further shows that it has three freight yards in the City of Louisville, and a fourth near thereto, which are fully adequate for the transaction of all its business, both freight and passenger; that its main or principal yard and depot is located at Ninth and Broadway, where the traffic crossing the Ohio River at Louisville is interchanged with the various railroads leading north from Louisville, and where local freight brought from the South, destined to Louisville, or received at Louisville destined to points south, is handled. Respondent says such is the capacity and commodious character of this yard and depot, that six trains, of eighteen cars each, making an aggregate of one hundred and eight cars, standing upon six tracks, can be loaded and unloaded at the same

time under shelter, and that respondent keeps at that point a large force of clerks, inspectors, porters, etc., for the transaction of its freight business. Respondent claims that having, under its charter obligations, established four ample and adequate yards and depots at Louisville for the transaction of its business, and where its interchanges with other carriers are made, and both through and local freights are received and delivered, it cannot be required to establish or furnish other and additional facilities at Seventh and Magnolia Avenue, for the convenience or accommodation of petitioner, or the carriers using its tracks. Respondent states that the lines of railroad owned, leased, controlled and operated by it extend from Cincinnati to Louisville, Nashville, Chattanooga, Decatur, Montgomery, Mobile, New Orleans, and other southern points; that from Louisville to Cincinnati its road, located on the south side of the Ohio River, forms a competing line with the Ohio & Mississippi Railway, extending from Louisville to Cincinnati, on the north side of said river; that going south, or to Chattanooga, and points south of there, its road is in active competition with the Cincinnati Southern, and the Louisville Southern Railroads; that prior to 1872, freight and passengers crossing the Ohio River at Louisville had to be transferred through the city, and ferried across the river, which occasioned serious delays, and extra expense to traffic and travel; to remedy which the Louisville Bridge Company was incorporated in 1856, by the Legislature of Kentucky, for the purpose of constructing a railroad bridge across the Ohio River, at or near the City of Louisville; that the charter of said Louisville Bridge Company was so amended in 1862 as to authorize it to contract with any incorporated railroad company, "to warrant the annual profits of the bridge, to be built by said company, shall be equal to the keeping the bridge in repair, and of its operation, and that the net earnings shall be equal to 6 per cent on a cost of \$1,000,000."

Said bridge company was further authorized to contract, at an agreed sum or rate, with any railroad company, for the annual use of said bridge by the cars, or for the purpose of said railroad company; and it was made lawful for any railroad company, incorporated by the Laws of Kentucky, to subscribe to the stock of said bridge company, and to make the guaranties and agreement, as to the earnings of the bridge, authorized by the Act; that by an Act of Congress approved February 17, 1865 (amending an Act approved July 14, 1862, declaring the bridge across the Ohio River at Steubenville to be a lawful structure), the Louisville & Nashville Railroad Company, and the Jeffersonville, Madison & Indianapolis Railroad Company, were authorized to construct a railroad bridge over the Ohio River, at the head of the Falls of the Ohio, subject to all the provisions of said Act of July 14, 1862; and the bridge so to be constructed was declared "to be a lawful structure;" that under this legislation, state and federal, the capital stock of the Louisville Bridge Company was subscribed for by various parties, individuals, and corporations, including the Jeffersonville, Madison & Indianapolis, and the Louisville & Nashville Railroad Companies—the subscription of the 2 INTER S.

latter being for \$300,000—and the bridge was constructed; and that thereafter, upon its completion, on June 5, 1872, a written contract was entered into between said Louisville Bridge Company as party of the first part, the Jeffersonville, Madison & Indianapolis Railway Company of the second part, the Ohio & Mississippi Railway Company of the third part, and the Louisville & Nashville Railroad Company of the fourth part, stipulating, among other things, as follows:

First. "That the second, third and fourth parties agree, respectively, to use said bridge."

Second. The first party "agrees that the tolls and charges over and for the use of said bridge and its tracks—in the transportation of freight, passengers, mails and other goods, received from or delivered to the roads of second, third and fourth parties, per ton, or per passenger, or per car, engine or other means of transfer, over said bridge—shall be fixed on signing this agreement, and shall not be in excess of a toll or charge sufficient to produce, in the aggregate, a sum equal to the cost and expense of keeping in repair and taking care of said bridge, paying a dividend of 6 per cent upon its capital stock of \$1,500,000; the interest upon said bonds (of the bridge company) as the same matures; a sinking fund, sufficient to pay off said bonds of \$800,000 at maturity; the amount necessary to keep up the corporate organization of the first party; and such taxes as may be chargeable against such bridge company, on said bridge, or other property pertaining thereto, or otherwise."

Third. "That said charges and tolls shall, from year to year, be reduced in proportion to the reduction of interest on said bonds, by the operation of the sinking fund."

Fourth. "That the tolls and charges shall always be the same, to each of the second, third and fourth parties."

Fifth. "That the tolls and charges to other railroads, or railroad companies, for like use of said bridge, and the approach owned by the first party, shall not be less than those charged to, or incurred by, the parties hereto."

Sixth. "That all such tolls and charges, paid by other railroads, shall be applied to, and form a part of, the fund hereinbefore provided for the payment of expenses, sinking fund, interest, dividend and taxes, the same as if paid by the second, third and fourth parties."

Seventh. That in the event the bridge should, by any casualty, be injured so as to render it useless or dangerous, and it should become necessary to rebuild the whole, or any material part thereof, involving an expenditure greater than could be realized from a judicious amount of guarantied rates and charges, "then an additional number of bonds were to be issued, to yield a fund sufficient to renew and repair the bridge; and in that event the tolls and charges were to be increased, so as to provide for the payment of such additional bonds, and to provide a sinking fund to retire them at maturity."

Eighth. The second and third parties (the Jeffersonville, Madison & Indianapolis, and Ohio & Mississippi Railway Companies), each severally agreed "that it will pass over the said bridge all the freight, passengers, mails, express matter and other goods carried on and

over their railroads, to and from Louisville, and to and from points, which require their passage over the Ohio River at or near Louisville, during the existence of this agreement," and will pay punctually to the first party the tolls and charges stipulated for the use of said bridge, and approaches thereto, owned by the bridge company.

Ninth. The party of the fourth part (the Louisville & Nashville Railroad Company) "covenants with each of the parties of the first, second and third parts, their respective successors and assigns, that it will deliver to said party of the first part, to be passed over the said bridge, or to the parties of the second or third parts, or to such other railroad company, or companies, as may, for the time being, be transporting freight, passengers, mails, express matter and other goods over said bridge, all the freight, passenger, mail and express matter, and other goods carried on, and over, its road, or any part thereof, destined for Jeffersonville, in the State of Indiana, or any other points, which require their passage over the Ohio River, at or near Louisville during the existence of this agreement, and all charge on said traffic, in addition to its rates for transportation service, the then established rate of tolls and charges, hereinbefore provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party."

Tenth. The north approach to said bridge, being owned by the second party (the Jeffersonville, Madison & Indianapolis Railway Company), and the line of the third party, entering Jeffersonville, being connected therewith, it was agreed between said parties that the third party would use said approach to and from said bridge, in going on and over the same, and that all the trains, cars and engines passing over said approach and bridge, "shall be under the control and direction of the second party, and that whatever rules are prescribed for the government of the trains, cars and engines of the second party in the premises, shall be equally applicable to the trains, cars and engines of the third party, each being dealt with alike; and the second party covenants to furnish all needful and sufficient engines for the service mentioned, and at all times to transfer, with the same promptness and care over the said bridge, the trains, cars, engines and traffic of the third and fourth parties, that it does the trains, cars, engines and traffic received from, or to be delivered to, its own road, the intention being that each of the parties shall enjoy equal facilities over said approach and bridge."

Eleventh. That "For the service aforesaid of said engines of the second party, and the conducting and management of the same, and of cars, trains and business over said approach and bridge, the second party shall be allowed a reasonable compensation, to be apportioned between the parties hereto, in proportion to the services to each, per ton, and per passenger, or per engine, or other means of transportation, as the parties may hereafter agree."

Twelfth. That "If any difference shall arise between the parties, or any of them, as to the construction of any of the provisions of this contract, or the mode of performance, the same shall be submitted to arbitration. The

qualification of arbitrators, and an umpire, and the obligation to perform the award by them made, to be the same as hereinbefore provided."

Thirteenth. That "This contract shall continue in force and operation, until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of which two years the same shall terminate as to all parties hereto, included in such notice."

Respondent further states that since said contract was entered into the Louisville, New Albany & Chicago Railway Company, and the Louisville, Evansville & St. Louis Railroad Company, have been allowed to use said bridge and its approaches, in substantial accordance with the provisions of said contract; that the rates of tolls and charges upon said bridge, have been continually growing less per ton, and per passenger, as the volume of traffic over the bridge has increased; that the dividends agreed to be paid upon the capital stock of said bridge company were, seven or eight years since, reduced from 6 to 4 per cent semi-annually, and that the sinking fund is now sufficient to pay off the mortgage bonds of the bridge company, which mature in December, 1888; that since the construction of said bridge, and under the operation of said contract, the practice has been for the roads coming into Louisville from the north to have their freight cars switched by the Jeffersonville, Madison & Indianapolis Railway engines, across the said Louisville Bridge, to the transfer yards of respondent at Ninth and Broadway, where all cars loaded for one point in the south were put into trains, and forwarded to destination; and whenever a car contained freight destined to two or more points in the south, the freight was unloaded, assorted and reloaded into cars destined to those points; that a similar practice, or mode of conducting the traffic, prevailed as to all freight coming over the respondent's road from the south, destined to points north of the Ohio River, and crossing the river at Louisville; and further, that said Louisville Bridge has been, and is, fully adequate to transfer all traffic crossing the Ohio River at Louisville, and to do it as promptly and cheaply as it can possibly be done by any other bridge.

Respondent then states that the Ohio & Mississippi Railway Company continued to use said Louisville Bridge, under the terms of said contract of June 5, 1872, and to interchange traffic, under arrangements therefor with respondent, at respondent's yard and freight depot, at Ninth and Broadway, in Louisville, until February 4, 1888, when said Ohio & Mississippi Railway Company gave notice of its intention to withdraw from said contract at 12 o'clock noon of that day.

Respondent says it is perfectly willing to continue to interchange traffic with said Ohio & Mississippi Railway Company, and with all other railroads reaching Louisville from the north, if they will use said Louisville Bridge, and will continue to make the interchange at respondent's yard at Ninth and Broadway, which has been prepared at great expense, and where all necessary and adequate facilities are

at hand; that to allow said Ohio & Mississippi Railway Company to divert its traffic from said bridge, will reduce the annual revenue thereof, about one fifth, or not less than \$129,167.17 per annum, and the loss of that revenue will compel a corresponding increase in the tolls to be paid by respondent upon the traffic which it is bound to send across said bridge, causing an annual loss and injury to respondent, of several thousand dollars.

Respondent says that petitioner, having built a new bridge across the Ohio River, has induced the Ohio & Mississippi Railway Company to abandon the Louisville Bridge, and to use petitioner's bridge, and now seeks to compel respondent to interchange traffic with the said Ohio & Mississippi Railway Company, at the intersection of petitioner's track with respondent's road, at Seventh Street and Magnolia Avenue, where there are no facilities for such interchange, and from which point all cars interchanged would have to be hauled over respondent's track, to its yard and freight depot at Ninth and Broadway, thus necessitating the use by petitioner, of respondent's terminal facilities at Louisville.

Respondent says that it cannot, at said point of connection, return or deliver cars to petitioner without using the latter's tracks to a greater or less extent, and that by the terms of the ordinance of the City of Louisville, granting petitioner the right to lay its tracks in said city, it is provided that, before entering upon the use of petitioner's tracks respondent, or any other railroad company, shall pay to petitioner a "pro rata" share of the cost of constructing such tracks, and shall bind itself, by contracts with the City of Louisville, that respondent, or such other railroad company, will contribute its *pro rata* share toward the repair and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges, trestles or fills, that may be necessary to the safe and efficient use of said tracks, and toward the maintaining of such watchmen as may be necessary to the proper guarding of street crossings, etc.; that respondent, having a sufficient number of tracks of its own, for the transaction of all its business at and in said city, has no desire to use petitioner's tracks, and is unwilling to incur the hazard of litigation with the City of Louisville, by even such use of petitioner's tracks, as would be necessary in returning cars to it.

Respondent insists that the order of the Interstate Commerce Commission in favor of petitioner, and against respondent, is not a lawful order or requirement, for the following reasons, viz.:

First. Because petitioner is neither *de jure* nor *de facto* a common carrier of interstate commerce.

Second. Because respondent is required to interchange traffic with common carriers, using petitioner's track, at said point of connection at Seventh Street and Magnolia Avenue, when no such carriers were parties to the proceedings in which the order was made.

Third. Because at said point of connection there are no buildings, sheds or conveniences for the interchange of freights, and no clerks, inspectors or other employes to attend to such interchange; while all such facilities, to an ample and sufficient extent, are provided at respondent's

Ninth and Broadway yard and depot, where it interchanges with all other railroads coming into Louisville from the north side of the Ohio River.

Fourth. Because under said order, respondent is required to receive and deliver at said point of connection, freight from and to any carrier using petitioner's track, although such carrier may have contracted with respondent to bring its traffic over the Louisville bridge, and to interchange it with respondent at its regular yard; that it will compel respondent to interchange, at said connection, freights which the Ohio & Mississippi Railway Company may bring across the Ohio River, over petitioner's bridge, in violation of its contract with respondent and others, and, in effect, impair the obligation of that contract. Respondent submits that it cannot be lawfully required to release the Ohio & Mississippi Railway Company from the obligation imposed by said contract.

Fifth. Because the effect of said order is to compel respondent, indirectly, to furnish to the public petitioner's bridge as an additional facility for the interchange of traffic crossing the river, after respondent had contributed, as a stockholder, in building the Louisville Bridge, and secured the use of that bridge, as a terminal facility at Louisville, for the transfer of traffic across the Ohio River.

Sixth. Because the effect of said order is to force respondent to enter into contracts with petitioner, and with carriers using its tracks, for the through transportation of interstate traffic to and from points beyond respondent's lines of railroad, simply because respondent has seen proper to make such contracts with other common carriers.

Seventh. Because the effect of said order will be, not only to require respondent to receive from petitioner, and all common carriers using its tracks, interstate traffic, but also to transport it, at the same *pro rata* of through rates that respondent may have agreed to with other carriers; the result of which, as respondent insists, will be, indirectly, to establish the rates which respondent is to charge on interstate through traffic tendered it by petitioner, or by carriers using petitioner's tracks; and this, respondent denies the authority of the Commission or of Congress to do.

Lastly, respondent submits that Congress cannot require, or authorize, this court to execute, or enforce, any order that said Commission may assume to make; and if the petition in this case is to be regarded as an original proceeding in this court, to enforce the supposed rights of petitioner, under the Act of Congress to regulate commerce, and without regard to the order made by said Commission, then respondent insists that the court has no jurisdiction, because the petitioner is a corporation chartered and created by the laws of Kentucky and Indiana, and respondent is a corporation also chartered and created by the laws of Kentucky.

Upon the filing of respondent's answer, all matters of fact raised by the pleadings, and necessary to a proper determination of the legal questions involved, were, by the court, referred for investigation and report, to a special referee, before whom much proof was taken on both sides, and the facts bearing upon the controversy were gone into more fully than

before the Commission. On the 29th of October, 1888, the referee submitted his report in the premises, with all the evidence introduced. The respondent filed numerous exceptions to said report, which was presented at the same time with the hearing upon the merits. Many of respondent's said exceptions are, in the judgment of the court, well taken, and should be allowed; but without noticing or acting upon them in detail, which would unnecessarily extend this opinion, the court finds the material facts of the case, as disclosed by said report, and such modification thereof, and additions thereto, as the evidence supporting and sustaining respondent's allowed exceptions to the same warrants, to be as follows:

The Louisville & Nashville Railroad Company was incorporated by an Act of the State of Kentucky, approved March 5, 1850, with power to construct "a railroad from Louisville to the Tennessee line in the direction of Nashville," and for the transportation of persons, merchandise and property of any kind over or along said railroad was authorized to charge any sum not exceeding certain specific rates. Its charter, among other things, provided that "It shall not be lawful for any other company or any other person or persons to travel upon or over any of the roads of said company, or to transport persons or property thereon, without the license and permission of the president and directors thereof;" but power was reserved to the State of Kentucky to incorporate thereafter other railroad companies, and it was provided (§ 18) "That any and all such railroad, or railroads, hereafter constructed may connect and join with the road hereby contemplated." By an amendment to its charter, made in 1860, said company was authorized to "make arrangements with other companies for through freights and passage from distant points, on such terms as they may agree from time to time."

Under proper legislative authority, the lines of the Louisville & Nashville Railroad Company have since been extended, so that it now owns, controls and operates a system of railroads running from Cincinnati, crossing the Ohio River at Newport, Ky., to Louisville, Nashville, Chattanooga, Decatur, Montgomery, Mobile, New Orleans and other southern cities. Under the requirements of its charter, it has provided, and for many years has had in use, for the accommodation of travel and traffic at Louisville, four separate and distinct freight yards and depots, with ample buildings, platforms, switches and other facilities, including an adequate force of clerks, inspectors and employes connected therewith, for the handling of freight and passengers arriving at or leaving that city, which constitutes one of its main terminal points. These four yards are conveniently located; No. 1 being at First and Water Streets, near the river front; No. 2 at East Louisville; No. 3 at South Louisville; and No. 4 at Ninth and Broadway Streets, in the western portion of Louisville.

This latter yard and depot is one of the most commodious in the United States, with every facility and convenience for the safe, rapid and cheap handling of traffic. Its character and capacity is correctly stated and described in

respondent's answer. This yard, supplied with sufficient switches and sidings, extends southward from Broadway to Oak Street, in Louisville. From Oak Street to the South Louisville yard, the Louisville & Nashville Railroad owns only a right of way sixty-six feet in width, occupied with double main tracks, with a spur switch on the east side thereof, running down Seventh Street, to a work or repair shop of the company. Said four yards, with their buildings and accommodations, have been procured and constructed by respondent at a cost of about \$1,500,000, and the same are now worth that sum. From 1872 to October 21, 1887, all freight traffic coming to Louisville from railroads north of the Ohio River, and destined to points south on the line, or lines, of the Louisville & Nashville Railroad Company, and all freights brought by the Louisville & Nashville Railroad Company from the south, and destined to points north of the Ohio River, were interchanged by and between respondent, and all other railroads entering Louisville from the north side of the river, at said Ninth and Broadway yard and depot, which was reached by connections made at Tenth and Maple Street, one block west of said yard.

The Louisville & Nashville Railroad Company does not engage in the business of a common carrier of interstate commerce to or from points beyond its own lines of road; neither does it hold itself out to the public as a common carrier of such interstate traffic. It has, at all times, refused to engage in the transportation of freight or passengers to or from points beyond its own line, except when certain agreements or arrangements have been made between itself and the other railroad company or companies, whose roads were to form part, or parts of the through routes, to be thus established.

Under the said agreements or arrangements certain through rates for transportation over the through route or routes are established, and the proportion in which such through rates are to be divided between the different companies comprising the through route are agreed upon; also the proportion in which the respective companies shall share in the losses resulting from such through business, and the terms and conditions to be inserted in the through tickets and bills of lading issued by them respectively. The Louisville & Nashville Railroad Company has now, and for many years past has had, such traffic arrangements with railroad companies reaching Louisville from the north side of the Ohio River, and extending to the cities of St. Louis and Chicago; but such agreements not only prescribe the terms and conditions on which the business shall be transacted, and the rates "prorated," but also designate the points and places on the respective railroads, between which the through route and the through rate shall apply. Under the arrangements which the Louisville & Nashville Railroad Company now has, and has heretofore had, with the railroads entering Louisville from the north side of the Ohio River, for through routes and through rates, many points, both on the north and south sides of the Ohio River, reached by the contracting companies, are not included; and through bills of lading, and through tickets, on the agreed through rates, are only author-

ized to be issued by the respective parties to such arrangements to and from the points designated by their agreement.

If the railroads north of the river, although parties to such arrangements with the Louisville & Nashville Railroad Company, bring freight to Louisville for transportation south, via the Louisville & Nashville Railroad Company, in violation of the terms, conditions and restrictions of the agreement for through route and through rate, or for points other than those embraced in the arrangement, the Louisville & Nashville Railroad Company refuses to receive and transport the same, except at local Louisville rates, treating such freight as a local Louisville shipment. In the absence of express contract, fixing the period during which such arrangements for through routes and rates shall continue, they are subject to change, modification, or abrogation, on notice from any of the parties, and are actually changed, or abrogated, from time to time, as the interest of the companies may dictate, or require.

Respondent's existing arrangements or agreements with railroad companies entering Louisville from the north side of the Ohio River over the Louisville Bridge, for through routing and through rating, upon agreed *pro rata* division of rates, provide, and require, that all such traffic shall be interchanged at Tenth and Maple Streets, or between Ninth and Tenth Streets, near Broadway, where respondent's main freight yard is located, and where ample facilities have been provided for such interchange.

The Louisville & Nashville Railroad Company has never entered into any arrangement with the petitioner for the interchange of interstate traffic on through routes and at through rates, and refuses to receive such freight from it, except the same be delivered at one of respondent's freight stations, where respondent will receive such freight, issue proper bills of lading therefor, and transport it, upon precisely the same terms and conditions on which like kind of property is received and handled for other Louisville shippers.

It is shown by the evidence that arrangements for joint through routes and through rates, which create and establish a *quasi* partnership and agency relation between the parties thereto are always and necessarily the subject matter of private contract or agreement between the railway companies, over whose roads the traffic is conducted, based upon various considerations, such as the division of rates, the solvency, reliability, and promptness of the respective lines; their ability to furnish equipment and suitable facilities for the dispatch of business; their ability to deliver business to the through line, or the traffic each can furnish; the mileage rate to be paid or allowed on cars passing on or over each other's line, the method of adjusting losses, the effect upon their other traffic, etc.

From 1850 to 1872 traffic crossing the Ohio River at Louisville had to be transferred by means of ferry boats, which was attended with great expense, delay and trouble, and often subject to serious interruptions by low stages of water and ice on the river. To remedy this condition of things the Louisville Bridge Company was incorporated by the State of Kentucky March 10, 1856, with powers to construct

a railroad bridge across the Ohio River at Louisville.

By an amendment to the charter made in 1862, the bridge company was authorized to contract with any railroad company incorporated under the Laws of the State of Kentucky, or any other State of the United States, to warrant the annual profits of the bridge, to be built by said company, to be equal to the keeping of the bridge in repair, and of its operation, and that the net earnings should be equal to 6 per cent on the cost of \$1,000,000. It was further authorized to contract, at any agreed sum or rate, with any railroad company chartered by the State of Kentucky, or any other State of the United States, for the annual use of said bridge by the cars, or for the purpose of said railroad company; and any railroad company incorporated by the State of Kentucky was authorized to subscribe to the stock, or make the guaranties and agreements, authorized by the charter.

The bridge was declared to be a lawful structure by an Act of Congress approved July 14, 1862. This Act was amended in 1865, so as to authorize the Louisville & Nashville Railroad Company, and the Jeffersonville Railroad Company, to construct a railroad bridge over the Ohio River at Louisville.

Under these Acts of legislation, the capital stock of the Louisville Bridge Company was subscribed for by the Jeffersonville, Madison & Indianapolis Railroad Company, the Louisville & Nashville Railroad Company, and other corporations, and by individuals. The Louisville & Nashville Railroad Company owned \$300,000 of the stock until December, 1880, when it ceased to be a stockholder.

On June 5, 1872, upon the completion of said bridge, a written contract was entered into between the Louisville Bridge Company of the first part, the Jeffersonville, Madison & Indianapolis Railroad Company of the second part, the Ohio & Mississippi Railway Company of the third part, and the Louisville & Nashville Railroad Company of the fourth part, in which it was recited that the capital stock of the bridge company was \$1,500,000, and that its mortgage debt was \$800,000, evidenced by bonds to mature December 1, 1888, bearing interest at 7 per cent, payable semiannually. The contract provided that the second, third and fourth parties agreed to use the bridge as covenanted therein; that the tolls and charges over and for the use of the bridge and its tracks, in the transportation of freight, passengers, mails and other goods, received from or delivered to the roads of said second, third and fourth parties, per ton, and per passenger, or per car, engine, or other means of transfer over said bridge, shall be fixed on signing this agreement, and shall not be in excess of a toll, or charge, sufficient to produce in the aggregate a sum equal to the cost and expense of keeping in repair and taking care of said bridge, paying a dividend semi-annually of 6 per cent on the capital stock of \$1,500,000, the interest upon the bonds, as the same shall become payable, a sinking fund sufficient to pay off the bonds of \$800,000 at maturity, the amount necessary to keep up the corporate organization of the first party, with its proper officers and servants, and such taxes as may be chargeable against the bridge company on said bridge, or other prop-

erty appertaining thereto, or otherwise. That the charges and tolls shall, from year to year, be reduced in proportion to the reduction of interest on the bonds, by the operation of said sinking fund, and the tolls and charges shall always be the same to each of the second, third and fourth parties; that the tolls and charges to other railroads or railroad companies, for like use of the bridge and the approach owned by the first party, shall not be less than those charged to or incurred by the parties to the contract; that all such tolls and charges paid by other railroads, or other railroad companies, shall be applied to, and form a part of, the fund provided for the payment of expenses, sinking fund, interest, dividends and taxes, the same as if paid by the second, third and fourth parties to the contract.

The parties of the second and third parts agree that they will pass over the said bridge all the freight, passengers, mails, express matter and other goods carried on or over their roads to and from Louisville, and to and from points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement, and will pay punctually to the bridge company the tolls and charges for the use by them of the bridge, tracks and approaches owned by the bridge company.

The Louisville & Nashville Railroad Company covenanted with each of the other companies to deliver to the Louisville Bridge Company, to be passed over the said bridge, or to the parties of the second or third parts, or to such other railroad company or companies as may, for the time being, be transporting freight, passengers, mails, express matter and other goods over the bridge, all the freight, passengers, mails, express matter and other goods carried on or over its roads, or any part thereof, destined for any points which require their passage over the Ohio River at or near Louisville, during the existence of the agreement, and will charge on said traffic, in addition to its rates for transportation service, the then established rates of tolls and charges provided for the use of said bridge and approaches, and punctually pay the said tolls and charges to the first party.

The approach to said bridge at the north end was owned by the Jeffersonville, Madison & Indianapolis Railroad Company; and the Ohio & Mississippi Railway Company agreed with the Jeffersonville, Madison & Indianapolis Railroad Company to use said approach to said bridge in going into and over it; and it was agreed between them that all the trains, cars and engines passing over the approach, and over the bridge, shall be under the control and direction of the Jeffersonville, Madison & Indianapolis Railroad Company, and that whatever rules are prescribed for the government of the trains, cars and engines of that company shall be equally applicable to the trains, cars and engines of the Ohio & Mississippi Railway Company, each being dealt with alike. And the Jeffersonville, Madison & Indianapolis Railroad Company covenanted to furnish all needful and sufficient engines for the service so provided for, and at all times to transfer with the same promptness and care over said bridge the trains, cars, engines and traffic of the third and fourth parties, that it does the trains, cars, engines and

traffic received from or to be delivered to its own road, it being intended that each of the parties shall enjoy equal facilities over the approach and the bridge.

A reasonable compensation is provided for, to be paid to the Jeffersonville, Madison & Indianapolis Railroad Company for the service to be rendered, to be apportioned between the parties to the contract in proportion to the service to each.

It is further provided that the contract shall continue in force and operation until it shall be terminated by some one of the parties thereto giving notice in writing to the other parties, of its intention to terminate the same at the expiration of two years from the giving of such notice; at the expiration of two years the same shall terminate as to all the parties thereto included in such notice.

When said contract went into operation, and to provide for the interchange of the traffic as therein contemplated, the Louisville & Nashville Railroad Company, at its own expense, constructed freight platforms and improvements therefor on the south side of Maple Street, in Louisville, near Tenth Street, at which point connection was readily and easily made with the tracks of the Louisville Bridge Company and the Jeffersonville, Madison & Indianapolis Railroad Company, running south from the river along Fourteenth Street.

On May 22, 1873, the Louisville & Nashville Railroad Company, the Jeffersonville, Madison & Indianapolis Railroad Company, and the Ohio & Mississippi Railroad Company, designated as the parties of the first, second and third parts respectively, entered into a written contract whereby the first party leased to the second and third parties a portion of the ground and terminal facilities, then occupied jointly by the three parties and situated on the south side of Maple Street, in Louisville, between Eleventh and Tenth Streets, and on Tenth Street, where interchange of traffic had been and was being effected between them, for which the second and third parties were to pay the first party \$200 per month; the proportion of said sum which the second and third parties were respectively to pay being graduated according to the number of car loads of freight transferred for each by the first party. Said second and third parties were also to pay the first party the sum of \$7,515.30, being one half of the actual cost of the improvement, consisting of platforms, etc., made on said ground; the proportion which the second and third parties were to pay of said sum being 57 per cent for the former, and 43 per cent for the latter. The agreement further provided that when said parties of the second and third parts should pay said amount, with interest from January 1, 1873, they should be joint owners with the first party, of said improvement, in proportion to the amounts paid toward the whole cost of the same, viz.: \$15,030.58. The contract provided for the readjustment of this one half ownership in the building, from year to year, on the basis of the work done at said transfer platform, for said second and third parties respectively. The lease was to continue for five years, after which it was optional with the first party to continue the same. The arrangement was not terminated at the expiration of five years, but

was continued thereafter by the parties to the same.

The Louisville & Nashville Railroad Company having, some years after the execution of said contract, changed its track gauge to conform to that of other roads north of the Ohio River, and constructed much more commodious platforms, and buildings, and large yards, at Ninth and Broadway Streets, about four or five hundred feet east of the Maple Street platform, it was agreed between said parties that their interchange of traffic should take place at that point; and it was accordingly done at said Ninth and Broadway yard and depot until terminated by the Ohio & Mississippi Railway Company, as hereinafter stated.

On May 16, 1888, the Louisville & Nashville Railroad Company and the Louisville Bridge Company entered into a written contract which, after reciting the said contract of May 22, 1873, and that it was for the mutual benefit of the parties thereto—that the location of said union (or Maple Street) transfer platform should be changed, and the business conducted on the ground of the Louisville & Nashville Railroad Company, situated on the south side of Broadway Street, between Ninth and Tenth Streets, provided that the second party, and all railroad companies running cars over its bridge subject to the right reserved to admit any other railroads not using said bridge, should have the joint use of said yards, platforms and buildings of the first party located at Ninth and Broadway (designated in the record as Yard No. 4); that for such joint use the second party (the Louisville Bridge Company) agreed to pay a monthly rental of \$200, and, in addition thereto, such proportion of the interest, at 6 per cent per annum, upon the cost of said transfer platform and tracks, as the number of cars handled for the second party bears to the total number of cars handled. Said contract further provided that the expense of the operation of said transfer platforms and tracks (viz.: labor of loading and unloading, clerk hire, maintenance and repair, etc., premiums of insurance, and taxes which might be lawfully levied and assessed upon said property) should be divided between the parties to the agreement, in the proportion that the number of cars handled at said platforms for each party, and for any other railroad companies that might thereafter be admitted to its use, bears to the total number of cars so handled, "it being understood that the total number of cars shall not only include cars handled for the first party, and the railroad companies using the second party's bridge and tracks, but also such as may be handled for other parties hereafter admitted to the use of said transfer platforms and tracks;" and it was further agreed that other railroad companies than those now using the bridge and tracks of the second party may also be admitted to the joint use of said transfer platform and tracks, on the terms herein set forth—that is to say, that they will bear their proper proportion of the ground rent, interest on the cost of the platforms and tracks, and the expense of maintenance and operation of the said platforms and tracks, based upon the number of cars handled, as per the second and third articles hereof." The switching of cars to and from said transfer platforms was to be

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done by the Louisville & Nashville Railroad Company between the points of the old joint siding on south side of Maple Street without cost to the second party. The contract provided for a readjustment of the monthly rental from time to time upon certain terms not necessary to notice, and the arrangement was to continue in force until terminated by six months' notice in writing from either party. It is still in full force and operation, as between respondent and the Louisville Bridge Company, and all the railroad companies entering Louisville from the north side of the Ohio River, except the Ohio & Mississippi Railway Company, which latter company ceased to make its transfer of traffic with respondent at said Ninth and Broadway yards in February, 1888.

While this contract bears date in May, 1888, its terms and provisions were agreed upon and arranged in January, 1888, with the knowledge and consent of the Ohio & Mississippi Railway Company.

Since the aforesaid contract of June 5, 1872, was entered into, the Louisville, Evansville & St. Louis Railroad Company, and the Louisville, New Albany & Chicago Railroad Company have been allowed to use, and are still using, said Louisville Bridge and approaches, in substantial accordance with the terms and provisions thereof. Said railroad companies also make their transfers and interchanges of freight traffic with respondent at said Ninth and Broadway yard. Since the date of said contract, the rates of tolls and charges have decreased per ton, and per passenger, as the volume of traffic over the bridge has increased. About eight years ago the dividends agreed to be paid upon the capital stock of the bridge company were reduced from 6 to 4 per cent semi-annually, and under the operation of said contract, the sinking fund therein provided for is now sufficient to pay off the bonds of the bridge company, which mature in December, 1888.

Under the operation of said contracts of June, 1872, and May, 1873, the business between the railroads north of the Ohio River and Louisville & Nashville Railroad Company was conducted in this manner: the parties having established the yard of the Louisville & Nashville Railroad Company at Ninth and Broadway, in Louisville, as the point for the interchange of traffic, the railroads from the north brought their cars to their respective yards on the north side of the river. From there they were hauled by the Jeffersonville, Madison & Indianapolis Railroad Company for the Louisville Bridge Company, to the yards of the several companies on the south side of the river; and cars containing freight to be delivered to the Louisville & Nashville Railroad Company were then by the Jeffersonville, Madison & Indianapolis Railroad Company switched over Fourteenth and Maple Streets to respondent's yard and transfer station, at Ninth and Broadway, where they were received and the goods, in less than car load lots, were assorted, distributed and reloaded into cars, and placed in trains for their proper destination. Car load lots were generally transferred to proper tracks, and placed in trains destined to points of shipment. Cars coming over respondent's road from the south, containing goods destined to

points north of the river, were brought to the same yard and delivered at the Maple and Tenth Street platform and tracks, where the Louisville Bridge Company, or the Jeffersonville, Madison & Indianapolis Railroad Company, acting as its switchman, received the same, and transferred the freight to proper points, on the lines of the railroads, north of the river. The expenses connected with such interchange of traffic together with a rental allowance to respondent for the use of its terminal facilities, as shown by said contract of May, 1873 and 1888, was borne by the several railroad companies *pro rata*, all companies interchanging business with respondent being placed upon the same footing, and all furnished the same facilities. The interchange of traffic continues in the same manner, at said point, as to all the roads north of the Ohio River, except the Ohio & Mississippi Railway Company, which, on February 4, 1888, gave notice that it would, and did, withdraw from said contracts at noon on that day. Said Ohio & Mississippi Railway Company has, since its withdrawal from the contract of June 5, 1872, ceased to interchange traffic with respondent at Ninth and Broadway, as formerly, and now conducts its business over the Kentucky & Indiana Bridge Company, which was chartered by the State of Kentucky in 1880, and completed its bridge across the Ohio River, between New Albany and Louisville, in 1886.

Its charter provisions and powers, as conferred by the Laws of Kentucky, so far as material to this case, are as follows:

"Said Kentucky & Indiana Bridge Company is hereby empowered to locate, build, construct and maintain, under the Laws of the United States, a bridge for railway, wagon, street railway and other purposes, between the Cities of Louisville, Ky., and New Albany, in the State of Indiana, from any convenient and accessible point within the limits of the City of Louisville, or within one mile thereof, and said company is hereby clothed with all the powers, privileges, rights and franchises necessary for the carrying out the purposes named herein.

"Said corporation shall have the power to lay down on said bridge, a single or double track, for railroad cars or street cars, or for wagons or other vehicles, and all animals, and to erect footways for passengers, and to charge for the use thereof reasonable tolls; and for said purpose may erect on either or both sides of said bridge, toll-gates, and may do all other acts or things, necessary for collecting the charges for the use of said bridge, and may also run any line of railways, through the City of Louisville, upon such terms as may be prescribed by ordinance of said City of Louisville, or along any street or alley, to connect with any railway, bridge, transfer company, or depot; and shall have the right to operate, or lease said connecting line, or lines, and may charge a reasonable compensation for the use of the same.

"Said corporation may contract with any railroad company, in or out of this State, for the use of said bridge by its cars and engines, or for other purposes; and any railroad, or street railway, or person, or municipal corporation, in or out of this State, may subscribe for the capital stock of said corporation, upon

any terms or conditions agreed upon, and may make such contracts or agreements as may be deemed expedient, for the use, management, or control of said bridge.

"Said Kentucky & Indiana Bridge Company is authorized to contract with, or to construct any railway, or terminal line, either in Kentucky or in the State of Indiana, which may be necessary for completing its terminal facilities, and it may construct such line or lines in the County of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots.

"Said Kentucky & Indiana Bridge Company is authorized to contract with any company organized under the Laws of the State of Kentucky, for the erection of said bridge, and the construction of any terminal lines connecting with it, and to pay for the same in bonds or stock of said company, at such price as may be agreed upon.

"Said Kentucky & Indiana Bridge Company is authorized to contract with, or to construct any railway or terminal line, either in Kentucky or in the said State of Indiana, which may be necessary for completing its terminal facilities; or it may extend such branch lines through the City of New Albany, State of Indiana; and it may construct such line or lines in the County of Jefferson, State of Kentucky, as may be necessary to complete the connection with other railways or depots; said Kentucky & Indiana Bridge Company is authorized to connect its line with the line of the Short Route Transfer Company, and for that purpose may cross other railway or bridge lines, passing either under or over the same; the said company is also authorized to cross the land of other railway or bridge companies, in case it may be necessary in running its connecting lines.

"The Kentucky & Indiana Bridge Company shall have the right and power to condemn any land in the City of Louisville, or County of Jefferson, State of Kentucky, that may be necessary or proper, for the construction or maintenance of any line of railway, which said company is authorized by its charter, or amendment or amendments thereto, to construct, maintain, or operate."

On March 2, 1881, under a general law of the State of Indiana, providing for the incorporation of companies formed for the purpose of constructing bridges for railway or common roadway purposes, or both, over rivers and streams forming the boundaries of said State, certain parties adopted articles of association, "for the purpose of constructing, operating, and owning a bridge, for railway, and common roadway purposes, over and across the Ohio River," between New Albany and Louisville. The association was styled the Kentucky & Indiana Bridge Company, and the articles recited that "The object and purpose of said company, is to construct, own, and operate a bridge, from a point in said City of New Albany, across the said Ohio River, to a point in said City of Louisville, for both railway, and common roadway purposes, together with—as an extension of, and in connection with, said bridge—a firm and substantial causeway," etc.

The Statutes of Indiana empowered said company "to construct a railway, with one or

more tracks from said bridge and embankment, and to connect the same with other railway tracks, and to fix the rates of toll, for persons and property passing over said bridge and tracks connected therewith, whether in cars propelled by steam, or otherwise." The company, under the statute, had authority "to connect the line of railway over said bridge, by continuous line of railway, in such manner, and upon such route and terms, as may be deemed most expedient, with any other line of railway whatever, and to maintain, use, operate, and control the said connection, when completed, and charge and receive tolls for the use thereof."

The two bridge companies thus formed under the Laws of Kentucky and Indiana were, on March 10, 1881, consolidated under the same name; whether such consolidation was effected under proper legislative authority does not appear. The bridge was built by the consolidated company, which thereafter, on September 29, 1886, entered into a written contract with the Ohio & Mississippi Railway Company, the important provisions of which are the following:

"The bridge company agrees to allow the railway company to run its locomotives, cars, and trains over the Kentucky & Indiana Bridge and approaches, from a convenient point of connection at Vincennes Street, New Albany, to the ground of the railway company at Fourteenth Street, in Louisville, or, should the railway company elect to do so, to a connection with the track of the Short Route Railway Transfer Company, near Thirteenth Street, in Louisville; the railway company's locomotives, cars, and trains to have preference over those of a similar class of other railroad companies that may use the bridge, so far as such preference can be legally granted by the bridge company."

The bridge company is to keep its bridges, approaches, and lines of railway in repair at its own expense; it agrees "to establish, provide, and maintain tracks connecting its present tracks with the tracks of all other railroads now seeking New Albany, within a reasonable time, either directly, or through the use of the other railway lines, and to switch the cars of the railway company, over such connecting tracks, at a switching charge of \$1 per car; also, to transfer cars from the railway company's transfer yards south of Bank Street, in Louisville, to the Louisville & Nashville Railroad, or the Chesapeake, Ohio & Southwestern Railroad, at the same rate per car."

It is agreed that "The tolls shall be fixed at the same rate, from time to time, as the rate of the Louisville Bridge Company, and these tolls shall be paid monthly by the railway company to the bridge company, it being provided, however, that whenever the sum so collected shall exceed the sum of \$17,500 per quarter, any excess over such amount shall be paid back to the railway company; but the railway company agrees to pay to the bridge company \$17,500 per quarter, whether or not the amount of tolls so collected equals that sum, the intention being to give a fixed annual rental to the bridge company of \$70,000 per annum." But the railway company is to "endeavor, with reasonable dispatch, to clear itself of future liability for tolls,

rentals, charges, or otherwise under its present contract for the use of the Louisville Bridge; and until such liability shall be removed, the railway company shall not be compelled to pay any tolls hereunder to the bridge company. And the Kentucky & Indiana Bridge Company may, at its own cost, and in the name of the said Ohio & Mississippi Railway Company, defend against any claim of liability on the part of said Ohio & Mississippi Railway Company under said contract."

"The railway company agrees . . . to carry and transport over said bridge, approaches, and railway tracks, all of its locomotives, cars, freight, passengers, mails, express matter, and everything else carried or transported by it on its own lines . . . destined, consigned to or from Louisville, or to or from points which require their passage over the Ohio River at or near Louisville. Provided, however, that said railway company is at liberty, if it so desires, to perform its passenger service over any other bridge, but the rental to be paid hereunder, shall not be decreased by reason thereof. The interchange of freight at Louisville and New Albany, between said railway company and any connecting road, shall be done over the tracks of the bridge company, between the south approach to its bridge, and the tracks of such connecting road, so far as the Ohio & Mississippi Railway Company can lawfully control the same; and the charge for the use of such tracks shall not exceed that on any other line.

"The railway company agrees, so far as it lawfully may, not to carry or transport over the said bridge and the approaches and tracks thereto, any locomotives, cars, freight, passengers, mail, and express matter, between Louisville and New Albany, that originates in, or comes from any railroad or water line, entering the one place, and destined for the other, it being mutually understood and agreed between the parties thereto, that the bridge company shall have the sole, exclusive right, to control, carry, and transport over the bridge and the approaches and tracks thereto, all traffic not received from, or destined to points reached over the railroad of the railway company, north and east of New Albany.

"The railway company agrees to furnish, at its own cost, all power necessary for the transfer of its locomotives, cars, freight, passengers, mails, and express matter transported by it, over the said bridge and the approaches and tracks thereto."

Said contract was to continue in force and in operation twenty years from the date of commencement of payment of tolls by the railway company to said bridge company, and it is still in full force and being acted upon by said parties.

On June 21, 1887, the petitioner entered into a written contract with the Louisville Southern Railroad Company, which connects Louisville with the South by way of the Cincinnati Southern Railroad, under and by the terms of which said bridge company leased to the Louisville Southern Railroad Company, for a period of ninety-nine years, an equal right to possession and use in common with it for railroad purposes, the railroad, right of way, road-bed, main and side tracks, switches, telegraphs and telegraphic facilities, and other appur-

tenances and fixtures, now possessed or owned, or which may be hereafter possessed or acquired by the Kentucky & Indiana Bridge Company, between a point in Magnolia Avenue, where the Louisville Southern Railroad Company's tracks join with those of the Kentucky & Indiana Bridge Company, to the connection with the tracks leading to the yard of the said Louisville Southern Railroad Company, on or near the line of Hardin Street, between Bank and Market Streets, in Louisville. The parties to said contract agreed to construct a line of track, with the necessary switches and sidings, eastwardly along Magnolia Avenue, from the junction of the Kentucky & Indiana Bridge Company's and the Louisville Southern Railroad Company's tracks, to a connection with the main tracks of the Louisville & Nashville Railroad Company, at or near the intersection of Magnolia Avenue and Seventh Street, said connection to be constructed and maintained at the joint expense of the Kentucky & Indiana Bridge Company and the Louisville Southern Railroad Company, in the manner described in said contract.

The Louisville Southern Railroad Company agreed to provide and keep a sufficient number of suitable switch engines on hand, and to handle promptly and with dispatch all freight cars to be moved between the Kentucky & Indiana Bridge Company's transfer tracks, between Bank and Market Streets, and the Chesapeake, Ohio & Southwestern Railroad Company's Railroad, and the Louisville & Nashville Railroad Company's Railroad, at a charge to be fixed by the parties to the contract. The Louisville Southern Railroad Company agreed to pay to the Kentucky & Indiana Bridge Company, of the revenue thus obtained, in the following proportion—namely: 55 per cent to the railroad company, and 45 per cent to the bridge company. In case said railroad company fails or refuses to remove all freights passing over this part of said tracks, with promptness and dispatch, then the bridge company reserves the right to move said freight, and to receive and collect all tolls due for said service.

The bridge company was not to grant any other party or parties, the right to do any switching, or make transfers of cars or freight on the line of road or tracks aforesaid.

Said contract further provided as follows: "And whereas, the said Kentucky & Indiana Bridge Company has heretofore entered into a contract with the Ohio & Mississippi Railway Company, providing for the transportation of all freight, from said railway to the roads south of the Ohio River, over the tracks herein described, and for which a charge is to be made by said bridge company: Now it is agreed, and it is part of the consideration of inducing the bridge company to enter into this agreement, that all such freight coming from the said Ohio & Mississippi Railway Company, and delivered and deliverable to the said railways south of the Ohio River, shall be moved over the tracks herein described, from the yards on Hardin, between Bank and Market Streets, to such railways, without charge or cost, and shall be made by the railroad company, with its engines, at rates to be fixed by the bridge company, and the tolls or revenue derived from such freight so moved, shall belong exclusively

to the bridge company, and shall not be subject to division, as herein provided, for the revenue derived from freight moved or handled on said tracks."

Said contract was to continue in force for and during the whole period of ninety-nine years, from and after September 1, 1837. It has not since been changed or modified, and the business being done between petitioner and said Louisville Southern Railroad Company, is carried on and transacted under and in pursuance of the provisions of said contract. The Louisville Southern Railroad Company has not, however, fully performed the switching service on the tracks of the Kentucky & Indiana Bridge Company, as it undertook to do. It has only done said switching from Thirty-Second and Market Streets, south, at night, using one engine. The rest of said switching has been done by the Kentucky & Indiana Bridge Company. All the transfer slips or bills, on freight so switched, are made out by the Kentucky & Indiana Bridge Company, which collects the charges therefor from the company or companies for whom the service is performed. The petitioner and the Ohio & Mississippi Railway Company and the Louisville Southern Railroad Company, have a yard near Thirty-Second and Market Streets in Louisville, at which said companies' interchanges of traffic are made.

Petitioner's tracks in Louisville branch in two lines, the point of divergence being near the intersection of Twenty-Ninth and Rudd Streets. From this point, one of said lines extends eastwardly near the canal bank to a point on Thirteenth Street, where it connects with the road of the Short Route Railway Transfer Company, over which and the Chesapeake Ohio & Southwestern Road, running eastwardly, petitioner and railroads using its bridge can readily connect with respondent's yard No. 1, at First and Water Streets, and extending thence to Preston Street. Petitioner's other line extends southwardly to Magnolia Avenue, where it connects with the Louisville Southern. Under several ordinances of the City of Louisville, passed from time to time, petitioner was given authority to construct and extend its tracks, in or over certain designated streets in said city.

The ordinance which conferred upon said bridge company the right to lay its tracks on or along Magnolia Avenue, was approved April 12, 1887. It granted to said bridge company the right "to locate, construct, maintain, and operate a single or double track railway, with necessary switches, turnouts, sidings, crossings, signals, and watch houses, along Magnolia Avenue from Eleventh to Eighteenth Street, and along other land acquired, or to be acquired, west from Eighteenth Street to the city limits, and to connect, with proper curves, with the Chesapeake, Ohio & Southwestern Railway, and the Louisville Southern Railroad, and other railroad lines which may hereafter desire to make connections with the same."

By the second section of the ordinance the said bridge company was required, under proper regulations for the safe and convenient use of said tracks constructed between the points named, to "permit other roads now built or

hereafter to be constructed, desiring to connect through such portions of the city, to use the railway tracks laid down or constructed through and along said line as herein provided, upon conditions, however, that, before entering on the use of said tracks, any railway company shall pay to the Kentucky & Indiana Bridge Company, its *pro rata* share of the cost of constructing the same, including damages awarded by reason of the construction thereof, and shall bind itself, by contracts with the City of Louisville, for the benefit of all parties interested, that it will contribute its *pro rata* share toward the repair and maintenance of any additional tracks, and of any gates, approaches, culverts, bridges, or trestles, or fills that may be necessary to the safe and efficient use of said tracks, and toward the maintaining of such watchmen as may be necessary to the proper guarding of the street crossings," etc. Similar provisions are found in the other ordinances.

This Ordinance of April 12, 1887, is the only one produced which gives said bridge company authority to locate its tracks on Magnolia Avenue, and grants the right from Eleventh Street westward.

Respondent's tracks at the intersection of Seventh Street and Magnolia Avenue are located eight hundred and twenty feet, or over two squares, to the eastward from Eleventh Street. The said bridge company has shown no authority or license from the City of Louisville, to extend its line or track from Eleventh Street, eastward along Magnolia Avenue to the Seventh Street and Magnolia crossing, or to a connection with respondent's tracks at that point; but it has actually made such an extension, and on the 20th of October, 1887, effected or formed a physical connection of its track, with respondent's main line, at Seventh Street and Magnolia Avenue.

This connection was made under the following circumstances. The Vice-President and General Manager of the said bridge company, under date of September 6, 1887, addressed to the Vice-President of the Louisville & Nashville Railroad Company a note as follows:

"DEAR SIR—The Kentucky & Indiana Bridge Company desire a connection with your road, at the corner of Seventh Street and Magnolia Avenue, for the purpose of mutual interchange of freight, between your road, and the various other roads, with which the Kentucky & Indiana Bridge Company, as a transfer company, connects. At Seventh Street and Magnolia Avenue, there are two private switches connected with your road, the one belonging to the Union Warehouse Company, and the other to Mrs. Bullitt and the Bank of Louisville. If we should make arrangements with either of these parties for the use of their switch, is it satisfactory to you for us to make connections at that point, provided your present rights of connection with the property of these parties is not interfered with?"

The Louisville & Nashville Railroad Company objected to the desired connection at said point, and to the bridge company's use of said private switches. The matter was referred to their respective attorneys. The attorney for the Louisville & Nashville Railroad Company advised its officers that under the eighteenth section of its original charter, respondent could

not lawfully object to or prevent the proposed connection, but that such connection would not, under a decision of the Kentucky Court of Appeals cited, necessitate or require a business connection at said point, or confer any right on the bridge company to use its track or run cars over its road. The bridge company having the right to thus force a physical connection, the Louisville & Nashville Railroad Company thereupon, on October 14, 1887, withdrew its opposition to such connection, and it was made October 20, 1887.

Said point of connection at Seventh Street and Magnolia Avenue is situated between the South Louisville yard and the Ninth and Broadway yard and station of respondent. It is $1\frac{1}{10}$ miles south of the Ninth and Broadway Station, and $1\frac{8}{10}$ miles north of the South Louisville yard. Between said yards respondent's trains and engines are constantly passing and repassing, day and night. The Louisville & Nashville Railroad Company neither receives nor delivers freight at said connection, either for private parties or other railroads. It has never been established or recognized as a station, or place at which freight should be received or delivered. There are no buildings, platforms, sheds or other facilities at said point for the interchange of business traffic, nor has either petitioner or respondent any ground or land at that place on which such buildings, platforms and facilities, suitable and convenient for the interchange of freights and the accommodation of clerks and employés, could be erected. Respondent has only 66 feet right of way at said point, which is needed for its tracks, while the petitioner has not even such right of way, if the license or permission of the City of Louisville to lay its track eastwardly along Magnolia Avenue from Eleventh Street is necessary to confer said right. By means of said connection it is practical to switch freight cars, loaded or empty, from the track of petitioner to the main track of respondent, and *vice versa*; but no interchange of freight cars and freight business between respondent and petitioner and railway companies using petitioner's bridge and tracks, can be conducted at said Seventh Street and Magnolia connection without subjecting respondent to extra expense, trouble and inconvenience, beyond what it is required to incur in interchanging with other roads at its regular yards and stations—and the greater the traffic to be interchanged at said junction the greater would be such expense to and burden upon the respondent.

The interchange of freights in broken lots, or less than car loads, cannot be made at said connection; such freights received from petitioner at said junction have to be hauled $1\frac{1}{10}$ of a mile to the Ninth and Broadway Depot of respondent, to be assorted and reloaded into cars, and placed in trains for destination. Neither can car load lots of mixed or miscellaneous freights destined for different points be interchanged there without being transferred to and assorted and reloaded at Ninth and Broadway. If such freights are to be delivered by respondent to petitioner at said point, they have first to be carried to respondent's said depot, there unloaded, assorted, reloaded and hauled back by respondent's engines and placed upon petitioner's track. So that in re-

ceiving and delivering less than car load lots of freight at said Seventh and Magnolia connection, respondent would be put to the expense and trouble of hauling all such freight $2\frac{3}{4}$ of a mile without compensation, together with the expense incident to the unloading, distributing and reloading the same at its Ninth and Broadway Station. Freight in car load lots interchanged at said connection would require respondent to switch or haul the same to the same station, to be there put into or taken from trains, and then carried back to or beyond said point. If petitioner makes such delivery of either car loads or broken lots of freight at Ninth and Broadway, it involves the use of respondent's terminal facilities. If respondent performs said service, there is involved the use of its engines, its tracks, its platforms, its clerks and employes at said Ninth and Broadway Station, for which no compensation has been agreed upon between petitioner and respondent. All such services and matters as to other railroads entering Louisville from the north side of the Ohio River and interchanging traffic with respondent at its Ninth and Broadway Station are made the subject of private contract and agreement, under and by the terms of which respondent is allowed and paid a consideration for the use of its engines, tracks and terminal facilities, in the shape of a monthly rental, interest on its improvements, and a "pro rata" proportion of the depot expenses connected with the transfer of freight, such as clerk hire, salary of employes and wages of laborers, based on the amount of business done for each of said roads. The petitioner has made no offer of such compensation to respondent for the interchange of traffic it seeks at its said connection. The mere reception of car load lots of freight by respondent at said Seventh and Magnolia Junction, without reference to any transfer thereof to said Ninth and Broadway yard and depot to be put into trains for distribution, would necessitate the employment by respondent of car inspectors, both day and night, to examine the condition of such cars, take their numbers and keep a record thereof, it not being usual or proper for one railroad company to receive from another company car load freights without having such cars inspected by its own agents at the point of reception, to ascertain the condition of the same. This would entail upon respondent some additional expense.

If respondent accepted loaded cars at said point of connection, it might or might not have the right to transport the freight to destination in such cars. If it had the right to use and did use such cars, it would, besides the expense of getting the same to its Ninth and Broadway Station and placing them in proper trains, be required to pay to the owner thereof wheelage or mileage at the rate of three fourths of one cent per mile, and be responsible for all damage done the cars while in its possession or on its road. If respondent had not the right, or did not desire to use such cars, it would be under the necessity of not only conveying them to the Ninth and Broadway Station, but of unloading and reloading them there, at its own cost and expense. Petitioner has no freight cars of its own, and can make no reciprocal interchange of cars with respondent.

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Petitioner never sought to effect a direct connection with respondent's Ninth and Broadway yard. A direct approach to said yard might have been made, up Broadway and Tenth Street, with the consent of the City of Louisville, but no application was made for leave to pursue that route. Nor was any effort made by petitioner to secure a nearer and more direct connection with respondent's road than at Seventh Street and Magnolia Avenue. That connection was made in pursuance of petitioner's contract with the Louisville Southern Railroad Company, bearing date June 21, 1887.

It is entirely practicable for petitioner, and the railroads using its bridge and tracks, to interchange traffic with respondent at the latter's Ninth and Broadway yard and depot, which can be reached by transferring or switching over the Short Route Transfer line, and the Chesapeake, Ohio & Southwestern, and thence up Fourteenth Street, over the line of the Louisville Bridge Company, and Jeffersonville, Madison & Indianapolis line to the junction at Tenth and Maple, where respondent receives from, and delivers to, other roads all freight to be interchanged. To reach respondent's said yard by this approach involves a switching charge of \$2 per car to the petitioner, or the railroads using its bridge; the Short Route Company and the Chesapeake, Ohio & Southwestern making a charge of \$1, and the Louisville Bridge Company and the Jeffersonville, Madison & Indianapolis also charging \$1 per car for such switching services. Prior to October 21, 1887, petitioner, and the railroads using its bridge and track, having freight for the Louisville & Nashville Railroad Company destined to points on its roads south of Louisville, delivered such freight at said Ninth and Broadway yard, by bringing or having the same brought over said approach or route and paying therefor switching charges of \$2 per car. The same facilities still exist, and are still open to petitioner, and the railroads using its bridge, for reaching respondent's Ninth and Broadway yard, and for the interchange of traffic at said point. In addition to this mode of reaching a connection with respondent, the petitioner and the railroads using its bridge had, and still have, another approach, by way of the Short Route and Chesapeake, Ohio & Southwestern line, to respondent's yard at First and Water Street in Louisville, which would involve a switching charge of only \$1 per car. These routes, which were open and accessible to petitioner, and the railroads using its bridge, prior to October 20, 1887, when it made the physical connection at Seventh Street and Magnolia Avenue, have since continued to exist, and are still available to petitioner, as a convenient means of reaching respondent's regular yards, with such freight as it seeks to have respondent transport over its lines.

Respondent is willing to accept and receive at its Ninth and Broadway, or other yards, all freight brought to it, by or over petitioner's bridge, and to transport the same to destination on its lines, at local Louisville rates, such as it charges all other Louisville shippers; but is not willing, and declines to accept and transfer such freight, upon a through routing and at through rates, such as it has agreed upon with the railroads using the Louisville Bridge. This

refusal is rested upon the ground that respondent has no arrangement or agreement with petitioner, and the railroad companies using its bridge, fixing and defining the terms and conditions, upon which such through routing shall be made, and the through rates prorated between them.

The Louisville & Nashville Railroad Company has, at all times, both before and since the passage of the Interstate Commerce Act, refused to engage in the transportation of freight or passengers, to or from points beyond its own lines, except where previous agreements or arrangements have been made between itself and other carriers, whose lines were part or parts of the through routes to be thus established, which agreements prescribed the terms, conditions, and restrictions on which the business should be done, and defined the share which each road was to receive of the through rates. The interchange of traffic between connecting lines, constituting the through route over which such traffic is to be passed, at or upon through rates, is always a matter of contract between the several companies operating such lines, and such arrangements are, in the absence of express agreement to the contrary, terminable at the pleasure of either party.

Petitioner is not a member of, and has no representation in, any freight or passenger associations, by whom through rates are fixed, and it has never offered or attempted to interchange any passenger traffic with respondent. Its passenger traffic business to and from the South, is done exclusively with the Louisville Southern Railroad Company.

Petitioner has no voice in making the division of through rates on traffic carried over or across its bridge. Its bridge toll is the only charge to be paid it, by the companies engaged in such through traffic. Under a contract entered into between them in 1887, the petitioner receives from, and delivers to, the Louisville, New Albany & Chicago Railroad Company, at New Albany, freights transported, or to be transported over its bridge to and from Louisville, said contract being terminable by either party upon thirty days' notice.

Petitioner issues no bills of lading for shipments from Louisville to any points south, reached either by the Louisville Southern or the Louisville & Nashville Railroad Companies; nor does it issue any bills of lading for shipments from Louisville to Cincinnati, or other points reached via the Ohio & Mississippi Railway Company. If a consignor at Louisville desired to ship over petitioner's bridge to Cincinnati, or other point on the Ohio & Mississippi Railway Company's lines, the latter would issue the bill of lading and collect the freight. If shippers at Louisville wished their freight for St. Louis to go over the Kentucky and Indiana Bridge, via the Louisville, Evansville & St. Louis Railroad, petitioner would accept and receive such freight on one of its Louisville tracks, provided the cars in which to load the same were furnished by the Louisville, Evansville & St. Louis Railroad Company; would then way-bill such car and freight to the latter road, which would issue the regular bill of lading therefor, and charge and collect its regular transportation rates thereon, and pay to petitioner its bridge toll for passing over its bridge.

So, if a Louisville shipper desired to ship his goods to Chicago over petitioner's bridge and over the Louisville, New Albany & Chicago Railroad, petitioner would accept such shipment on its tracks in Louisville, if said railroad company would furnish the cars in which to load it, and would bill the same to the Louisville, New Albany & Chicago Railroad, which would perform the transportation service, and charge or collect the freight or fares thereon. So, if New Albany shippers wished to ship goods south over the Louisville & Nashville Railroad, petitioner would accept such shipment, if respondent would furnish the car or cars in which to load it; would then furnish to respondent a way or transfer bill for such car and freights, and respondent would issue its own bill of lading therefor, pay petitioner its bridge toll for passing the freight over its bridge, and collect its regular charges for transporting the goods to destination. Petitioner has no freight cars of its own, and neither procures nor furnishes cars in any other manner. On business thus handled, the rates given or charged the shippers are in some cases the bridge tolls, and the rates of the railroad over which the shipment has to be carried by the company furnishing the car or cars, and performing the service. In other cases, the line furnishing such car or cars, pays the bridge toll itself. Jeffersonville, New Albany, and Louisville being grouped, and having the same rates to and from all points south, on shipments thus procured by petitioner for respondent, and loaded in cars furnished by respondent, the bridge toll would be paid by respondent, and to that extent would reduce its regular rate to destination of goods, going south of Louisville. The petitioner makes the transfer and delivery of such cars to the road over which the freight is to go, and collects from such road its bridge toll.

In addition to its bridge toll, thus charged and collected of roads for which petitioner may have solicited shipments, petitioner, in some cases, where cars are loaded on its tracks, or loaded cars are received from one railroad to be transported to some other line over its tracks, makes and collects a switching charge from the company for whom the service is performed, ranging from \$1 to \$3 per car.

Where the respondent, and railroads north of the Ohio River, have entered into arrangements, or agreements, forming through routes and through rates, as to which the bridge companies are not consulted, and have no voice, the bridge tolls are first deducted from the through rate, and the remainder of the traffic charges for the service is "prorated" between the parties forming the through route, according to their agreement. The shipper does not, as a matter of fact, pay the bridge tolls, in every instance, either under such through routing and through rating, or when there is no such arrangement for through traffic. Owing to its competition with the Cincinnati Southern Railroad, which owns its own bridge, and pays no bridge tolls, respondent, in respect to much of its southern traffic, has to bear the burden of such tolls at Louisville, or deduct such tolls from its rates to Louisville, and across the bridge at that point. So, in respect to through rates, competition will force the roads, crossing the river at Louis-

ville, to fix such through rates, as though no arbitrary bridge charge or toll was to be paid, or deducted therefrom; and, in such cases, the roads, and not the shippers, pay said tolls.

From March, 1887, to October 20, 1887, petitioner, to a limited extent, interchanged traffic with, or delivered traffic to, respondent at the latter's yard at Ninth and Broadway, such traffic being brought over the connections reaching Maple and Tenth Streets, and in some instances issued bills of lading for such freight, whether at through or local rates does not appear. The Ohio & Mississippi Railway Company continued to interchange with respondent at said yard, under the terms of the contracts of June 5, 1872, and May, 1873, until February 4, 1888, when the said Ohio & Mississippi Railway Company gave notice to the Louisville Bridge Company and to respondent, that it would and did withdraw from said contract of June 5, 1872, at noon on that day. The said Ohio & Mississippi Railway Company has, since February 4, 1888, ceased to use said Louisville Bridge and the connections afforded by that route for reaching respondent's yard at Ninth and Broadway, but instead uses the petitioner's bridge under the contract of September 29, 1886, and through petitioner seeks an interchange with respondent at said Seventh Street and Magnolia junction.

By the withdrawal of the Ohio & Mississippi Railway Company from said contract of June 5, 1872, and its abandonment of the Louisville Bridge, there has been a decrease in the receipts or revenues of said bridge, to the amount which would have been derived from the Ohio & Mississippi Railway Company's traffic. This loss to the bridge company amounts to about one fifth of its income, or about \$129,167.17 on the basis of receipts for 1887. Said bridge company has not increased its tolls for 1888, but the loss of the Ohio & Mississippi Railway Company's business has prevented any decrease or reduction in said tolls, which it could and would otherwise have made, if said railway company had continued the use of said bridge, and complied with said contract of June 5, 1872. Said bridge company's revenues are, in part, made up of tolls upon freight interchanged by respondent with the roads using said bridge, and such freights, or the roads themselves, will have to pay an increase of some \$27,000 in tolls, in consequence of the Ohio & Mississippi Railway Company's withdrawal from the use of said bridge, and the respondent's proportion thereof will amount to about \$13,000 per annum.

The respondent is otherwise interested peculiarly in the tolls of said bridge, and in the reduction thereof, inasmuch as under its competition with other routes, said tolls, to a considerable extent, have to come out of its revenues received on through rates, and are not paid by shippers or consignees. Said Louisville Bridge Company, for some years past, has had surplus revenues, which have been, from time to time, prorated and paid back to certain of the railroads using its bridge. The respondent has received no part of such surplus earnings, and made no demand for it. Whether it is entitled to share in such surplus earnings is not involved in this controversy. Respondent is, however, interested

in having all the earnings of the bridge company, not required to meet the charges provided for in the contract of June 5, 1872, applied in a way to reduce the bridge tolls, which affects its rates and business.

The Louisville Bridge Company can do business over its bridge and terminal lines as cheaply and promptly as the Kentucky and Indiana Bridge Company can over its bridge and terminal lines; and had, in 1838, and prior thereto, and still has, capacity to transact all the business which the railroads crossing the Ohio River were able to bring to it.

The capital stock of the Louisville Bridge Company amounts to \$1,500,000. Its bonded debt, of \$800,000, is paid, or fully provided for. The capital stock of the Kentucky & Indiana Bridge Company is \$1,700,000, and its bonded debt \$1,400,000. The respondent ceased to be a stockholder in the Louisville Bridge Company in 1880. The Ohio & Mississippi Railway Company never complained of the manner in which it was served over the Louisville Bridge, before withdrawing from said contract of June 5, 1872. Its own yards, at Louisville, and on the north side of the river, were insufficient for the handling of its business. This occasioned, at times, some delay in transferring its cars. On one occasion, while the employes of the Louisville & Nashville Railroad Company were on a strike, and the cars of the Ohio & Mississippi Railway Company were crowded in the yards of respondent, it declined to receive other cars from the Ohio & Mississippi Railway, until the latter's cars, which were blocking its yard, were removed. This occasioned some short interruption to the interchange of traffic between them. The yards of the respondent, and other roads than the Ohio & Mississippi Railway Company, were ample for the handling of all the business passing over the Louisville Bridge.

The main line of the Ohio & Mississippi Railway Company enters Jeffersonville, Indiana, convenient, and readily accessible to the Louisville Bridge. After entering into the contract with the petitioner, dated September 29, 1886, the Ohio & Mississippi Railway Company extended a branch line from Watson, Indiana, a town northeast from Jeffersonville, over a route provided for it by petitioner, to New Albany, Indiana, so as to form a connection with the Kentucky & Indiana Bridge Company's line and bridge. While the Ohio & Mississippi Railway Company has the right, under said contract of September 29, 1886, to use petitioner's terminal lines in New Albany, and its bridge and southern approaches thereto, down to said railway company's yard at Hardin and Bank Streets, it has not, under said contract or otherwise, the right to use petitioner's lines or tracks in Louisville south of said yard, or out to the junction which petitioner has made with respondent's track at Seventh Street and Magnolia Avenue—to reach which point, its cars and freight have to be switched by the petitioner, or its ally, the Louisville Southern, at or for a switching charge of \$1 per car, which the Ohio & Mississippi Railway Company has to pay petitioner. Nor does it appear from the record that said Ohio & Mississippi Railway Company has any authority, either from the State of Kentucky or the

City of Louisville, to extend its own line or track south from its said yard, so as to form a direct connection with respondent, at any point.

At said Seventh Street and Magnolia Avenue connection a limited interchange of traffic was carried on between petitioner and respondent from October 21, 1887, up to and including the 16th of November, 1887; but such interchange was had without the knowledge of the officers of the respondent, having authority to direct and sanction the matter. When it was brought to the attention of respondent's officers, having authority to control the subject, such interchange was stopped at said point, and respondent thereafter treated all freight coming over its road for petitioner, or points on its tracks, as Louisville City business, and required petitioner to pay the freight and charges thereon, before delivery would be made. The expense bills furnished petitioner showed that the business was placed upon respondent's city, and not upon its transfer, books. A number of empty cars were returned to the respondent at said connection, and a considerable number of stock cars were delivered by respondent to petitioner at said point, under a temporary injunction from the Chancery Court of Louisville, which injunction was subsequently dissolved.

The car which petitioner tendered on September 12, 1888, at Seventh Street and Magnolia Junction, and which respondent refused to accept, was brought from Cincinnati, and over petitioner's bridge, by the Ohio & Mississippi Railway Company, to its yard south of the river in Louisville, which was the southern terminus of said railway. From that yard it was placed upon the tracks of the petitioner, and by it switched to said Seventh Street and Magnolia connection, under the contract of September 29, 1886, at and for a switching charge to the Ohio & Mississippi Railway Company, of \$1. The transfer slip, which petitioner offered respondent with said freight, specified the rate of fifty-three cents per hundred pounds, as the charge which respondent was to receive, for transporting the car of freight to Columbia, Tenn., its point of destination. It does not appear that Columbia, Tenn., was one of the points to or from which respondent interchanged traffic with other railroads north of the river, upon a through routing and at through rates; nor does it appear that the rate of fifty-three cents per hundred pounds, which the transfer slip proposed to allow respondent, conformed either to respondent's rates from Louisville to Columbia, Tenn., or the through rates arranged between respondent and its northern connections over the Louisville Bridge. The terms, conditions and stipulations of the bill of lading which was issued by the Ohio & Mississippi Railway Company to the shippers, or forwarded to the consignee, were not made known to respondent. Nor was the rate charge apportioned to it tendered respondent, either before or at the time of offering the freight. Respondent's agents, however, assigned no reasons for refusing to receive and transport said car.

There are certain private sidings, constructed under written contracts between their owners and the respondent, connecting with respondent's main tracks, between its Ninth and Broad-

way yard and its South Louisville yard, to and from which respondent delivers and receives its own cars, loaded or to be unloaded with what is called dead freight, such as lumber and other nonperishable articles, on the transportation of which respondent charges and collects local Louisville rates. Respondent is fully provided with cars, both freight and passenger, for the transaction of its business, and is unwilling and refuses to transport the cars of other railroads offered it by petitioner, who has no freight cars of its own, and pay mileage for the use of the same; and also declines to deliver its own cars to petitioner, to be carried away from respondent's lines and yards, and look to petitioner, either for mileage therefor, or damage for injury, while in its possession.

In the absence of buildings, platforms, sheds, and employes at said Seventh Street and Magnolia Avenue connection, such as are required and necessary to carry on an interchange of traffic between petitioner and respondent at that point, respondent, in order to comply with the order of the Commission, must either allow petitioner and the railroads using its bridge the use of its tracks and terminal facilities, without any provision or arrangement as to the compensation to be paid for the use thereof, or must, against its will, receive and use cars offered by petitioner, paying mileage thereon, and incurring the expense of switching the same to its Ninth and Broadway yard, there to be put into trains and again hauled over the same distance; and it must also permit its own cars containing freight consigned to it, or to be handled by petitioner, to go into petitioner's possession and be used by it, after respondent has been to the trouble and expense of carrying such freight to its Ninth and Broadway Depot, and there unloading, assorting, and reloading, and then bringing the same back to said Seventh Street and Magnolia connection for delivery.

All other railroads entering Louisville, including the Louisville Bridge Company, having connections, directly or indirectly, with respondent, and interchanging business with it, whether on through or local rates, allow and pay respondent an agreed consideration for the use of its tracks and terminal facilities, and bear their *pro rata* proportion of the expense of handling the traffic interchanged, and also arrange for the mutual allowance and payment of mileage on cars of each used by the other, where cars are interchanged.

No complaint is made, nor does it appear that respondent's local Louisville rates of freight charges on interstate traffic are unreasonable.

Petitioner's bridge is used principally by the Ohio & Mississippi Railway Company, and the Louisville Southern Railroad Company. The latter, being in active competition with respondent from Louisville south, to and beyond Chattanooga, interchanges little or no business with the Louisville & Nashville Railroad Company, either directly or through the instrumentality of petitioner. The through business carried or brought by the Ohio & Mississippi Railway Company over petitioner's bridge south, constitutes the main, if not sole traffic which petitioner seeks to have interchanged with respondent at Seventh and Magnolia Avenue connection.

On the foregoing statement of facts, and under the pleadings, the leading and important questions presented for consideration and determination are the following:

First. Is the Commission created by the Act to Regulate Interstate Commerce invested with, and does it exercise, judicial powers such as to make its orders the judgment of a court, which is wanting in constitutional authority, because its members have no such tenure of office as required by the Constitution in the establishment of "inferior courts?"

Second. What is the nature of the present proceeding in this court? Is this court merely to enforce the order of the Commission, and thus exercise a non-judicial power, or is the case in this court to be treated as an *original* and *independent* suit, in which its own judgment on the facts and merits may be rendered?

Third. Is petitioner, either in law or fact, such a common carrier of interstate commerce within the scope and contemplation of the Act to Regulate Commerce among the States, as will entitle it to claim the benefits of said Law, or to have its provisions enforced in its behalf?

Fourth. Is petitioner's connection with respondent's road at Seventh Street and Magnolia Avenue in the City of Louisville a suitable and convenient point for the interchange of traffic between them and the railroads using petitioner's tracks? And is respondent's refusal to interchange business at said point, an unjust and unreasonable discrimination against petitioner?

Fifth. Does the Law impose upon respondent the duty of making an interchange with petitioner at said connection, if such interchange of traffic involves the use by petitioner, and the roads using its bridge, of the tracks and terminal facilities of respondent or subjects respondent to expense over and above what it incurs in interchanging traffic with other railroads, at its regular and established yards in Louisville?

Sixth. Does the Interstate Commerce Law, rightly construed, require respondent not only to interchange traffic, at said point of connection, with petitioner and railroads using its tracks, but also to afford and concede to them, on such interchange of business, the same through routing, and upon the same joint through rates, which respondent has, by contract, arranged and agreed upon with certain railroads entering Louisville from the north side of the Ohio River? In other words, does said Act require that if respondent has entered into traffic arrangements with one or more railroads, connecting with it over the Louisville Bridge, for the joint through routing of business, at or upon through rates, to be apportioned between them, it shall concede to, or make with, any or all other roads engaged in interstate commerce, and connecting with it at other and different points, and running in different directions, the same or similar arrangements for through traffic, and upon the same joint through rates? And if this is required by the Law, is such requirement valid, and within the constitutional power and authority of Congress to regulate commerce among the States?

The first and second of said propositions are so connected and dependent upon each other, that they may properly be considered together.

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In respect to the question presented by the first, counsel for respondent takes the position that the Interstate Commerce Law confers judicial powers upon the Commission, that such judicial powers are exercised in its proceedings, that its orders are judgments of a court, not lawfully created, since its members are not appointed and commissioned in accordance with art. III., sec. 1, of the Constitution, inasmuch as they hold office only for designated periods and not "during good behavior," which latter "constitutional tenure of office, judges must possess, before they can become invested with any portion of the judicial powers of the Union," and that the proceedings before, and the order or judgment of, the Commission are, and were, consequently void.

In respect to the second question, it is claimed by counsel for respondent that, aside from the judicial character and power attempted to be conferred upon said Commission, the Interstate Commerce Law imposes upon this court non-judicial powers, which it cannot properly exercise, inasmuch as it is limited and restricted by the sixteenth section of the Act to the mere enforcement of the Commissioner's orders, it found to be lawful, with no authority to go into the merits of the controversy between the parties, and make its own adjudication thereon; but if not so limited and restricted to the mere enforcement of an order made by another body, and the proceeding in this court can be regarded and treated as an original and independent suit to determine the rights of the parties, that the court has no jurisdiction of the case, because the parties, complainant and defendant, are both corporations of the State of Kentucky.

In support of their position, that judicial powers are conferred upon and exercised by the Commission, counsel refer to various provisions contained in Sections 12, 13, 14, 15, 16, 17, and 18 of the Act, which, together with the rules of practice adopted, show, as they insist, that a proceeding before the Commission, like the one in question, involves and embodies features and ear marks of judicial procedure and action, in the following particulars, viz.:

First. A petition, corresponding with the petition or bill in equity, is filed.

Second. Notice is issued for, and service thereof made upon, the defendant, or party complained of, conforming to, and corresponding with, the process of subpoena in courts of the United States, requiring such defendant to satisfy the complainant, or to appear and answer the same.

Third. The filing of defendant's answer, as in equity, which makes up, or forms the issue or issues.

Fourth. The issuance of subpoenas requiring the attendance of witnesses, or for the taking of depositions, upon the issues made up by the answer.

Fifth. The assignment of a time and place for the hearing, when and where the parties appear in person or by attorney—witnesses are sworn and examined, and arguments are made orally, or by brief.

Sixth. When the conclusion is reached, a written report, corresponding in all respects to an opinion, is delivered, filed, and published.

Seventh. The order of the Commission is re-

corded by its secretary, as decrees in equity are recorded by clerks of court—and

Fifth. A copy of such order, under the seal of the Commission, issues to the defendant, requiring obedience thereto.

This mode of procedure certainly conforms, in many respects, to the regular practice of courts, and is no doubt authorized by the Law; but does it involve the performance of judicial acts, and the exercise of judicial powers, by the Commission, as claimed?

It is well settled that Congress, in ordaining and establishing "inferior courts," and prescribing their jurisdiction, must confer upon the judges, appointed to administer them, the constitutional tenure of office, that of holding "during good behavior," before they can become invested with any portion of the judicial power of the government, and if the act to Regulate Interstate Commerce does not in fact establish an inferior court, the Commissioners appointed thereunder for certain fixed periods, are clearly not such judges as can be invested with any portion of the judicial power of the United States, and their decision in matters affecting personal or property rights, could have no force or validity. But does the Interstate Commerce Law undertake either to create an "inferior court," or to invest the Commission appointed thereunder with judicial functions? We think not. While the Commission possesses and exercises certain powers and functions, resembling those conferred upon and exercised by regular courts, it is wanting in several essential constituents of a court. Its action or conclusion upon matters of complaint brought before it for investigation, and which the Act designates as the "recommendation," "report," "order," or "requirement," of the board, is neither final nor conclusive; nor is the Commission invested with any authority to enforce its decision or award. Without reviewing in detail the provisions of the Law, we are clearly of the opinion that the Commission is invested with only administrative powers of supervision and investigation, which fall far short of making the board a court or its action judicial in the proper sense of the term. The Commission hears, investigates, and reports upon complaints made before it, involving alleged violations of, or omission of duty under the Act, but subsequent judicial proceedings are contemplated and provided for, as the remedy for the enforcement, either by itself, or the party interested, of its order or report in all cases, where the party complained of, or against whom its decision is rendered, does not yield voluntary obedience thereto. By the fourteenth and sixteenth sections of the Act, it is provided that the report or findings made by the Commission, "should thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

The Commission is charged with the duty of investigating and reporting upon complaints, and the facts found or reported by it are only given the force and weight of *prima facie* evidence, in all such judicial proceedings as may thereafter be required or had for the enforcement of its recommendation or order. The functions of the Commission are those of referees or special commissioners, appointed to make preliminary investigation of, and report

upon, matters for subsequent judicial examination and determination. In respect to interstate commerce matters covered by the Law, the Commission may be regarded as the general referee of each and every Circuit Court of the United States, upon which the jurisdiction is conferred of enforcing the rights, duties, and obligations, recognized and imposed by the Act. It is neither a federal court under the Constitution, nor does it exercise judicial powers, nor do its conclusions possess the efficacy of judicial proceedings.

This Federal Commission has assigned to it the duties, and performs for the United States, in respect to that interstate commerce, committed by the Constitution to the exclusive care and jurisdiction of Congress, the same functions which state commissioners exercise in respect to local or purely internal commerce, over which the States appointing them have exclusive control. Their validity in their respective spheres of operation stands upon the same footing. The validity of state commissioners, invested with powers as ample and large as those conferred upon the federal commissioners, have not been successfully questioned, when limited to that local or internal commerce, over which the States have exclusive jurisdiction; and no valid reason is seen for doubting or questioning the authority of Congress, under its sovereign and exclusive power to regulate commerce among the several States, to create like commissions, for the purpose of supervising, investigating, and reporting upon matters or complaints connected with, or growing out of, interstate commerce. What one Sovereign may do, in respect to matters within its exclusive control, the other may certainly do, in respect to matters over which it has exclusive authority.

We are also clearly of opinion, that this court is not made by the Act the mere executioner of the Commission's order or recommendation, so as to impose upon the court a nonjudicial power. Congress has, in some cases, assigned to federal courts duties which, though of a *quasi* judicial nature, did not come within the judicial power granted in the Constitution. Thus, the Act of March 23, 1792 (1 U. S. Statutes at Large, 243), required the circuit judges to examine into the claims of persons asking for pensions, and make report thereon, to the Secretary of War. The Judges of the Circuit Courts for the Districts of New York, and Pennsylvania, held that the function, or duty, thus imposed, was not judicial. So, the Circuit Court for the District of North Carolina declared that it could not execute that part of the Act which required it to examine, and report an opinion on, the unfortunate cases of officers and soldiers disabled in the service of the United States. *Hayburn's Case*, 2 U. S. 2 Dall. 409 [1 L. ed. 436].

In *U. S. v. Ferreira*, 54 U. S. 13 How. 40 [14 L. ed. 32], which arose under the Act of March 3, 1849, directing the Judge of the District Court of Northern Florida to adjudicate upon certain claims for injuries, and report the evidence thereon, the supreme court held that the authority thus conferred was not "authority to exercise any of the judicial powers of the United States under the Constitution." And the judge's decision was held, not to be the judg-

ment of a court of justice, but simply "the award of a commissioner."

The principle announced in this case would sustain counsel's position, if this court, under the provisions of the Interstate Commerce Law, is limited and restricted to the mere ministerial duty of enforcing an order or requirement of the Commission, whether it be regarded as a judicial or a nonjudicial tribunal. But such is not, in fact, the jurisdiction which this court is called upon to exercise. The suit in this court is, under the provisions of the Act, an original and independent proceeding, in which the Commissioners' report is made *prima facie* evidence of the matters or facts therein stated. It is clear that this court is not confined to a mere re-examination of the case, as heard and reported by the Commission, but hears and determines the cause *de novo*, upon proper pleadings and proofs, the latter including not only the *prima facie* facts reported by the Commission, but all such other and further testimony as either party may introduce bearing upon the matters in controversy. The court is empowered "to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to perform a just judgment in the matter of such petition; and on such hearing, the report of said Commission shall be *prima facie* (not conclusive) evidence of the matters therein stated." No valid constitutional objection can be urged against making the findings of the Commission *prima facie* evidence in subsequent judicial proceedings. Such a provision merely prescribes a rule of evidence clearly within well recognized powers of the Legislature, and in no way encroaches upon the court's proper functions. *Holmes v. Hunt*, 122 Mass. 505.

It is further provided in said sixteenth section, that when the subject in dispute shall be of the value of \$2,000 or more, either party to such proceedings before said court may appeal to the Supreme Court of the United States, under the same regulations as [now provided by law in respect of security for such appeal.

In view of these provisions, relating to the substance of the proceeding in this court, and clearly indicating its true character as an original suit, we should not be misled by other expressions in that section, which seem to imply that the duty imposed upon the court is only to enforce, in a ministerial way, the requirement of the Commission.

In the case of *U. S. v. Ritchie*, 58 U. S. 17 How. 525 [15 L. ed. 236], which arose under the Act of March 3, 1851 (9 Statutes at Large, 631), and August 31, 1852 (10 Statutes at Large, 99), creating a Board of Commissioners to settle private land claims in California, and providing for an "appeal" to the district court, the supreme court held that what was called an "appeal" was a mere mode of removing the papers and evidence from the Board of Commissioners, and the institution of an original proceeding in court, where all questions were to be reheard and re-examined *de novo*. The rule laid down in that case is directly applicable to the present proceedings, and sustains the construction which we placed upon the provisions of section 16 of the Law under consideration.

As an original and independent suit, can the jurisdiction of this court be maintained, inasmuch as both petitioner and respondent are corporations, and therefore citizens, of the State of Kentucky? We think there can be no doubt on this question. The right asserted by petitioner arises, and is claimed, under a law of the United States, which relates to a subject matter over which Congress had exclusive control. This is sufficient to sustain the court's jurisdiction, independent of the citizenship of the parties to the controversy, since it involves a federal question.* The first and second of the above propositions, are accordingly ruled against the respondent's contention.

Upon the third inquiry presented—involving the question whether petitioner is such a common carrier of interstate commerce as entitles it to invoke and assert the provisions of the Act in its own behalf, or in behalf of other railroads which use its bridge, or for whom it transfers cars—our conclusions are: first, that petitioner is certainly a common carrier in fact of interstate passenger traffic between New Albany and Louisville; but that traffic is not involved in this controversy, since petitioner has not offered, nor does it propose, to interchange such passenger traffic with respondent at any point; and, secondly, that petitioner is not, in law or in fact, a common carrier of property or freights within the true meaning of section 1 of the Act to Regulate Commerce, and that in respect to freight, which it offers or seeks to have interchanged with respondent at said Seventh and Magnolia connection, it is only a transfer company, or agency, engaged in performing a switching service, for which it demands and receives from the party for whom such service is rendered, not traffic rates on the freight transported or transferred, but simply a switching charge for the shifting of cars, loaded or empty, from one line of connection to another.

Little, if anything, can be added to what has been so well said in the dissenting report of *Mr. Commissioner Schoonmaker* (†) on the subject of petitioner's legal "status" and character under its charter and articles of association, the provisions of which are fully set out in the foregoing statement of facts. We concur in the views expressed and the conclusions reached by him, that petitioner's corporate powers fall short of making it a common carrier of property having the right to engage in the transportation of freight for hire. The charter powers and franchises conferred upon petitioner make its bridge and approaches thereto, such as it had authority to construct, a public thoroughfare or highway, for the use of which, by railroads or street cars, wagons, vehicles, animals and foot passengers, it was authorized to charge "reasonable tolls,"—for the collection of which suitable toll-gates could be established. The word "toll" is, no doubt, sometimes employed in railroad charters to express the charge for transportation rather than for the use of the structure over which such transportation may be conducted; but it is manifestly not used in that sense when applied to a bridge built and maintained for use by the public or others

*See *Connor v. Vicksburg & M. R. Co. ante*, 177. [Ed.]

†*Ante*, 113. [Ed.]

engaged in transporting property. The franchises and powers conferred upon petitioner of building, maintaining, and operating, its bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties, upon making compensation therefor, in the shape of "reasonable tolls." These "tolls" which petitioner is authorized to charge for the use of its bridge are not applicable to, nor demandable for, any transportation service it may perform or be permitted to render. The word, as used in its charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge, or highway, established and maintained for use by common carriers, and others, upon paying compensation for such use, in the way of "tolls," however graduated, and that of an incorporated common carrier engaged in transporting property for hire is well defined. It is pointed out and illustrated in the case of *Boyle v. Philadelphia & R. R. Co.* 54 Pa. 310, and *Lake Superior & M. R. Co. v. U. S.* 93 U. S. 442-445 [23 L. ed. 965-968]. In the latter case, *Mr. Justice Bradley*, speaking for the court, says, p. 451 [970]: "But it is not alone in charters which contemplate the creation of railroads, as public highways, that we find evidence of the understood distinction between railroads as mere thoroughfares and the operations to be carried on upon them by means of locomotives and cars. This is manifest from the fact, among other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon, and charge compensation therefor. This practice evidently springs from the conviction that a railroad company is not necessarily a transportation company, and that to make it such express authority must be given for that purpose, in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication."

The rule here laid down applies with more force to the case of an incorporated bridge company, like petitioner, whose charter powers neither expressly nor by any clear implication confer upon the company authority "to equip its road and to transport goods and passengers thereon, and charge compensation therefor." The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operating and maintaining of its bridge and approaches thereto, for the public purposes it was intended to subserve: that of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods, or passing as they pass over a turnpike, a canal, or a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare,—and do not in any way constitute petitioner a common carrier of goods, authorized to equip its road, or to charge compensation for transporting goods on or over

the same. Nor does petitioner, in the legal sense of the term, act or hold itself out to the public as a common carrier of property, in connection with the railroads on either side of the Ohio River. It has no freight cars; when it solicits or accepts freight upon its tracks on either side of the river for any railroad company it is compelled to call upon the railroad for whom the freight is intended, or over whose line it is to go, to furnish the cars in which to load the same. Such cars the petitioner merely transfers over its bridge and delivers to the railroad furnishing the same, charging for its service its regular bridge toll, which is in no sense a charge for transporting the freight contained or carried in the car or cars. In some cases it makes an additional charge for switching cars, which require to be transferred from one connection to another. Its object and purpose in thus constituting itself the soliciting agent for the railroad companies, who are willing to provide the cars for the freight it may secure, is manifestly to obtain "tolls" for use of its bridge.

Again: it is perfectly clear that petitioner cannot be properly regarded as a common carrier of the interstate freight transported over its bridge by the Ohio & Mississippi Railway Company, for the obvious reason that said bridge and approaches thereto, to and from the yard and depot of the Ohio & Mississippi Railway Company, at Hardin & Bank Streets, in the City of Louisville, under the terms of the contract of September 29, 1886, between petitioner and said railway company, and under the provision of section 1 of the Act to Regulate Commerce, constitute a part and portion of the Ohio & Mississippi Railway Company's lines over which said railway performs its own transportation service. The provision of section one, referred to, provides that "The term 'railroads,' as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage." Having, by contract with the petitioner, not only acquired the right to use said bridge and its approaches but secured for its engines, cars, and trains, a preference over all other railroads in such use, down to its southern terminus in the City of Louisville, and being in the actual use thereof, under said contract, during the period covered by the present controversy, the Ohio & Mississippi Railway Company must, for the time being, be regarded as the owner or operator of said bridge and approaches, under the above provision of law, as to all freights transported by said company; and the through traffic which it carries over said bridge, to its yard and depot in Louisville, is in no sense either handled or moved by petitioner as a common carrier. In thus making the bridge and approaches a part or portion of the line of the railroad which uses or operates it under contract, there is a clear implication that the Act to Regulate Commerce did not intend to include such bridges as independent carriers or "railroads" coming within the purview of the Law.

The Ohio & Mississippi Railway Company

neither owns nor operates any connecting line with respondent. It has no authority, either from the State of Kentucky or the City of Louisville, to connect with respondent at any point. Under its contract with petitioner it has no right to use petitioner's tracks south of Hardin and Bank Streets, or to the petitioner's connection with respondent's road at Seventh Street and Magnolia Avenue. What, then, is, or was, the real relation which petitioner sustains to the Ohio & Mississippi Railway Company in respect to freights which the latter transports from the north side of the Ohio River to its yard in Louisville, and which petitioner has tendered and seeks to have interchanged with respondent at its Seventh Street and Magnolia connection? The case of the car tendered on the 12th of September, 1888, will serve to illustrate this relation. That car was brought by the Ohio & Mississippi Railway Company over its road, including said bridge as a part thereof, to said company's yard in Louisville, the southern terminus of its lines. It was then placed on the track of petitioner who, for a switching charge of one dollar, to be paid by the Ohio & Mississippi Railway Company, transferred the car to said Seventh Street and Magnolia connection and requested respondent to receive it there. The service performed was wholly within the limits of Louisville. The charge for that service was not made for the transportation of the goods contained in the car, but simply for switching the car itself. Upon what principle is petitioner to be held or regarded as a common carrier, either of this car or of its contents? It was transferred under the obligation of its contract with the Ohio & Mississippi Railway Company to perform the service for one dollar. It was under no public duty to do such switching for any common carrier. It could not be required, aside from its agreement, to perform such service; and in performing the same it assumed none of the responsibilities of a common carrier, but only those of a switchman moving the vehicle in which the Ohio & Mississippi Railway was transporting its traffic. In respect to cars or traffic thus handled, petitioner can only be regarded as a switchman or transfer company. In the performance of such service it is no more a common carrier of interstate commerce or traffic, within the provisions of the Law, than a city transfer company which checks a passenger's baggage at the hotel where it is received and carries it, for an agreed compensation, to the station of the railroad over which it is to be transported into another State. The Act to Regulate Commerce does not extend to such agencies, or embrace such transfer companies, nor can they invoke the provisions of said Act in their behalf, or in behalf of those whom they thus serve.

The Ohio & Mississippi Railway Company could readily have effected the delivery of said car (tendered by petitioner, on the 12th of September, 1888), at respondent's Ninth and Broadway yard, through connections via the Short Route Transfer, the Chesapeake, Ohio & Southwestern, and the Jeffersonville, Madison & Indianapolis lines, reaching and extending up Fourteenth Street, to Maple and Tenth Streets, at a cost of two dollars; or it could have

reached respondent's yard at First and Water Street, over the Short Route Transfer Company's line, at a charge of one dollar. Under its contract with petitioner it paid for cars switched to said Seventh Street and Magnolia connection one dollar per car, making a saving to itself of one dollar per car in going to that point rather than to the Ninth and Broadway yard; but in pursuing this course for the benefit of itself and petitioner there is imposed upon defendant, if it is compelled to accept such cars at said Seventh and Magnolia connection, an extra expense of more than one dollar, in keeping someone at said point to inspect and receive such cars, and in addition thereto, the cost of switching the same to said Ninth and Broadway yard, to be put into proper trains for destination. The interchange of traffic between the Ohio & Mississippi Railway Company and respondent, at the latter's Ninth and Broadway yard, which is entirely practicable, and where respondent is entirely willing to make such interchange, would deprive petitioner of its switching charge of one dollar, and would increase the cost to the Ohio & Mississippi Railway Company to the extent of one dollar per car, and this benefit to the one and increased cost to the other, without regard to the extra expense imposed upon the respondent at one point over the other, discloses one of the objects sought to be effected in seeking to force or compel an interchange at the point of connection selected by petitioner for its own convenience; but what public interest is to be subserved in aiding the petitioner to accomplish this object, or what bearing it has upon interstate commerce, which the Act of Congress undertakes to regulate, is difficult to perceive. It is, however, certain that the business thus transacted by petitioner does not make it, in law or in fact, a common carrier of interstate traffic. It is equally certain that petitioner is not a common carrier of that class of interstate freight, which it solicits for railroads, either under express or implied agreement, and for which such roads furnished it with cars, for the transfer of which over its bridge, petitioner charged and collected bridge tolls only. The Law does not require respondent or any other railroad company to keep up such an arrangement with petitioner as to continue to supply it with cars in order to obtain such traffic; thus making petitioner its soliciting or collecting agent in order to protect its interest in securing tolls for its bridge. Aside from the service performed by petitioner in these two classes, there is nothing in its business, as actually conducted, to sustain its claim to be even a *de facto* common carrier of interstate freight traffic.

The petitioner and the Louisville Bridge Company occupy precisely the same position and character—they both charge tolls for the use of their bridges. They differ in the manner of doing business in this: that petitioner, in addition to its bridge tolls, collects, in certain cases, for the services performed in making transfers of cars, a switching charge, which the Louisville Bridge does not make against the railroads using its bridge. Neither of them are, in law or in fact, common carriers of interstate traffic within the scope and meaning of the first section of the Act to Regulate Com-

merce, and neither can invoke the provisions of that Law to compel railroad companies to transact business with or through them. Between such a bridge company as petitioner and railroad carriers of the country, the Law establishes no such reciprocal relations, duties and obligations, as require the latter to form business connections with the former. We accordingly rule this third proposition against the petitioner.

The fourth point presented in this case,—which is whether petitioner's connection with respondent's road at Seventh Street and Magnolia Avenue in Louisville is a proper, suitable, and convenient place for the interchange of traffic between them and the railroads using petitioner's track, and whether respondent's refusal to interchange at said point is an unreasonable and unjust discrimination against petitioner and the carriers using its track,—involves questions both of fact and law. We think it clear that petitioner cannot, either in its own behalf or in behalf of railroads using its bridge, assert any valid right to an interchange of business with respondent at said point, under the eighteenth section of the latter's charter, which authorizes other railroads to make connections with its line of road. It is settled by the case of the *Shelbyville R. Co. v. Louisville, C. & L. R. Co.* 82 Ky. 541, and *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 681 [28 L. ed. 296], that the connection thus authorized is a physical, and not a business connection requiring an interchange of traffic at the point of junction. Petitioner's claim must, therefore, be founded, if it has any existence in law, upon some provision or requirement of the Act to Regulate Commerce. Counsel for petitioner, accordingly, rely upon the second clause of the third section, in connection with the seventh section of said Act, as sustaining petitioner's right to demand and require an interchange of traffic with respondent at said junction. The seventh section of the Law makes it unlawful for any common carrier, subject to the provisions of the Act, "to enter into any combination, contract, or agreement, expressed or implied, to prevent by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freight from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption, made by such common carriers, shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption, was made in good faith, for some necessary purpose, and without any intent to avoid, or unnecessarily interrupt, such continuous carriage, or to evade any of the provisions of this Act." The facts show no violation of this provision of the Law on the part of the respondent. The contracts which it had with several railroads when the Act to Regulate Commerce went into operation, and which still continue in force, are in no wise inconsistent with the things forbidden by this section, and there is no pretext for saying that defendant has, since the passage of the Interstate Commerce Act, entered into any combination, contract, or agreement "to prevent by change of time schedules, carriage in different cars," or by

other means or devices, the carriage of freight from being continuous. It has made no change in its method of doing business, indicating the slightest intention of violating the provisions of said section, and petitioner cannot, and does not in its petition, assert any such claim. Its right of interchange must, therefore, rest alone upon the second clause of the third section of the Act, which provides that "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic, between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines, and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

Neither this nor any other provision of the Law requires of the common carrier of interstate commerce the duty of either forming new connections or of establishing new stations for the reception and delivery of freights. The Act to Regulate Commerce deals with such common carriers as it finds them, and leaves to them full discretion as to what extensions they will make of their lines—the connections they may form, and the yards and depots they may choose to establish. When railroad companies, in compliance with their charter obligations, have provided themselves with convenient, suitable, and ample stations and depots, for the accommodation of their business, the Law imposes upon them no duty, either to the public or other railroad lines, of making new stations, yards, or depots, even though such additional constructions might be for the convenience of the public, or of other carriers. Congress has certainly not undertaken, even if it possessed the power, to deal with such matters.

Now, it clearly appears, from the foregoing statement of facts, that respondent has already established, and has in use in the City of Louisville, four suitable, ample, and conveniently located and fully equipped yards and depots, at one or the other of which it receives and delivers all freights arriving at, or departing from, Louisville, and makes all its interchanges of freights with other lines, furnishing to the latter, at said places, "all reasonable, proper, and equal facilities," not only for such interchange of traffic, but also "for receiving, forwarding, and delivering, of passengers and property, to and from its line, or lines, and those connecting therewith," and does this, without discrimination in its rates and charges, as between such connecting lines. At petitioner's Seventh Street and Magnolia Avenue connection neither respondent nor petitioner has any yard, station, or depot; neither owns any ground there, except respondent's right of way, 66 feet in width, on which its double main tracks are located; neither has any buildings, sheds, or platforms there, for the reception and accommodation of freights to be handled and exchanged at that point; nor has either of them any clerks or employes stationed there, for the inspection of cars, receipting for freights, etc. Without such accommodations, and without

the employment of such clerical force located there, an interchange of traffic at said point cannot be made in a proper and convenient way to either party. No authority is conferred upon the Commission, or upon this court, to compel respondent to provide at that connection the same or equal facilities which it had provided at its regular established yards and depots in Louisville, in order to effect an interchange with petitioner and the railroads using its bridge. Respondent neither receives nor delivers Louisville freights, whether local or through, at that point. In some instances it receives and delivers its own cars, on, and from, certain private sidings in Louisville, and at local Louisville rates—said private sidings being constructed and used, under special contracts with the owners, and subject to respondent's right to remove or sever its connection with them at any time. Under said contracts such private sidings constitute, for the time being, portions of respondent's Louisville lines. The interchange sought by petitioner is entirely different. Louisville shippers or consignees, of either local or interstate freight, could not require respondent to receive or deliver their traffic at said Seventh Street and Magnolia Avenue connection, and in refusing to accept from or to deliver interstate traffic to private shippers or consignees at said point, it could not be claimed that respondent was denying to them the same proper, reasonable, and equal facilities which it afforded to other shippers or consignees, who delivered and accepted their through freight, at its Ninth and Broadway yard and depot.

If we assume that petitioner is a common carrier within the meaning of the Law, can it, or the railroads using its track in the manner heretofore stated, properly demand or require of respondent to concede to it, or them, rights and facilities which respondent is under no obligation or duty to grant or provide for the owners and shippers of interstate commerce? This would be conferring upon common carriers, engaged in transporting interstate traffic, rights and privileges superior to those intended for the benefit of such commerce itself. The Law was not designed to advance the interests of or to benefit the carriers, but was intended for the benefit and advantage of the commerce they transported, and the provisions of the Act all look to that as its object and purpose. With no facilities at said Seventh Street and Magnolia connection, for the interchange of traffic, or for the receiving, forwarding and delivering of property there, and being under no legal duty or obligation to provide such facilities at said point, upon what principle can it be successfully asserted that in declining to transact such business at such place respondent is refusing or denying to petitioner, and the roads using its track, "all proper, reasonable, and equal facilities" for the interchange of traffic, or for receiving, forwarding, and delivering of property, such as it has provided and affords to other connecting lines at its Ninth and Broadway yard and depot? Can it be properly said that such refusal involves any discrimination against petitioner and the railroads using its track, and seeking a connection at that point with respondent—or against the traffic it or they may handle? In refusing to transact

business with petitioner at Seventh Street and Magnolia Avenue junction, while interchanging with other connecting lines at Ninth and Broadway Station, is respondent making or giving "any undue or unreasonable preference or advantage" to the latter companies or the traffic they transport?

An affirmative answer cannot be made to these questions, unless the third section of the Commerce Act is construed to mean, that whatever facilities a railroad company engaged in interstate traffic may furnish or provide for the interchange of business with connecting lines at any one place, such as its regular established and properly equipped depot, it is bound to provide for any, and all other railroads, at such other and different points as they may select in making their connection. The section does not admit of this construction. It obviously means that where a railroad subject to the provisions of the Act has provided and established at any given place its facilities in the shape of yards, stations, and depots, for the interchange of traffic, or for the receiving, forwarding, and delivering of passengers and property, and there affords such facilities to some of its connecting lines, it shall not deny to other connecting lines, at that point, the same proper, reasonable, and equal facilities, for such interchange, or for receiving, forwarding and delivering of property, to and from such other connecting line. The question, therefore, as to what constitutes reasonable, proper, and equal facilities, necessarily involves a consideration of the place, accommodations, terms, and conditions at, and under which, facilities for interchange are sought, as compared with those where such interchange is conceded or afforded. It by no means follows, because certain facilities for the interchange of freight are furnished by a railroad to another connecting line, or lines, at one point, upon certain terms, conditions, and considerations, and where ample accommodations for the transaction of such business are provided and maintained, at the joint expense of the companies using them, that another company, making a physical connection with the road furnishing such facilities, at another different and distant place, is entitled to demand at said different point of connection the same or equal facilities.

The company making the physical connection, at a point other than that at which the established road has already provided its facilities and conducts its interchange with other connecting lines, cannot demand or require an interchange of freight at such point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought. It cannot rely upon the terminal facilities at another point of the road with which it has formed the physical connection; nor can it compel the road with which the connection is made to join with it in the expense of providing at that point the facilities necessary and proper for the interchange. In saying that petitioner, or other road in its position, could not properly require an interchange at the new point of physical connection, before it had first provided reasonable facilities there for transacting the business incident to an interchange of traffic, we do not mean to be understood as

holding that after providing such facilities at the point of connection it could then lawfully require respondent to interchange traffic with it and the railroads using its tracks at that place. We do not pass upon that question now, as it is not involved in the present controversy.

It is perfectly manifest from the location of the said Seventh Street and Magnolia connection, and from the lack of all suitable and proper accommodations there, for conducting the business involved in the interchange of freights, and from the manner in which such freight, whether in car load or broken lots, would have to be handled by respondent, that if respondent is required to furnish at that point all proper, reasonable, and equal facilities, or, as required by the order of the Commission, "the same equal facilities," which it furnishes and affords to the lines connecting with it at Ninth and Broadway yard, petitioner will, thereby, secure benefits and advantages superior to those conferred upon any other connecting line or lines, and largely, if not entirely, at respondent's expense. The order of the Commission imposes no terms and conditions, under which the interchange at said connection shall be made. Petitioner is not required to pay respondent anything for switching services, which it will be compelled to perform in interchanging, or any rental for the use of its terminal facilities at Ninth and Broadway, where the freights, both in car loads and broken or mixed lots, have to be transferred, and put into proper trains. Neither is petitioner required to bear any portion of the expense of handling the traffic at said yard; and in seeking the aid of this court to compel obedience to said order, or to enforce its rights, petitioner makes no offer to compensate respondent for such services and expenditures. The Commission did not, perhaps, have the authority to impose such terms and conditions upon the petitioner; nor has this court either the right, or the necessary data, to settle and adjust those matters, which are the subject of private contract and arrangements between the parties. But without the imposition of such terms and conditions, it is clear that petitioner, and the railroads using its tracks and seeking an interchange at said connection, will secure, without cost to themselves or compensation to respondent, services, and the benefit of facilities, and of employes, for which other connecting lines interchanging at other places, make respondent compensation, and bear their proportion of the terminal expense. The Law never contemplated such results. No provision of the Interstate Commerce Act confers equal facilities to connecting lines, under dissimilar circumstances and conditions. On the contrary, even as to interstate commerce itself, the distinction is recognized throughout the Law, between discriminations and preferences which are just and reasonable and those which are unjust and unreasonable, according as they are made, or given, under similar or dissimilar circumstances and conditions. All discriminations and preferences are not forbidden or made unlawful, but only such as are unjust, or undue, or unreasonable, are prohibited. In each and every case, therefore, the question whether a discrimination is unjust, or a preference is undue or unreasonable, either as to the com-

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mon carrier, or the commerce it may transport, involves a consideration of the circumstances and conditions under which such discrimination or preference is made or given.

Our conclusion upon this fourth proposition is, that said Seventh Street and Magnolia Avenue connection is not a proper, suitable, and convenient point for the interchange of freights between respondent, and petitioner, and railroads using its tracks, and that in declining to deliver and receive freight at that point, to and from petitioner, respondent is neither discriminating improperly against petitioner, and the carriers using its tracks, nor giving the roads with which it does interchange traffic at the Ninth and Broadway yard any undue or unreasonable preference or advantage.

Upon the fifth question presented, viz.: Does the Law impose upon respondent the duty of making an interchange with petitioner at said connection, if such interchange or traffic involves the use, by petitioner and the roads using its bridge, of the tracks and terminal facilities of respondent, or subjects respondent to expense over and above what it incurs in interchanging traffic with other railroads at its regular and established yards in Louisville, little need be said. An interchange at that connection in its present situation, with no buildings, sheds, platforms or any facilities whatever for the proper care, protection, and handling of freight, and with no clerks, or employes stationed there, to look after and attend to the business, cannot possibly be carried on without requiring respondent either to concede the use of its tracks and terminal facilities to petitioner and the roads using its tracks, or without imposing upon respondent the trouble, inconvenience, and expense, of handling such traffic, both that received and delivered, in the manner above stated; that is, transferring it to said Ninth and Broadway Depot, and then rehandling, reloading or placing it into proper trains. Petitioner's superintendent, A. J. Porter, properly states that it is a physical impossibility to carry on an interchange of traffic, at that point, between the parties, without using each other's tracks. It does not admit of any question that neither the Commission nor this court has any authority to require respondent to concede the use of its tracks and terminal facilities in order to accomplish the desired interchange. Nor can this court or the Commission impose upon respondent the duty of making such interchange at its own expense, over its own tracks, with its own engines, at its own yard, and with its own employes. Other railroads connecting with respondent, and interchanging traffic with it at its regular yards, contribute their proportion of the expense incident to such interchanges, and compensate respondent for its services in handling their freight in a less inconvenient way, and for a shorter distance, than respondent would be necessarily compelled to handle the traffic received from or to be delivered to petitioner. The terms under which other railroads, connecting and interchanging with respondent at said Ninth and Broadway yard, are allowed to use its tracks and terminal facilities, and have their freights handled and transferred, are arranged by mutual agreements, which secure to respondent compensation for services, and for use of its improve-

ments, and provides for "prorating" the expense incident to such interchanges. Is it either legal or equitable to require respondent to handle traffic for petitioner upon terms less favorable? And, if the parties cannot themselves agree upon such terms, can this court make an agreement or contract for them in the matter? We think this is beyond the province of any court or commission, under existing law, and under circumstances such as exist in this case.

An interchange on the main line or tracks of a railroad is essentially different from such an interchange at its regular yard, where such business is usually transacted and where suitable conveniences and facilities are provided. If respondent is required "to allow and afford" to petitioner at said Seventh Street and Magnolia connection, "the same equal facilities," which it affords to railroads connecting with it at its established yards, without prescribing the terms, conditions, and considerations, under or upon which such facilities shall be afforded, it is manifest that petitioner will secure not equal, but exceptional, advantages over all other connecting lines—and it is furthermore clear, from the foregoing statement of facts, that such exceptional advantages will involve either the use of respondent's tracks and terminal facilities by petitioner, or will impose upon respondent expenses and inconveniences and the performance of services without compensation, such as it does not perform or incur in effecting its interchanges with the carriers connecting with it at the Ninth and Broadway yard.

If, under such circumstances, an interchange can be demanded and enforced at a physical connection with respondent's main track, one mile and seventeen one hundredths of a mile from its regular depot, at what distance from such depot may such an interchange be properly refused? If the principle involved in the requirement of the Commission, or asserted in the claim of petitioner, is correct, as applied to the present case, where shall the line be drawn in respect to the distance from its regular yards, at which respondent can be compelled to allow and afford to other roads intersecting, or joining its main track, "the same equal facilities," which it affords to other connecting lines, which reach, and interchange business at, such established yards? The Law furnishes no answer to those questions, and if the right herein asserted is well founded, this court could not fix the limitation, upon its application to any distance.

The sixth inquiry suggested above is, "Does the Interstate Commerce Law, rightly construed, require respondent not only to interchange traffic, at said point of connection (Seventh Street and Magnolia Avenue), with petitioner, and the railroads using its tracks, but also to afford and concede to them, on such interchange of business, the same through routing, and upon the same joint through rates, which respondent has, by contract, arranged and agreed upon with certain railroads entering Louisville from the north side of the Ohio River? In other words, does said Act require that if respondent has entered into traffic arrangements with one or more railroads, connecting with it over the Louisville Bridge, for the joint through routing of business, at and upon joint through rates, to be apportioned

between them, it shall concede to, or make with, any and all other roads engaged in interstate commerce, and connecting with it, at other and different points, and running in different directions, the same or similar arrangements for through traffic, and upon the same joint through rates? And if this is required by the Law, is such requirement valid, and within the constitutional power and authority of Congress to regulate commerce among the States?"

Aside from the place at which the interchange of traffic is sought, the present controversy clearly involves the question as to whether such interchange shall be effected at local Louisville through rates, or at such through joint rates as respondent has arranged with the roads connecting and interchanging with it over the Louisville Bridge. Respondent is now, and has always been, willing to interchange freights with petitioner and the Ohio & Mississippi Railway Company, when such freights are tendered at its proper yards, and it is allowed to charge for the transportation thereof its local Louisville rates to destination. The petitioner and the Ohio & Mississippi Railway Company, since the latter's abandonment of the Louisville Bridge, and its contractual relations with the Louisville & Nashville Railroad Company, have not been willing to concede to respondent the right of charging local Louisville rates on the freight they sought to have interchanged. Duncan, the general freight agent of the Ohio & Mississippi Railway Company, states that his company could not interchange traffic with the Louisville & Nashville Railroad Company on these terms, which would leave the Louisville & Nashville Railroad Company in position where it could decline "to pay any of our charges on freight that we offered them at Louisville rates." The agents and officers of petitioner also state that they expected respondent to accept and carry at through joint rates the freight as to which interchange was sought. Petitioner claimed before the Commission, for itself and the railroads using its tracks, that it was entitled, at its said connection, to an interchange of freight, upon the same terms, as to through routing and through joint rates, which respondent made with other railroads using the Louisville Bridge; and that respondent in refusing such routing and rating was discriminating against it. If, therefore, the question of rates was not passed upon by the Commission, or covered by its report and order, one of the real points in controversy between the parties was not disposed of. To leave it open, as suggested by counsel for petitioner, will only be to invite, and necessitate, further litigation between the parties; for if this court were to issue its mandate requiring respondent to obey the award of the Commission, expressed in the general and indefinite terms of "ceasing its refusal to receive traffic offered at said connection, and of allowing and affording to petitioner at said point 'the same equal facilities' which respondent affords to other common carriers at the points of connection with their lines respectively," the question would come back to the court at once, as to whether "the same equal facilities" included through routing, and through joint rates, such as respondent makes with other carriers connecting with it, or is satisfied with Louisville

routing, and local Louisville rates, to destination of freight offered for interchange.

Or if the court should be in error in its conclusions that said Seventh Street and Magnolia Avenue connection is not a proper, suitable, and convenient point for the interchange of traffic between the parties, and that such an interchange at that connection could not be effected without either the use, by petitioner, of respondent's track and terminal facilities, or the imposition, upon respondent, of expenses and burdens such as it is not required to incur in conducting its interchanges of business with other railroads, reaching its Ninth and Broadway yard, then the question of through routing, and through joint rating, is a necessary and material matter for determination in the present controversy.

The first section of the Act to Regulate Commerce, provides that "all charges" for services rendered by common carriers subject to the provisions of the Law, "shall be reasonable and just," and prohibits, and declares unlawful, "any unjust and unreasonable charge." This is the sole requirement of the Law, upon the subject of rates, which common carriers subject to the provisions of the Law, may demand for the transportation of interstate traffic. The second section of the Act clearly defines what shall constitute the "unjust discrimination" which is prohibited. The third section prevents the making, or giving of any undue, or unreasonable preference or advantage, to any firm, company, person, corporation, locality, or traffic, or the subjecting of any person, company, firm, corporation, locality, or description of traffic, to any undue or unreasonable prejudice, or disadvantage; and by its second clause, requires common carriers to afford all reasonable, and proper, and equal facilities for the interchange of traffic, and for the receiving, forwarding, and delivering of passengers and property, between their lines and those connecting therewith, and prevents them from discriminating in their rates and charges, between such connecting lines; but without requiring any such common carrier "to give the use of its tracks and terminal facilities to another carrier engaged in like business."

Now, under this last limitation upon, or qualification of, the duty of affording all reasonable, proper, and equal facilities for the interchange, or for the receiving, forwarding, and delivering, of traffic, to and from, and between, connecting lines, it is clearly left open to any common carrier to contract, or enter into arrangements, for the use of its tracks and terminal facilities, with one or more connecting lines without subjecting itself to the charge of giving an undue, or unreasonable, preference, or advantage, to such lines, or of discriminating against other carriers, who are not parties to, or included in, such arrangements. No common carrier can, therefore, justly complain of another, that it is not allowed the use of that other's tracks and terminal facilities, upon the same, or like terms and conditions, which, under private contract or agreement, are conceded to other lines.

It is equally clear from the provisions of section 6 of the Act that two or more common carriers may lawfully enter into contracts or

agreements for the establishment and operation of through routes, at or upon joint through rates. Copies of such contracts and agreements have to be filed with the Commission. "And in case where passengers and freight pass over continuous lines, or routes operated by more than one common carrier, and the several common carriers operating such lines or routes, establish joint tariffs of rates, or fares, or charges, for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission." Such joint rates, fares, or charges on such continuous lines, are to be made public, when directed by the Commission, and the failure of any common carrier to comply with such requirements, will authorize this court, upon the application of said Commission, to restrain such common carrier from receiving or transporting property among the several States, etc.

If, in the exercise of the right, thus impliedly if not expressly recognized, a common carrier, by private arrangement, forms a through route, and establishes joint through rates, fares, or charges, with certain connecting lines, is it compelled to concede to all other connecting railroads, the same, or equal through rates, on traffic which the latter may offer for transportation? It is settled by the case of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 682 [28 L. ed. 297], that neither at common law nor under the Constitution of Colorado (section 6)—providing that all individuals, associations, and corporations, shall have equal rights to have persons and property transported on any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State—does the refusal of a common carrier to make through traffic arrangements, at or upon joint through rates, with one connecting railroad company, such as it makes or enters into with another connecting line, constitute any undue or unreasonable discrimination in charges or facilities. That decision is conclusive of the present question, unless some provision of the Act to Regulate Commerce has expressly, or by clear implication, provided otherwise. It is insisted for petitioner that such is the case, and the second clause of section 3 of that Act is relied on, in connection with section 5258, Revised Statutes of the U. S. (embracing the Act of June 15, 1866), as establishing a different rule and regulation, from that announced in the above decision. We think it is very manifest that section 5258, Revised Statutes, which imposes no duty, but merely permits or authorizes the carriage of traffic from one State to another, and to that end, the formation of continuous lines, evidently by mutual agreement, does not sustain petitioner's proposition. That section was in full force when the cases of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* [*supra*] and *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 584 [22 L. ed. 173], were decided, and was not considered by the supreme court as conferring any right to a through route and a joint through rating. Is it a public duty imposed by the Act to Regulate Commerce, that every common carrier subject to the provisions of that Law, shall concede, or afford through

routeing and through rates, to all connecting lines, whenever and so long as it voluntarily makes or enters into such arrangements with any connecting lines?

After a careful examination of the Act, and the arguments of counsel, and authorities cited, we fail to discover any such requirements. In the report of the Commission in the case of *Chicago & A. R. Co. v. Pennsylvania. Co.* (1 Inters. Com. Com. Rep. 94, 1 Inters. Com. Rep. 360), it is well and properly said, in reference to through tickets, that "Such tickets very evidently are a great convenience to travelers, and perhaps to connecting roads; but they are a part of the voluntary arrangements for business purposes, like joint tariffs, interchange of cars, and common use of depots. It being, therefore, under our statute, matter of mutual agreement, whether coupon or through tickets shall be sold by a railroad company, over roads of other companies, it follows that the form of such tickets, and the manner of their sale, are also matters of agreement by the companies interested. If companies can agree upon their tariffs, the form of their tickets, and how they shall be sold, they have the right to do so, and by such agreement, become interstate carriers; but if they cannot agree, the Act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious."

It will hardly be insisted that a different rule applies in respect to through freight traffic, and joint through rates or charges, the arrangement for which, as well as the forms of the bills of lading, and the apportionment to be made of such joint tariff rates, and of losses or damage to freights in course of transit, are all matters of private agreement. Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations, varied and complex, as shown in the above statement of facts. In some instances, and between some companies, they may be mutually desirable and beneficial, while in other cases, and with other connecting lines they might be prejudicial, and injurious to the interest of one or both. Can companies in the latter situation properly claim as matter of right what the former have acquired under and by virtue of private contract and arrangement?

No provision of the Law, rightly construed, sanctions or supports such a proposition. The statute does not undertake to create between connecting lines such an agency, or *quasi* partnership relation, as is necessarily involved in agreements, or arrangements, for the establishment of through routes and the making of through rates. As such arrangements exist by contract, express or implied, the fact that a common carrier enters into them, with one or more connecting lines, does not impose upon such carrier, the duty, or obligation, to make the same, or like contracts, with all other lines. The Law possesses no such elastic or expansive quality, as to reach, or bring within its operation, in favor of all common carriers subject to its provision, every varying right and privilege which any other carrier may acquire, or concede by private contract, not in conflict with the Act. No authority is

conferred upon common carriers of interstate commerce, to issue through tickets to passengers, or through bills of lading for property, at through rates, over connecting lines, in the absence of such arrangements between the companies. Neither is the Commission invested with authority to establish through routes, or to fix through rates, between connecting lines. The English Act of 1873,* amendatory of the Act of 1854, did confer such authority, in providing that "The said facilities to be afforded, are hereby declared to, and shall, include the due and reasonable receiving, forwarding, and delivering, by any railway company and canal company, at the request of any other such company, of through traffic to, and from, the railway or canal of any other such company, at through rates, tolls, or fares;" but, in the apportionment of such through rates, said Act required the commissioners "to take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or making of the route, or any part of the route, as well as any special charges, which any company may have been entitled to make, in respect thereof."

Our Act to Regulate Commerce contains no such provision, and confers no such authority. The English cases, under the Act of 1873, cited by counsel, cannot, therefore, have any bearing upon the present case, and need not be referred to.

Looking at this question from another standpoint, we find that the Law was intended, primarily, for the benefit of the interstate traffic, rather than for the advantage of the designated common carriers engaged in its transportation; and the latter, as the instrumentalities and agencies of commerce, can hardly assert rights and privileges, under the statute, which could not be properly or lawfully claimed by such commerce itself. Let us, then, by way of illustration, and to bring out more distinctly the question under consideration, take the case of a shipper or consignor at Nashville, Tenn., wishing to have his goods transported to Cincinnati, Ohio. Could he legally require the Louisville & Nashville Railroad Company, not only to accept such shipment, but to route it over, or via, the petitioner's bridge and the Ohio & Mississippi Railway, and at the same through rates, from Louisville to Cincinnati, as respondent's own *pro rata* charge between said points would be, if it carried the goods direct from Nashville to Cincinnati? Or could such shipper require respondent to route his goods, in the way stated, at the same, or equivalent, through rates, which respondent has established with connecting roads leading north from Louisville to Indianapolis, St. Louis, or Chicago? The Louisville & Nashville Railroad Company could not decline to accept and carry such goods to Louisville at its regular rates, between Nashville and Louisville, but could it not properly decline the demand to route and rate them beyond Louisville to Cincinnati, on the ground that it had a direct line of its own to Cincinnati, over which the property could be carried by itself—that it had no arrangement or agreement with the Kentucky and Indiana Bridge Company and the Ohio & Missis-

*See 1 Inters. Com. Rep. 843 [Ed.]

Mississippi Railway Company for such through routing and through joint rating—and that between Louisville and Cincinnati it was a competing, and not a connecting line with the Ohio & Mississippi Railway Company? Could the Nashville shipper successfully urge, in support of his demand for such through routing and rating, that the Louisville & Nashville Railroad Company had existing arrangements with lines (other than the Ohio & Mississippi Railway Company) crossing the Louisville Bridge, under which interstate traffic was carried at through rates between certain points? There can be but one answer to these questions. The Law confers no such right upon the shipper, and imposes no such duty upon the common carrier. If Cincinnati is made the point of shipment, and the Ohio & Mississippi Railway Company is taken as the initial carrier, it is equally clear that, in the absence of any through traffic arrangement between the Louisville & Nashville Railroad Company and the Ohio & Mississippi Railway Company, a shipper at Cincinnati could not lawfully require the Ohio & Mississippi Railway Company to accept his goods, and issue a through bill of lading therefor to Columbia, Tennessee, via the Kentucky and Indiana Bridge, and via the Louisville & Nashville Railroad, at the same through rates from Louisville to Columbia, which the Louisville & Nashville Railroad Company would charge from Louisville to Columbia, under its through rate from Cincinnati to Columbia. What the shipper of interstate commerce may not lawfully demand, the common carrier engaged in transporting such commerce may not lawfully require of connecting lines.

In the absence of traffic arrangements between respondent and petitioner, and the railroads using its tracks, the former has a right to treat freights tendered it at Louisville, as local Louisville business, and charge for the transportation thereof, its Louisville rates to destination, and in doing this no discrimination is made against said parties, or the traffic they carry; nor does respondent make, or give, any undue or unreasonable preference or advantage to other lines, or the traffic they handle, with whom it has agreements for through routing, and at through joint rates, which may be lower than its Louisville rates to the same points. The service in the two cases is not the same, or identical, as was settled in the case of the *Union Pac. R. Co. v. U. S.* 117 U. S. 355 [29 L. ed. 920], where the supreme court held that "The service rendered by a railway company in transporting a local passenger from one point on its line to another is not identical with the service rendered in transporting a through passenger over the same rails." There is nothing in the Commerce Act of Congress to change this rule. The effect of a through traffic arrangement between different companies is to extend a railroad's line, during the existence of such arrangement, to the point or points agreed upon, and over such extended routes it may charge, as a through rate, less than for transporting local traffic from one point to another on its own line, provided that in so doing the fourth section of the Act is not violated.

The Louisville & Nashville Railroad Company is under no legal duty or obligation to

extend its line across the petitioner's bridge to New Albany; and if it was, petitioner has, by its contract of September 29, 1886, with the Ohio & Mississippi Railway Company, shut itself off from affording to respondent the same or equal facilities in the use of said bridge, by having given the locomotives, cars, and trains of the Ohio & Mississippi Railway Company a preference over those of a similar class of other railroad companies that may use said bridge. So that it is not in a position, while that contract is in force, to grant, or concede, such traffic arrangements as it demands for itself, and the railroads using its bridge.

While the Ohio & Mississippi Railway Company is not an actual party to this controversy, which this court is required "to hear and determine as a court of equity," it is, however, perfectly manifest that this proceeding, as well as that before the Commission, is intended for the private benefit, not merely of petitioner, but of the Ohio & Mississippi Railway Company; and its object is to relieve the latter from the contract of June 5, 1872, in order that petitioner may secure from it, the rental stipulated to be paid for the use of its bridge; the Ohio & Mississippi Railway Company not being bound by the contract of September 29, 1886, to pay petitioner "any tolls" thereunder, until its liability for tolls, charges, or rentals, under the contract of June 5, 1872, with the Louisville Bridge Company, is removed. Now the contract of June 5, 1872, which the Ohio & Mississippi Railway Company entered into with the Louisville Bridge Company and other railroad companies, including respondent, and in the maintenance and enforcement of which, respondent has a direct business and pecuniary interest, was neither abrogated nor annulled by the Act to Regulate Commerce. The provisions of that contract are not in conflict, but in strict conformity, with both the letter and spirit of the Act of Congress.

Under the terms and operation of that contract, which is still in full force as against the Ohio & Mississippi Railway Company, and all parties thereto, the Ohio & Mississippi Railway Company had and enjoyed all reasonable, proper, and equal facilities, with any and every other railroad company entering Louisville from the north side of the Ohio River, and interchanging traffic with respondent. It voluntarily abandoned these facilities in 1888, changed its business to the petitioner's bridge, not in the interest of the public or of the interstate commerce it handled, but for its private benefit and advantage; and petitioner now seeks to secure for it, as well as for itself, the same terms and facilities which existed under the contract of June 5, 1872, and without subjecting either to the obligation of compensating respondent, or sharing in the expense of an interchange, as provided in the contracts of May 22, 1873, and May 16, 1888. The Act to Regulate Commerce, no more than the Act of June 15, 1866 (section 5258, R. S. U. S.), was never intended to invade the domain of private contracts between common carriers, which were valid when made, and are not in conflict with the provisions of the law. In *Dubuque & S. C. R. Co. v. Richmond*, 86 U. S. 19 Wall. 590 [22 L. ed. 176], the supreme court says of such contracts "that the observance of good faith

between the parties and the upholding of private contracts, and enforcing their obligations, are matters of higher moment and importance to the public welfare, and far more reaching in their consequences, than the public policy sought to be established in the facilitation of commercial intercourse among the States, which the Act of June 15, 1866, aimed to promote."

Under such circumstances as surround the parties, neither the Ohio & Mississippi Railway Company, nor the petitioner, who, for private advantage, is co-operating with the Ohio & Mississippi Railway Company in trying to escape from the obligations of said contract of June 5, 1872, are in a position to commend themselves to the favorable consideration of a court of equity; and no strained construction of the Law should be made, in order to afford them, or either of them, the relief they seek at the hands of the court. The Law should be as liberally construed, in favor of commerce among the States as its language will permit, but when complaint is made, or relief is sought, solely, or mainly, in the interest of the common carriers engaged in the transportation of such commerce, the act complained of, or the right asserted, should not rest upon any doubtful construction, but should clearly appear to have been forbidden or conferred. But under no construction, which can properly be placed upon the present case, can it be maintained that a public duty is imposed upon respondent of interchanging traffic with petitioner, and the railroads using its tracks, upon the same terms as to through routing and through joint rates which it has, by private agreement, established with other connecting roads using the Louisville Bridge.

Having reached the conclusion that the Act to Regulate Commerce, rightly construed, does not sanction nor support the affirmative of the proposition presented, it is not deemed necessary to go into any discussion as to the power of Congress over the subject of rates, which common carriers may charge on interstate commerce, or whether Congress, under the power conferred by the Constitution to regulate commerce among the States, could require all connecting lines engaged in transporting such commerce, to establish through routes, and make through joint rates, which should be equal between all such companies. No court has attempted to define the extent, limit, or scope of the power, conferred by the Constitution upon Congress, to regulate commerce among the States. The power is undoubtedly sovereign and exclusive. Prior to the passage of the Interstate Commerce Act this power and exclusive authority over the subject was only exercised—with the exception of regulations for the protection of passengers upon navigable waters, and the transportation of live stock by railroads—through the judicial department of the general government in the way of restraining or annulling state legislation or action, which undertook to interfere with, obstruct, or impose burdens or restrictions upon, interstate commerce. But the power is manifestly not confined or limited to this negative form of action upon the States. It clearly admits of affirmative exercise on the part of Congress, as much as any other power granted by the Con-

stitution to the federal government. *Chief Justice Marshall* in *Gibbons v. Ogden*, 23 U. S. 9 Wheat. 1 [6 L. ed. 23], gave this comprehensive definition of this power: "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than those prescribed in the Constitution. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign Nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power, as are found in the Constitution of the United States."

Possessing such sovereign and exclusive power over the subject of commerce among the States, it is difficult to understand why Congress may not legislate, in respect thereto, to the same extent both as to rates and all other matters of regulation, as the States may do in respect to purely local or internal commerce. But we are not called upon in the present case to say what would or would not come within this regulating power, for the existing Law does not undertake to prescribe any thing more, upon the subject of rates, than that they shall be reasonable and just. It does not undertake to require a common carrier subject to its provisions, to establish through routes and through rates with all connecting lines, if it does so with one or more lines, and does not, as we construe its provisions, entitle petitioner to the relief which it seeks in this proceeding.

For the foregoing reasons our conclusions upon the whole case are that the order of the Commission was not a lawful requirement, such as respondent is bound to obey, and that petitioner is not entitled to the relief which it seeks in this court. *It is accordingly ordered and decreed that petitioner's bill or petition be dismissed at its costs, to be taxed, including in such costs an allowance of \$600 to the referee, as compensation for his services in taking proof and making report herein.*

Barr, D. J.:

I agree with so much of His Honor's—*Judge Jackson's*—opinion as decides the Interstate Commerce Act constitutional, and that this court has original jurisdiction in this cause.

I also concur with him in the opinion that the complainant is not a common carrier of interstate traffic, within the meaning of the Interstate Commerce Act, and that there are not proper and suitable facilities for the interchange of traffic at the intersection of Seventh Street and Magnolia Avenue; but I do not concur in so much of his opinion as seems to indicate that complainant, or the railroads using its bridge, must bring their freight for interchange to one of the established depots of the Louisville & Nashville Railroad Company.

On the contrary, I think the intersection of Seventh Street and Magnolia Avenue is a proper place for the interchange of traffic, if suitable platforms and other structures were

erected. These necessary facilities should be furnished by the complainants or those demanding the interchange of traffic at that point, as they have no right to use either the track or terminal facilities of the Louisville & Nashville Railroad Company without its consent.

Having concurred in the opinion that the complainant cannot obtain an interchange of

traffic with the Louisville & Nashville Railroad Company, and that the petition must be dismissed, I do not wish to give an opinion as to the rates which should be charged as between common carriers in the interchange of traffic under and by virtue of the Interstate Commerce Act, until a case arises which requires a decision.

THE INTERSTATE COMMERCE COMMISSION.

William H. HEARD

v.

GEORGIA R. CO

(No. 166.)

COMPLAINT based upon the exclusion from a first class car, of a colored passenger holding a first class ticket, and compelling him to ride in a second class car set apart for colored persons.

The opinion of the Commission in a previous proceeding between the same parties, is reported 1 Inters. Com. Rep. 719.

State of South Carolina, }
Charleston County. } ss.

To the Honorable,

Interstate Commerce Commission:

Gentlemen:

I, William H. Heard, of the City of Philadelphia, make the following complaint against the Georgia Railroad Company, as a citizen of the United States:

I purchased at No. 838 Chestnut Street, Philadelphia, Pa., January 25, 1889, a first class ticket No. 792 & 8529 over the Pennsylvania Railroad from Philadelphia, Pa., to Atlanta, Ga., for which I paid \$21.50. I presented this to each conductor at connecting points, and took first class coach until I reached Augusta, Ga., when I was told by the conductor of the South Carolina Railroad that "I would be assigned to a car for colored persons only." I changed cars at Augusta, Ga., for Atlanta,

2 INTER S.

Ga., and was pointed to my car by the train hand. I went aboard and complained of the condition of the coach in which I was compelled to ride, but was told the law allowed them to assign me to this second class coach, though I held a first class ticket. The coach in which I was compelled to ride was No. 30, dirty, poorly appointed, only a panel door one and one fourth inches thick separated it from the smoking coach, or it was one half of the smoking coach, and this door was opened very often by the conductor, train hands and smokers, and this half of coach was constantly filled with tobacco smoke. The coach was second class in every particular to the coach in which white passengers rode—No. 13.

I pray your honorable body to investigate this matter, and if what I have sworn to be true that you at once cause said Georgia Railroad Company to comply with your decision in the case of *Wm. H. Heard against the Georgia Railroad Company*.

I further pray, if your honorable body allow separate coaches for white and colored passengers, that the same size cars be allowed for colored as for whites, and that the smoking coach be not a part of the colored passenger coach.

Bishop W. J. Gaines, of Atlanta, Ga., Dr. William D. Johnson, of Athens, Ga., and Mrs. Fannie Cargyle, of Washington, Ga., can testify to these facts.

W. H. Heard.

[Verified at Charleston, S. C., February 7, 1889.]

THE INTERSTATE COMMERCE COMMISSION.

MILWAUKEE CHAMBER OF COMMERCE

v.

FLINT & PERE MARQUETTE R. CO. and
Detroit, Grand Haven & Milwaukee R. Co.

(No. 120.)

*(Through Rates on Wheat, Flour and Mill Stuffs
from Northwestern to Eastern Points.)*

1. **The rate** of 80½ cents per 100 pounds on wheat, flour and mill stuffs from Minneapolis via Milwaukee to New York and common billing points, established by the defendants and their connecting lines February 1, 1888, was a through rate.
2. **The percentage**, amounting to 23 cents per 100 pounds, received by the defendants and their connecting points east of Milwaukee as their proportion of this through rate on shipments from Minneapolis and points west of Milwaukee and between Milwaukee and Minneapolis, while the defendants charge 25½ cents per 100 pounds on the same class of freight originating at Milwaukee and transported over their lines and connecting lines to eastern points, was not an unjust discrimination against Milwaukee; nor did it injure the business of Milwaukee; nor was it a violation of the Act to Regulate Commerce, approved February 4, 1887.
3. **A rate** is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a waybill showing the route over which it is to pass, with the percentages of all the other lines set forth on the waybill, because the initial carrier charges its local rate as part of the total rate and the remaining lines charge an agreed rate made by percentages.
4. **When a combined rate**, evidenced by a through bill of lading from the point of origin to destination, has every substantial constituent of a through rate, it is not necessary that it should be formally "quoted" by one of the carriers to another who is engaged in the making of it, in order to constitute it a through rate. Names are nothing in such a transaction; the Law looks at the elements and substance of the transaction itself.
5. **Through rates** as such, discussed and defined.
6. **Through rates**, like any other agreements that parties competent to contract may make, admit of very great variety in the forms they assume; and such rates, when reasonable and fairly adjusted in their relations to local business, are greatly favored in the Law because they furnish cheapened rates and greater facilities to the public, while at the same time they give increased employment and earnings to a larger number of carriers.

7. **The difference between proportions of through rates** along the same lines should be fairly reasonable in amount and properly guarded in their application and not such as to injure or suppress business in one locality in order that it may be stimulated and built up in another.

8. **Where a rate is in itself a through rate**, and made up of percentages to an intermediate point on a long haul, the circumstances and conditions of transportation must be rarely exceptional indeed, to be of such controlling force as to warrant any considerable excess of such a rate in amount, over a percentage of a through rate for an equal distance, along the same line, by way of the same point, to a more distant point.

9. **Milling-in-transit rates** as part of a through rate in this case, discussed.

(Complaint Filed Feb. 21, 1888.—Answer Filed March 15, 1888.—Assigned for Hearing April 27, 1888.—Hearing Postponed to June 12, 1888.—Hearing Indefinitely Postponed at Request of Parties June 8, 1888.—Depositions Filed Oct. 3, 1888.—Set for Hearing Dec. 5, 1888, and Heard at that Time.—Decided Feb. 19, 1889.)

PROCEEDING on complaint charging unjust discrimination against Milwaukee in rates on flour, etc. *Dismissed.*

See abstracts of pleadings, 1 Inters. Com. Rep. 774, 792.

Mr. F. L. Gilson for plaintiff.

Mr. W. L. Webber for Flint & Pere Marquette Railway Company.

Mr. E. W. Meddaugh for Detroit, Grand Haven & Milwaukee Railway Company.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The complaint in this proceeding avers in substance that on or about February 1, 1888, the defendants reduced the rate of freight on flour, grain and mill stuffs 2½ cents per 100 pounds from Milwaukee to the general eastern domestic markets, to apply on such property when shipped from Minneapolis; that the shippers of Milwaukee have requested and demanded of the above named railroads that the same reductions be made in rates charged to them as was being made on the Minneapolis shipments, and have been and still are refused such reductions; that this class of property has been and still is being shipped from Minneapolis to Milwaukee on prepaid transit freight, the reductions complained of for the transportation of such property by the said railroad companies being at the rate of twenty-three cents per 100 pounds from Milwaukee to New York when shipped from Minneapolis, and 25½ cents on the same class of property when shipped from Milwaukee to New York; that the rate is twenty-eight cents per 100 pounds from Milwaukee to Boston on freight shipped from Minneapolis, and 30½ cents per 100 pounds on the same class of property when shipped from Milwaukee to Boston; that there is no joint tariff from Minneapolis via Milwaukee over the railroads complained of, and that the rate

from Minneapolis to Milwaukee is a local and specific rate, and is not a moneyed or mileage percentage of a through rate; and that the property thus shipped is delivered to the railroads east bound just as free from transportation charges between Minneapolis and Milwaukee, as is the same class of property when delivered to these railroads by shippers of Milwaukee. It is claimed that this is an unjust discrimination against Milwaukee.

In answer to the complaint, the defendants, in substance, state that the rates from Minneapolis to New York and Boston were not made by them, but are through rates from Minneapolis to these eastern cities, and that they accepted as their proportion of these through rates twenty-three cents per 100 pounds from Milwaukee to New York, and twenty-eight cents per 100 pounds from Milwaukee to Boston for themselves and their connecting lines east of Milwaukee; that the property mentioned in the complaint was shipped on through bills of lading from Minneapolis to these eastern cities on a through rate; that while the local rate from Milwaukee to these eastern cities was $2\frac{1}{2}$ cents higher than their proportion of the through rate from Minneapolis, as above stated, yet that this is no violation of the Statute, and is a difference that can be, and is, justified by them under the circumstances and conditions surrounding the two classes of shipments, and the service performed in transporting them between the different points named.

We have carefully considered all the evidence adduced in support of the complaint and answer; and in the statement we now make, omitting by way of recital such portions of it as are not material to the solution of the questions involved, or are merely cumulative, we find the material facts to be: that during the months of January and February in the year 1888, associated lines of railways were strongly and actively competing with each other for the business of transporting flour, grain and mill stuffs, designated by them as sixth class freight, from the City of Minneapolis, the largest milling center in the United States, to New York, Boston, Philadelphia, Baltimore, and other eastern points. These lines were the Chicago, Milwaukee & St. Paul Railway, the Chicago & Northwestern Railway, the Chicago, Burlington & Northern Railway, the Wisconsin Central Railway, and the St. Paul, Minneapolis & Sault St. Marie Railway, and their respective connecting lines to eastern points. Prior to December 29, 1887, the rate on this class of freight from Minneapolis to New York and common points was thirty-five cents per 100 pounds; but on this last named date, the St. Paul, Minneapolis & Sault St. Marie Railway and its connecting lines, commonly known as the "Soo Line," and a new line, published a tariff reducing this rate to $32\frac{1}{2}$ cents per 100 pounds. About January 28, 1888, the Soo Line made a further reduction of two cents per 100 pounds, and then the rate over this line from Minneapolis to New York on this class of freight by that route was $30\frac{1}{2}$ cents per 100 pounds. A day or two before this last reduction was made by the Soo Line, the Chicago, Burlington & Northern Railway made a rate on this class of freight of $30\frac{1}{2}$ cents

per 100 pounds from Minneapolis to New York.

To meet the foregoing reductions in rates, on February 1, 1888, the Chicago, Milwaukee & St. Paul Railway made rates via Milwaukee, and over the defendants' roads, and their connecting lines, as follows:

Minneapolis to New York and common points $30\frac{1}{2}$ cts. per 100 lbs.

Minneapolis to Boston and common points $35\frac{1}{2}$ cts. per 100 lbs.

Minneapolis to Philadelphia and common points $28\frac{1}{2}$ cts. per 100 lbs.

Minneapolis to Baltimore and common points $27\frac{1}{2}$ cts. per 100 lbs.

And on February 7, 1888, the Chicago & Northwestern Railway, to meet the same reductions, made the same rates from Minneapolis to the same points as the Chicago, Milwaukee & St. Paul Railway had done, and via Milwaukee over the defendants' lines, and their connecting roads. And at the same time, to meet the reductions of the Soo Line, the all rail routes from Minneapolis via Chicago, to eastern points, reduced their through rate to $32\frac{1}{2}$ cents per 100 pounds, by the lines east of Chicago agreeing to receive as their proportion of it twenty-five cents per 100 pounds to New York; and concerning this reduction the business men of Chicago have made no complaint.

Before and at the time the foregoing reductions were made, the rates on like articles of freight from Milwaukee, the third largest milling center in the United States, over the Detroit, Grand Haven & Milwaukee Railway were as follows:

To New York and common points $25\frac{1}{2}$ cts. per 100 lbs.

To Boston and common points $30\frac{1}{2}$ cts. per 100 lbs.

To Philadelphia and common points $23\frac{1}{2}$ cts. per 100 lbs.

To Baltimore and common points $22\frac{1}{2}$ cts. per 100 lbs.

The rates from Milwaukee to the same points were the same as those last stated on flour over the Flint & Pere Marquette and its connecting lines, but on grain in bulk the rates over this line were as follows:

Milwaukee to New York $27\frac{1}{2}$ cts. per 100 lbs.

Milwaukee to Boston $32\frac{1}{2}$ cts. per 100 lbs.

Milwaukee to Philadelphia $25\frac{1}{2}$ cts. per 100 lbs.

Milwaukee to Baltimore $24\frac{1}{2}$ cts. per 100 lbs.

While the rate was thirty-five cents per 100 pounds on this class of freight from Minneapolis to New York and common points, this was by shipment all rail from Minneapolis, and the rate was made up as follows: $7\frac{1}{2}$ cents from the Minneapolis to Chicago and $27\frac{1}{2}$ cents per 100 pounds from Chicago to New York. For rate purposes, in regard to this class of freight, Milwaukee and Chicago were treated as common points, upon all rail shipments, whether these were from the east, or from the west of these cities; but if the shipment was made from Milwaukee across Lake Michigan over defendants' lines, then a lower rate by two cents was allowed by that route than by the all rail shipments. When the reduction was made on sixth class freight from thirty-five cents per 100

pounds to 30½ cents per 100 pounds from Minneapolis to New York via Milwaukee and over the defendants' lines, the rate was then made up as follows:

The proportion of the Chicago, Milwaukee & St. Paul Railway, or of the Chicago & Northwestern Railway, or of the Wisconsin Central, as the case might be, from Minneapolis to Milwaukee was 7½ cents per 100 pounds; and the proportion of the rates of the defendants and their connecting lines to New York was twenty-three cents per 100 pounds. The following table will show how this proportion of twenty-three cents per 100 pounds was divided between the Flint & Pere Marquette and its connecting lines east of Milwaukee by their agreement:

| Road. | Per cent. | Proportion in cents. |
|---|-----------|----------------------|
| Flint & Pere Marquette Railway..... | 30.58 | 7.03 |
| Michigan Central Railway..... | 33.48 | 5.41 |
| New York Central & Hudson River Railroad..... | 45.94 | 10.56 |
| | 100.00 | 23.00 |

For the purposes of comparison the percentages and proportions of the 30½ cent rate per 100 pounds from Minneapolis to New York, based upon actual mileage, via roads indicated, would have been, in the absence of any agreement of the lines east of Milwaukee as to their twenty-three cent proportion, and the manner in which they agreed to divide this proportion, as follows:

| Road. | Milage. | Per cent. | Proportion in cents. |
|---|---------|-----------|----------------------|
| Chicago, Milwaukee & St. Paul Railway..... | 335 | 24.45 | 7.46 |
| Flint & Pere Marquette Railway..... | 325 | 23.71 | 7.23 |
| Michigan Central Railway..... | 269 | 19.65 | 5.99 |
| New York Central & Hudson River Railroad..... | 441 | 32.19 | 9.82 |
| | 1370 | 100.00 | 30.50 |

Percentages and proportions of the through rates from Milwaukee east as compared to the local rates of the lines from Milwaukee to New York per 100 lbs. were:

| Road. | Local rate. | Proportion of through rate. |
|---|-------------|-----------------------------|
| Flint & Pere Marquette (Milwaukee to Wayne Junction)..... | 12 cts. | 07.03 |
| Michigan Central (Wayne Junction to Buffalo)..... | 13 " | 05.41 |
| N. Y. Central & Hudson River R. R. (Buffalo to New York)..... | 14 " | 10.56 |
| | 39 cts. | 23.00 |

The rate of 30½ cents per 100 pounds, above 2 INTER S.

mentioned, from Minneapolis to New York, was so worked, that at stations between Minneapolis and Milwaukee where the rate was less than 7½ cents per 100 pounds from such stations to Milwaukee, then the entire through rate from such stations to New York was twenty-eight cents per 100 pounds. On this basis the defendants and their connecting lines would receive of this twenty-eight cent rate, as their proportion, twenty-three cents per 100 pounds, while the Chicago, Milwaukee & St. Paul Railway would receive five cents per 100 pounds. And the following statement will show the rate and percentages received at this rate, namely:

| Road. | Rate. | Per cent. |
|------------------------------------|-------|-----------|
| Chicago, Milwaukee & St. Paul..... | 05 | 17.86 |
| Lines east of Milwaukee..... | 23 | 82.14 |
| | 28 | 100.00 |

The three principal railroads that bring western freight of this class from Minneapolis via Milwaukee, for shipment east, are the Chicago, Milwaukee & St. Paul Railway, the Chicago & Northwestern Railway and the Wisconsin Central Railway; but the evidence shows that only a small proportion of it is brought by the last named road. The local rate on freight of this class by the Chicago, Milwaukee & St. Paul Railway during the month of February, 1888, from Minneapolis to Milwaukee was 12½ cents per 100 pounds. The distance via the Chicago, Milwaukee & St. Paul Railway from Minneapolis to Milwaukee is 335 miles; by the Chicago & Northwestern Railway, is 364 miles; and by the Wisconsin Central Railway, is 383 miles. The local rates of 12½ cents and the transit rates of 7½ cents per 100 pounds on each of these roads from Minneapolis to Milwaukee during the time that the 30½ cent rate prevailed in the month of February, 1888, were the same, and the same rule prevailed in the working of this 30½ cent rate on each of these roads.

Percentage rates as such, in the transportation of this class of freight, obtained only on the lines east of Chicago and Milwaukee, and not on the lines west of these cities. The course of business was for the lines west of Chicago and Milwaukee to charge their transit or local rate, as the case might be, to these cities, to which was added the joint rate of the lines east of Milwaukee or the lines east of Chicago. For eight or ten years prior to February 1, 1888, the course of business had been for the lines at Minneapolis to issue through bills of lading on sixth class freight via Milwaukee and over the defendants' lines to eastern points, the rate from Minneapolis to Milwaukee usually being prepaid by what is known as transit-milling rates, and the lines east of Milwaukee charged the joint rate prevailing between them from Milwaukee to such eastern points. Freight destined east over the Flint & Pere Marquette and its connecting lines is rebilled at Ludington because its officers are there; and over the Detroit, Grand Haven and Milwaukee is rebilled at Grand Haven for

the same reason; but in each instance the re-billing is dated at Milwaukee.

When the reduction was made in this rate on February 1, 1888, to 30½ cents per 100 pounds from Minneapolis to New York, a through bill of lading was in every case issued showing that the freight was prepaid from Minneapolis or from the point west of Milwaukee from which the freight was shipped, as the case might be, to Milwaukee, and then the proportion of the through rate from Milwaukee to point of destination; and upon the face of all the bills of lading was stamped in printed letters these words: "The rate given in this bill of lading as from Milwaukee is the proportion of the through rate from point of shipment and must not be construed as the rate from Milwaukee proper." The total rate and the proportions of each road appeared upon the manifest of the Flint & Pere Marquette Railway, and its connecting lines, with the proportions of each road, which was never the case before that time. The books of the Flint & Pere Marquette Railway showed this in the case of every shipment. Until February 1, 1888, no through rate from Minneapolis to New York on sixth class via Milwaukee and defendants' lines was ever "quoted" to the Flint & Pere Marquette Railway Company and its connecting lines. The rule in regard to transporting freight of this class seems to be that the initial road makes the rate, and the connecting lines accept it, and agree to receive their proportions of it. Under this rule the initial road in transporting such freight from Minneapolis to New York via Milwaukee and the defendants' lines would be the Chicago, Milwaukee & St. Paul Railway, or the Chicago & Northwestern Railway, or the Wisconsin Central Railway, as the case might be.

The reduction to the 30½ cent rate per 100 pounds from Minneapolis to New York on February 1, 1888, was made by the lines east of Milwaukee agreeing to take twenty-three cents per 100 pounds as their proportion of that rate from Minneapolis to New York, and at the same time a like reduction was made by the lines east of Chicago on like shipments from Minneapolis by their agreeing to take twenty-five cents per 100 pounds from Chicago to New York as their proportion of the St. Paul and Minneapolis rate instead of the former rate of 27½ cents per 100 pounds. The 30½ cent rate from Minneapolis to New York via Milwaukee was withdrawn February 12, 1888, after ten days' notice.

The expense bill in use over the defendants' lines during the period to which this controversy relates, in February, 1888, showed the number of the car, the number of the waybill, the point of shipment and destination, the consignor, number of packages, articles, weight, rate, freight charges, and rate to destination. The waybill during the same period showed the number of the car, from what point shipped, to what destination, consignee, number of packages, description, articles, weight, through rate, line charges, advance charges, prepaid, unpaid, percentages, total, proportion of line charges to destination. The waybill is made out at point of shipment and accompanies the freight to destination.

Freight of this class billed on through rates

from Minneapolis when it reaches Milwaukee or Chicago is rebilled at Ludington or Grand Haven but dated Milwaukee, according to directions given at Minneapolis as indicated by the notations on the expense bill. The names of the consignee and consignor appear on the waybills and their initials on the expense bills. After the Soo Route was opened it carried to eastern markets on an average about 3,000 barrels of flour per day during the month of February, 1888, from Minneapolis.

Milling-in-transit rates exists in a large extent of territory in the transportation of wheat in the Northwest and also in some other portions of the country. By this system wheat and its products are shipped from points west of Minneapolis in Dakota Territory, in the States of Minnesota and Iowa, and also in the Manitoba region, to Minneapolis, or billed through to Milwaukee and Chicago, being common billing points, with the privilege of milling that wheat in transit at Minneapolis. When the receiver of the grain in Minneapolis gets the wheat he pays the whole freight through to Milwaukee, or Chicago, whichever way they happen to bill it. Then there is due him transportation for so many pounds of flour or mill feed, to be forwarded free of any charge from Minneapolis to Milwaukee or Chicago. When the shipper was shipping flour or mill feed from Minneapolis to Milwaukee or Chicago, he would take the certificates showing the transportation to which he was entitled, say, for instance, by the car load, and it would go through to Milwaukee or Chicago, the freight being prepaid by the cancellation of the certificate. In this manner he would finish up the previous contract on that freight, and the railroad would also complete its part of the contract.

After the enactment of the Act to Regulate Commerce, these certificates were limited to ninety days, and to the millers. The shipper who desired to obtain these certificates would then have to get a miller to buy them and let the freight be shipped in the miller's name. When the millers and shippers discovered that the railroad companies were going to advance their rate from the summer rate of five cents per 100 pounds, and then to 7½ cents per 100 pounds, they often bought many million pounds of these certificates to be used in the transportation of freight from Minneapolis to Milwaukee or Chicago, so as not to be obliged to pay the 12½ cent local rate. Prior to the passage of the Act to Regulate Commerce these milling-in-transit certificates were good until used, and transferable to anybody. A large business is done at Milwaukee as well as at Chicago in freights transported to those cities under these milling-in-transit rates, as well as upon freight shipped to eastern points via those cities.

From Milwaukee, the route across the lake being two cents less than the all-rail route via Chicago, the bulk of the shipments go that way to the east, and the basis of Milwaukee sales are made on shipments across the lake. About 1,214,000 barrels of flour were actually milled at Milwaukee during the year 1887.

The rate on freight originating at Milwaukee as well as on freight originating at Minneapolis or at points west of Milwaukee and between Milwaukee and Minneapolis, and transported by the Detroit, Grand Haven & Milwaukee

Railway and its connecting lines to eastern points, is a through rate. The percentage of the Detroit, Grand Haven & Milwaukee Railway is shown by the evidence to be about 29 per cent of the Milwaukee rate to New York, and about 27 per cent of the Milwaukee rate to Boston, but the percentage, or rates, of its connecting lines east are not shown by the evidence, nor are they material in the view that we take of this case.

The testimony in this proceeding was taken by depositions of witnesses at Milwaukee before a commissioner selected by the parties with parties and their counsel present. Some of the witnesses testified that on or about January 28, 1888, the Soo Line made a reduction of the rate from Minneapolis to New York to 30½ cents, and that a day or two before that time the Chicago, Burlington & Northern Railway Company made a similar reduction. The witnesses were not required to produce the tariffs by which these reductions were made, nor was any witness required to produce them, so that they might be put in evidence. The statements of the witnesses were accepted that such reductions were made, and there was no testimony in conflict with them in this respect, and so we must accept them in regard to the facts they state; but we find no tariffs filed with us by either of those companies by which any such reductions were made. Doubtless counsel supposed, as they had a right to do, that the tariffs by which these reductions were made by the Soo Line and the Chicago, Burlington & Northern Railway had been filed by these companies with the Commission.

The Statute has made it the duty of the carrier, under a heavy penalty, to file a copy of such tariffs with the Interstate Commerce Commission, and this is one of the most vital and important provisions of the Statute. Upon its observance by the carriers depends the integrity of the Law; and carriers, for their own protection in their own business, are quite as much interested in observing it as are the public that it should be obeyed. Compliance with it would have saved carriers from many of the silly, reckless and wasteful rate wars in which some of them have engaged, to the great injury of the properties they represent, and of the investors; and would also have prevented numerous and, in many instances, well founded complaints on the part of the public. In every stage of its administration, the Commission has earnestly endeavored to impress upon the carriers the importance of complying with this provision of the Statute, and all our experience has only the more demonstrated that its rigid enforcement is a paramount duty. As the Soo Line and the Chicago, Burlington & Northern Railway Company are not parties to this proceeding, we will make no further remarks upon this aspect of the case at present.

The main question involved in this proceeding is whether the rate of 30½ cents per 100 pounds on sixth class freight put into effect from Minneapolis to New York via Milwaukee by the lines west of Milwaukee and over the lines of the defendants and their connecting lines on February 1, 1888, was a through rate.

The petitioners contend that it was not a through rate. To support this view of the case it is insisted that there was no joint agreement

between the lines east and west of Milwaukee for any such through rate. It is further insisted that the lines west of Milwaukee charged their local rate to that city, and that the freight is there delivered by them to the eastern lines who rebill and transport it upon a joint rate of their own to eastern points; and that this demonstrates that this is not a through rate, even although a through bill of lading is issued upon the freight from Minneapolis via Milwaukee to New York or Boston, as the case may be, and the freight is rebilled at Grand Haven or Ludington by the eastern lines in accordance with the instructions from Minneapolis found in notations on the expense bills. The fact is also relied upon that the lines east of Milwaukee charge fixed percentages of a joint rate, which percentages are in each instance considerably less than their respective local rates, coupled with the further fact that the connecting line west of Milwaukee does not charge a percentage rate, but charges its local rate; and this is urged as being conclusive evidence that the combined rate made by the two is not a through rate.

The defendants contend that prior to the establishment of the 30½ cent rate from Minneapolis to New York with corresponding and different rates from Minneapolis to Boston, Philadelphia, Baltimore and common billing points with each of these cities, on February 1, 1888, there was no through rate from Minneapolis to each of these cities and their common billing points, until these rates were made February 1, 1888, although through bills of lading had for eight, or ten years before that time been issued on such freight when shipped from Minneapolis to all these points via Milwaukee and over defendants' lines, and their connecting lines. They urge as a fact which seems to be conclusive of this, in their estimation, that no through rate was ever "quoted" to them on such shipments until the rate of February 1, 1888, was put into effect, and that therefore there was no through rate until that time.

Upon the evidence before us in this proceeding we find ourselves unable to assent to the correctness of either of these grounds as they are assumed by the contending parties. For eight or ten years prior to the first day of February, 1888, the course of business had been for the lines operating between Minneapolis and Milwaukee to issue through bills of lading upon this class of freight to New York, Boston, Philadelphia, Baltimore, and common billing points, with each of these cities, via Milwaukee, over the defendants' lines, and their connecting lines, to destination. These lines between Minneapolis and Milwaukee, being the initial roads, made this through rate, and the defendants accepted it, and transported the freight upon the through bill of lading to destination. The total of the rate was named in the bill of lading. The initial road charged its local rate, or its milling in transit rate, as the case might be, and the defendants charged their rate from Milwaukee, made up of their locals or agreed percentage rates, as the case might be, to the point of destination. The waybill showed the route the freight was to go to destination.

This was the way the business was done

prior to February 1, 1888. According to this course of business the rate from Minneapolis to New York via Milwaukee, for example, upon one of these through bills of lading, was made up of the milling-in-transit rate of the initial road from Minneapolis to Milwaukee, and of the agreed rate of 25½ cents of the defendants and their connecting lines from Milwaukee to New York. By this arrangement the rate from Minneapolis to New York on this class of freight was then 32½ cents per 100 pounds. It was a through rate and had every essential constituent of a through rate.

It was wholly immaterial whether such a rate so made was "quoted" as a through rate or not. The through bills of lading, the fixed total rate, the waybill, the expense bill, the course of business between the parties by which the contract of shipment was performed from the point of origin to destination made it a through rate. Names are nothing in such a transaction. The Law looks at the elements and substance of the transaction itself. The through bill of lading issued by the initial carrier in which it was shown what the rate was, and that the carriers would transport the freight from Minneapolis to Milwaukee and east to destination, was a contract with the shipper for a through rate. The proposal of the initial carrier was accepted by the defendants and their connecting lines when they took the freight at Milwaukee and transported it to New York upon their agreed rate of 25½ cents per 100 pounds, and it then became an executed contract, and performed according to the well known and published course of business of these carriers. The shipper had contracted for the through rate, and had received it. It would be a mockery in terms to call such a transaction any other than a through rate.

The reduction in the rate upon this class of freight, from Minneapolis to eastern points, of February 1, 1888, was made, as we have seen, by the defendants and their connecting lines agreeing to accept twenty-three cents per 100 pounds as their proportion of this business from Milwaukee east. The rate related to business originating at Minneapolis or at points between Minneapolis and Milwaukee and west of Milwaukee. On shipments originating at Milwaukee, and destined to New York over their lines and connecting lines the defendants left their rate standing at 25½ cents per 100 pounds on this class of freight. Then the initial road between Minneapolis and Milwaukee, in accordance with its published tariffs and as a matter of caution, stamped in printed letters upon the through bill of lading these words:

"The rate given in this bill of lading as from Milwaukee" (*i. e.* twenty-three cents per 100 pounds) "is the proportion of the through rate from points of shipment and must not be construed as the rate from Milwaukee proper."

The freight was then rebilled at Ludington or Grand Haven but dated at Milwaukee over defendants' roads and their connecting lines in accordance with their instructions from the point of shipment as found in the notations on the expense bill.

The mistake of the petitioners consists in supposing that, upon such a course of business as is here shown, there was no through rate, because the initial road between Minneapolis or

the point of origin of the freight west of Milwaukee charged its local rate, instead of agreeing to receive a percentage of the total rate from the point of origin to the destination of the freight. A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a waybill, showing the route over which it is to go, with the percentages of all the other lines set forth on the waybill, because the initial carrier charges its local rate as part of the total rate, and the remaining lines charge an agreed rate made by percentages. It may occur where the freight is shipped under a through bill of lading from the point of origin to the final destination, and has to pass over ten or a dozen different lines of railroad, and several of these, or, for that matter, each of these roads may charge its local rate, and still the total rate is a through rate. As through rates are made by the American system of roads, agreed percentages of the total rate, considerably less in amount than the local rates of the respective roads receiving such percentages, are usually a leading feature of such through rates, and it is eminently proper, as a general rule, that this should be so. This rule is illustrated in the percentages received by the defendants and their connecting lines east of Milwaukee, of the proportion of twenty-three cents per 100 pounds of the Minneapolis rate, as well as their percentages of the 25½ cents per 100 pound rate on shipments of the freight originating at Milwaukee. But, as we have already stated, it is not necessary that this should be so in order to constitute a through rate.

Through rates, like any other agreements that parties competent to contract may make, admit of very great variety in the forms they may assume. In one shape or another, they are in very general use upon the American roads, and in the case of long hauls are one of the necessities of the situation. Commerce and trade require it, and competition compels it. Such rates, when reasonable and fairly adjusted in their relations to local business, are greatly favored in the Law because they furnish cheapened rates and greater facilities to the public, while, at the same time, they give increased employment and earnings to a larger number of carriers.

Upon the facts and the law of this case, the mistake of the defendants consists, as we have already indicated, in supposing that the rates from Minneapolis on through bills of lading via Milwaukee over their own and connecting lines to New York and eastern points, were not through rates prior to February 1, 1888, and that they were then made through rates for the first time by stamping on the bill of lading the provision we have mentioned, and by rebilling them at Milwaukee or Ludington, in accordance with those instructions from Minneapolis, or the point of shipment. They were through rates without this, and this method of dealing with them did not make them any more through rates than they were before this was done.

The reduction of rates made by the defendants and their connecting lines west of Milwaukee was forced upon them by the reductions made by the Soo Line and by the Chicago, Burlington & Northern Railway Company. If

this reduction had not been made by the defendants and their connecting lines west of Milwaukee, the evidence shows that the result would have been that but little of this class of freight, comparatively speaking, would have gone to eastern points via Milwaukee and over the defendants' lines, and the bulk of it would have been appropriated by the Soo Line and by the Chicago, Burlington & Northern Railway. It was under such circumstances that the defendants and their connecting lines made this reduction in rates and it does not appear to have been one that was unreasonable or capricious. It was not a reduction that was unfair or unjust to Milwaukee any more than the same reduction by the lines east of Chicago from 27½ cents to twenty-five cents per 100 pounds, as their proportion of the Minneapolis business, was unjust or unfair to Chicago; and neither of those reductions was unfair or unjust to Milwaukee or Chicago. While they were in force, the rate from Minneapolis to New York, for example, on this class of freight via Milwaukee and over defendants' lines, was still five cents higher per 100 pounds than it was on freight originating at Milwaukee and shipped to New York over defendants' lines; and there was no point west of Milwaukee and between Milwaukee and Minneapolis from which the through rate to New York was less than 2½ cents per 100 pounds higher than upon freight originating at Milwaukee and shipped east over defendants' lines and their connecting lines. On a car of 28,000 pounds this would make the through rate \$14 per car higher from Minneapolis to New York, than on freight originating at Milwaukee; and on such a car the through rate from the nearest point to Milwaukee and west of that City to New York would be \$7 per car higher than on freight originating at Milwaukee and transported via Milwaukee over defendants' lines and their connecting lines to New York. The evidence does not show that this injured the business of Milwaukee in the slightest degree; it related entirely to freight passing through Milwaukee from more distant points which had materially higher rates than on freight originating at Milwaukee to eastern cities. What we have here said as to Milwaukee is true also of Chicago, as to the reduction made by the lines east of that city upon their portion of the through rate on freight from Minneapolis, and points west of Chicago, between Minneapolis and Chicago, destined to eastern points.

In the case of the *Detroit Board of Trade v. Grand Trunk Railway of Canada and New York Central & Hudson River Railroad Company*, 2 Inters. Com. Rep. 199, 2 Inters. Com. Rep. 315, we had occasion to consider the relative difference between a through rate at an intermediate and a far distant point, and the one, as compared to a percentage of the other, for an equal distance. The principle we there announced is applicable here to the extent that upon the manifest and widely different circumstances and conditions of transporting this class of property from Minneapolis to eastern points, as compared with those surrounding the transportation of similar freight from Milwaukee to the same eastern points, the division of the Minneapolis rate at Milwaukee west, so that the proportion of it from Milwau-

kee to New York, or any other eastern point, should be the same and no less than the rate upon the same class of freight originating at Milwaukee and destined to New York, or such eastern point, is a standard of comparison that cannot be sustained.

We did not assert the proposition in that case, nor do we in this, that there may not sometimes be a relation between the two, for there often is such relation. The difference between proportions of through rates along the same lines should be fairly reasonable in amount, and properly guarded in their application, and not such as to injure or suppress business in one locality, in order that it may be stimulated and built up in another. Where a rate is in itself a through rate and made up of percentages to an intermediate point, like Milwaukee, or Detroit, for example, and upon a long haul, the circumstances and conditions of transportation must be rarely exceptional indeed to be of such controlling force, as to warrant any considerable excess of such a rate in amount over a percentage of a through rate, for an equal distance along the same line, by way of the same point, to a more distant point. The doctrine of relatively fair rates to different localities is one that we have frequently asserted. The difference at Milwaukee, however, of 2½ cents per 100 pounds as a proportion of the through rate from Minneapolis to eastern points, as compared with shipments of the same class of freight originating at Milwaukee and destined to eastern points, was not one, upon all the facts of this case, which we regard as unreasonable in amount or calculated to injure the business at Milwaukee, that it may be stimulated and built up at Minneapolis. Nor can a corresponding difference between other points according to distance, situated between Milwaukee and Minneapolis, have any such effect, when these rates are still considerably higher than the through rate charged upon freight originating at Milwaukee and destined to eastern points. Besides, these are all very long hauls, in addition to being controlled by circumstances and conditions of transportation which are widely dissimilar.

No complaint is made of milling-in-transit rates in this proceeding, and we can well understand why this should be so, for Milwaukee is, in proportion to the immense grain and flour business it does, quite as much interested in obtaining grain under the rates resulting from this system as Minneapolis. In the view we take of the case it is wholly immaterial that the freight rates from Minneapolis to Milwaukee and from points west of Milwaukee were prepaid to Milwaukee by the milling-in-transit rates, because they were in every such instance part of a through rate. They were paid as part of the through rate. In this respect it does not appear that they were the means of violating the Law. They were the known and prevailing rates in regard to this class of business. They were treated by the parties as the basis of the through rate. Every shipper knew that these were the rates which were used in transporting this class of freight to Milwaukee from Minneapolis and points west of Milwaukee, for shipment via Milwaukee and defendants' lines to eastern points as the basis of the through rate; and that the local rate of

12½ cents per 100 pounds on this class of freight from Minneapolis to Milwaukee was not, and could not be, used as part of this through rate of February 1, 1888. They were in fact very moderate rates, being much the same in amount, according to actual distance, as the percentages of agreed rates over defendants' lines and their connecting lines. No shipper has complained that he was unable to obtain these rates while other shippers were receiving them.

It results from the conclusion we have reached that the petition in this proceeding cannot be sustained, and it is therefore dismissed.

MEMPHIS FREIGHT BUREAU

v.

KANSAS CITY, FORT SCOTT & MEMPHIS R. CO.

(No. 168.)

COMPLAINT filed February 15, 1889, alleging an unjust inequality, in rates between certain stations on defendant's line and Memphis, resulting in a discrimination against such stations.

January 22, 1889.

To the Honorable Interstate Commerce Commission, Washington, D. C.

This petition of the Memphis Freight Bureau respectfully sheweth:

That the said Memphis Freight Bureau is an organization incorporated under the Laws of the State of Tennessee, and is composed of merchants and manufacturers and other business men of the City of Memphis, Tennessee.

That the duties of the organization are the following, as embodied in the charter of incorporation:

For the general purpose of forwarding and protecting the interests of the merchants and shippers of the City of Memphis, as well as of their patrons, in all matters connected with or relating to freight, freight rates and transportation, and embracing all business with and all manner of claims against common carriers, whether railroad or steamboat or other species of common carrier, and in which said merchants, shippers and patrons may be concerned and also in connection therewith, for the purpose of furnishing any such common carrier from time to time information about shipments of freight to and from said City of Memphis of the character best to insure its proper classification; of procuring such freight rates to and from all shipping points as shall prevent discrimination against Memphis shippers and patrons, and aid them in controlling trade; of assisting in the adjustment and collection of claims for overcharges, losses and damages, or either, against any common carrier or other person liable therefor; of rendering to its members individually and collectively its services in all matters touching the transportation of merchandise, cotton, grain and other products, of procuring special rates for commercial travelers and for other purposes; and generally of taking all proper steps and using all fair and honorable means for the extension of the trade of said City of Memphis, and of doing and

performing all services and duties in reference to these subjects.

That the Kansas City, Fort Scott & Memphis Railway Company is a corporation incorporated under the Laws of the State of Missouri and is engaged in the transportation, for hire, of persons and property.

That the Kansas City, Fort Scott & Memphis Railway Company operates and maintains a continuous line of railway from Memphis, Tenn., through the States of Tennessee, Arkansas and Missouri to Kansas City, Mo.

That the Kansas City, Fort Scott & Memphis Railway Company has established and published a tariff of freight and charges, as it of right ought to do, from Memphis, Tenn., to stations on its line in the States of Arkansas and Missouri.

Your petitioner avers that in establishing and publishing the aforesaid tariff of freight and charges, the said Kansas City, Fort Scott & Memphis Railway Company has willfully and unjustly discriminated against certain stations on its road, to wit, the several stations located between Sibley, Ark., and Cabool, Mo., by an unjust and improper gradation of rates.

That if the rates are correctly adjusted between Memphis and Spring Hill, Mo., viz.:

Classes.

| 1. | 2. | 3. | 4. | 5. | A. | B. | C. | D. | E. |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| .85 | .65 | .50 | .40 | .30 | .33 | .28 | .22 | .18 | .17 |

the distance being 457 miles, it is unjust and unreasonable to exact from Memphis to Big Bay, a distance of fifty-six miles, the following rates, viz.:

| 1. | 2. | 3. | 4. | 5. | A. | B. | C. | D. | E. |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| .45 | .39 | .30 | .25 | .20 | .19 | .15 | .12 | .09 | .06 |

Your petitioner also avers that if the rates are correctly adjusted from Memphis to Nichols, Mo., a distance of 288 miles, viz.:

| 1. | 2. | 3. | 4. | 5. | A. | B. | C. | D. | E. |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| .70 | .60 | .50 | .40 | .30 | .30 | .24 | .20 | .17 | .14 |

it is unreasonable and unjust to charge the following rates to Mammoth Springs a distance from Memphis of only 144 miles, viz.:

| 1. | 2. | 3. | 4. | 5. | A. | B. | C. | D. | E. |
|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|
| .70 | .60 | .50 | .40 | .30 | .30 | .24 | .20 | .16 | .11 |

Your petitioner prays that Your Honorable Commission will investigate the charges herein made, and if established that an order be made to said Kansas City, Fort Scott & Memphis Railway Company to amend its tariffs of rates and charges, by a proper gradation of same, according to distance, so that the rates from Memphis to the several stations between Memphis and Cabool, Mo., may be equitably adjusted and have a proper bearing to the rates from Memphis to the stations west of Cabool, Mo., to and including Spring Hill, Mo.

MEMPHIS FREIGHT BUREAU

v.

KANSAS CITY, FORT SCOTT & MEMPHIS R. CO.

(No. 169.)

COMPLAINT filed February 15, 1889, charging the imposition of excessive rates

between Memphis and Kansas City, as compared with rates between Chicago and Kansas City.

January 22, 1889.

To the Honorable Interstate Commerce Commission, Washington, D. C.
Gentlemen:

This petition of the Memphis Freight Bureau, an organization of merchants and business men incorporated under the Laws of the State of Tennessee, respectfully sheweth:

That the Kansas City, Fort Scott & Memphis R. Co., is a corporation incorporated under the Laws of the State of Missouri and is engaged in the transportation of persons and property, for hire, between Kansas City, Mo., and Memphis, Tenn., and intermediate places in the States of Missouri and Arkansas.

That the Kansas City, Fort Scott & Memphis R. Co. is a member of the Western Freight Association, of which Mr. J. W. Midgley is chairman, with office in the "Rooker" in Chicago.

That the said Mr. Midgley with knowledge and consent of the said Kansas City, Fort Scott & Memphis R. Co., publishes tariffs of freight charges to apply on shipments of freight and live stock between Kansas City and Memphis, when transported over the said Kansas City, Fort Scott & Memphis R. Co.'s lines.

That the accompanying tariff No. 1 was issued by Mr. J. W. Midgley, and is authority for the rates given between Kansas City and Memphis via the Kansas City, Fort Scott & Memphis R. Co., and is also authority for the rates therein given between Kansas City and Chicago and Milwaukee by the roads, members of the Western Freight Association, engaged in the transportation of freight and live stock between said Kansas City and Chicago and Milwaukee.

Your petitioner complains that in adjusting rates between Kansas City and Memphis the said Kansas City, Fort Scott & Memphis R. Co. should not have made the rates any higher than, if as high as, those charged and accepted by other members of the Western Freight Association engaged in the transportation of business between Kansas City and Chicago and Milwaukee, for the following reasons:

First, that the distance between Kansas City and Chicago by the shortest line, viz., by the Chicago, Santa Fé & California R., is 458 miles; to Milwaukee via the same line 543 miles; from Kansas City to Memphis via the Kansas City, Fort Scott & Memphis R. 487 miles.

Second, that business to and from Kansas City is lost to the City of Memphis by reason of the present adjustment.

Third, that the physical difficulties of transportation are not, as far as your petitioner knows and believes, any greater, nor even as great, between Memphis and Kansas City than between Milwaukee and Kansas City, the Chicago, Santa Fé & California R. having to cross, by bridge or ferry, the following large rivers between Kansas City and Chicago, in addition to making transfer to depots of connecting lines at Chicago, viz.: the Missouri River at or near Sibley; the Des Moines River at or near Dumas; the Mississippi River at or near Madison; the Illinois River at or near Chillicothe.

2 INTER S.

Your petitioner prays your honorable Commission to issue an order requiring the Kansas City, Fort Scott & Memphis R. to reduce its rates between Kansas City and Memphis so that said rates may not at any time be higher than the published rates of the Western Freight Association between Kansas City and Chicago.

MEMPHIS FREIGHT BUREAU

MISSOURI PACIFIC R. CO.

(No. 170.)

COMPLAINT filed February 15, 1889, charging discrimination against Memphis in rates to St. Louis.

January 22, 1889.

To the Honorable Interstate Commerce Commission, Washington, D. C.

Gentlemen:

This petition of the Memphis Freight Bureau, an organization of merchants and business men incorporated under the Laws of the State of Tennessee, respectfully sheweth:

That the Missouri Pacific Railway Company is a corporation incorporated under the Laws of the State of Missouri and is employed in the transportation of persons and property, for hire, in the States of Illinois, Missouri, Nebraska, Kansas, Arkansas and Tennessee.

That the said Missouri Pacific Railway Company has established a tariff of rates on freight applying between the Cities of Kansas City, Mo., St. Joseph, Mo., Atchison, Kan., and Leavenworth, Kan., and the Cities of St. Louis, Mo., East St. Louis, Ill., and Memphis, Tenn.

That the said Missouri Pacific Railway Company in establishing said tariff makes no distinction in rates between St. Louis, Mo., and East St. Louis, Ill., and either of the western points enumerated, but between Memphis and said western points higher rates are demanded and exacted between St. Joseph, Atchison, Leavenworth and Memphis, than between Kansas City and Memphis, to the unlawful advantage and preference of the Cities of St. Louis, Mo., and East St. Louis, Illinois, and the disadvantage and prejudice of the City of Memphis.

Your petitioner further complains that the said Missouri Pacific Railway Company has unjustly discriminated against the City of Memphis, in applying certain preferential rates between St. Louis, Mo., and East St. Louis, Ill., and Kansas City, Mo., St. Joseph, Mo., Atchison and Leavenworth, Kan., and denying corresponding preferential rates between Memphis and said Kansas City, St. Joseph, Atchison and Leavenworth in exacting rates of first class on the following articles of dry goods, made wholly of cotton, to wit: calicoes, canton flannels (plain or dyed), canvas, corset jeans, cottonades, cotton warp, cotton yarn, crash (linen or cotton), domestic checks, stripes and chevots, cotton ducks, denims, drills, domestic ginghams, glazed cambrics, osnaburgs,

sheetings (bleached and brown), tickings, window hollands in bales, also bags, sacks, and bagging (other than burlaps, gunny or jute).

Your petitioner believes that the said Missouri Pacific Railway Company, in adjusting rates between St. Louis and Memphis and the cities located on the Missouri River named in the foregoing, has unlawfully discriminated, and continues to unlawfully discriminate, against the City of Memphis in the particulars herein before related; and the aid of your honorable Commission is invoked to cause the said Missouri Pacific Railway Company to relieve this city of the discrimination under which it now suffers.

In support of the allegations herein made, your petitioner begs respectfully to send herewith a copy of the tariff now used by the Missouri Pacific Railway Company in assessing charges of freight on shipments made between St. Louis, Mo., East St. Louis, Ill., and Memphis, respectively, and Kansas City, Mo., St. Joseph, Mo., Atchison and Leavenworth, Kansas.

MEMPHIS FREIGHT BUREAU

v.

MISSOURI PACIFIC R. CO.

(No. 171.)

COMPLAINT filed February 15, 1889, alleging the placing of Memphis at a disadvantage by reason of the rates between that city and Omaha.

January 22, 1889.

To the Honorable Interstate Commerce Commission, Washington, D. C.

Gentlemen:

This petition of the Memphis Freight Bureau, an organization of merchants and business men incorporated under the Laws of the Commonwealth of Tennessee, and having its principal office in Memphis, respectfully sheweth:

That the Missouri Pacific Railway Company, a corporation incorporated under the Laws of the State of Missouri and carrying persons and property, for hire, to and from points on its operated and leased lines in the following States, to wit, Missouri, Kansas, Nebraska, Arkansas and Tennessee, have issued rates jointly with various and sundry railroad companies, to wit, Chicago, Burlington & Quincy R. Company; Chicago, Milwaukee & St. Paul Railway Company; Chicago & North Western Railway Company; Chicago, Rock Island & Pacific Railway Company; Chicago, St. Paul, Minneapolis & Omaha R. Co.; Kansas City, St. Joseph & Council Bluffs R. Co.; St. Louis, Keokuk & North Western Railway Company; Wabash Western Railway; Wabash Railway; and Rock Island & Peoria Railway, as per accompanying copy of tariff No. 21 issued between Chicago, St. Louis, East St. Louis and other western terminals, and Omaha, Neb., from which tariff it will be observed, in comparison with tariff of Western Freight Association No. 1, also herewith accompanying, and to which the said Missouri Pacific Railway is a joint party, that the said Missouri Pacific Railway Company has applied between the Cities of Omaha and St. Louis, Mo., and East

St. Louis, Ill., the same rates as exacted by said company on shipments between Kansas City, Mo., St. Joseph, Mo., Leavenworth and Atchison, Kan., and the Cities of St. Louis, Mo., and East St. Louis, Ill.

It is further stated by your petitioner that the said Missouri Pacific Railway Company has issued a tariff of freight and charges, a copy of which also accompanies this petition, applying between the Cities of Omaha and Memphis, in which said Missouri Pacific Railway Company has not made the same relative adjustment as has been made by them between Omaha and St. Louis, but exacts greater rates between Omaha and Memphis than is done by the same company between Kansas City and Memphis, to the great detriment and disadvantage of the City of Memphis and the unlawful advantage of the Cities of St. Louis, Mo., and East St. Louis, Ill.

As it is the belief of petitioner that the City of Memphis is being unjustly discriminated against by the said Missouri Pacific Railway Company, in its adjustment of rates herein complained of, your petitioner would respectfully ask that an order issue compelling the said railway to so adjust its tariffs that the rates between Omaha and Memphis shall not at any time be higher than the current rates of same company between Kansas City and Memphis, and that the latter have a proper relation, distance and other features considered, to established rates of said company between Kansas City and St. Louis.

MEMPHIS FREIGHT BUREAU

v.

SOUTHERN R. & STEAMSHIP ASSOCIATION.

(No. 172.)

COMPLAINT filed February 15, 1889, alleging discrimination against Memphis.

January 22, 1889.

To the Honorable Interstate Commerce Commission, Washington, D. C.

Gentlemen:

This petition of the Memphis Freight Bureau, an organization of merchants and manufacturers incorporated under the Laws of the State of Tennessee, and having its office in the City of Memphis, Tennessee, respectfully sheweth:

That the Southern Railway & Steamship Association is an organization of certain railroad and steamboat carriers doing business to and from interior and coast points in the Southern States.

That the said Southern Railway & Steamship Association is represented by a general commissioner, having an office in Atlanta, Ga.

That it is the duty of said commissioner to issue from time to time tariffs of rates as authorized by the rate committee of the said Southern Railway & Steamship Association.

That the inclosed tariff, entitled Circular No. 13, Series 1888-9, was issued by the said commissioner and is authority for assessing freight between the several points named.

That the said Southern Railway & Steamship Association in adjusting its rates of freight have unlawfully discriminated against the

City of Memphis, in demanding and collecting unreasonable and unjust rates of freight to the following points, viz.: Anniston, Ala.; Eufaula, Ala.; Opelika, Ala.; Selma, Ala.; Montgomery, Ala.; Columbus, Ga.

The discriminations complained of are to be found in the following comparative table of rates, compiled from the accompanying tariff of the Southern Railway & Steamship Association, issued September 30, 1888:

| In Cents Per 100 lbs. | | | | | | | | | | | | | In Cents |
|-----------------------------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------------|
| Between NASHVILLE and | 1. | 2. | 3. | 4. | 5. | 6. | A. | B. | C. | D. | E. | H. | Per Bbl. F. |
| Anniston, Ala. | .72 | .62 | .56 | .46 | .38 | .33 | .20 | .24 | .24 | .20 | .33 | .32 | .40 |
| Columbus, Ga. | .72 | .62 | .56 | .46 | .38 | .33 | .20 | .30 | .26 | .22 | .35 | .37 | .44 |
| Eufaula, Ala. | .72 | .62 | .56 | .46 | .38 | .33 | .20 | .30 | .26 | .22 | .35 | .37 | .44 |
| Montgomery, Ala. | .73 | .62 | .53 | .41 | .34 | .28 | .20 | .23 | .15 | .13 | .33 | .21 | .22 |
| Opelika, Ala. | .72 | .62 | .56 | .46 | .38 | .33 | .20 | .30 | .26 | .22 | .35 | .37 | .44 |
| Selma, Ala. | .63 | .62 | .53 | .41 | .34 | .28 | .20 | .23 | .15 | .13 | .33 | .21 | .22 |

| In Cents Per 100 lbs. | | | | | | | | | | | | | In Cents |
|---------------------------|------|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|-----|----------------|
| Between MEMPHIS and | 1. | 2. | 3. | 4. | 5. | 6. | A. | B. | C. | D. | E. | H. | Per Bbl. F. |
| Anniston, Ala. | .103 | .88 | .77 | .64 | .52 | .42 | .24 | .28 | .27 | .23 | .44 | .49 | .46 |
| Columbus, Ga. | .103 | .88 | .77 | .64 | .52 | .42 | .24 | .34 | .29 | .25 | .46 | .51 | .50 |
| Eufaula, Ala. | .103 | .88 | .77 | .64 | .52 | .42 | .24 | .34 | .29 | .25 | .46 | .51 | .50 |
| Montgomery, Ala. | .103 | .88 | .74 | .59 | .48 | .37 | .24 | .27 | .18 | .16 | .44 | .29 | .28 |
| Opelika, Ala. | .103 | .88 | .77 | .64 | .52 | .42 | .24 | .34 | .29 | .25 | .46 | .51 | .50 |
| Selma, Ala. | .94 | .88 | .74 | .59 | .48 | .37 | .20 | .27 | .18 | .44 | .44 | .29 | .28 |

These rates show uniformly the following differentials in favor of Nashville on the respective classes to all points named above as follows:

| In Cents Per 100 lbs. | | | | | | | | | | | | |
|-----------------------|-----|-----|-----|-----|----|----|----|----|----|-----|--|--|
| 1. | 2. | 3. | 4. | 5. | 6. | A. | B. | C. | D. | E. | | |
| .31 | .26 | .21 | .18 | .14 | .9 | .4 | .4 | .3 | .3 | .11 | | |

Inasmuch as Nashville by the shortest line is only forty-three miles nearer to the points in question than Memphis, this distance being computed by deducting the difference between the distance from Memphis to Birmingham, and the distance from Nashville to Birmingham, the business necessarily passing through Birming-

ham from both Nashville and Memphis, your petitioner contends that the City of Memphis is unjustly discriminated against by the said Southern Railway & Steamship Association, and that neither distance nor any other feature known to the petitioner justifies the said Southern Railway & Steamship Association in maintaining such exorbitant differences as shown above.

Your petitioner is of the belief that the differentials should be fixed on a percentage basis, and not on an irregular arbitrary scale as at present, and that the rates from Memphis should not at any time be higher than 10 per cent over the rates established by the said Southern Railway & Steamship Association from Nashville.

Milton L. MYERS, SURVIVOR OF HOSTETTER & CO.,

PENNSYLVANIA CO., Operating Pittsburgh, Fort Wayne & Chicago Railway; and Baltimore & Ohio R. Co.; Lake Shore & Michigan Southern R. Co.; Pittsburgh & Lake Erie R. Co.; New York Central & Hudson River R. Co.; Allegheny Valley R. Co., and Pennsylvania R. Co.

(No. 118.)
(Classification of bitters, and relative reasonableness of rates.)

- Hostetter's Stomach Bitters** prior to the Act to Regulate Commerce were shipped under the Middle and Western States' classification in the third class in less than car loads, and in the fourth class in car loads.
- Bitters** generally in that classification were placed in first class in less than car loads, but were also put in the third class with the specification "manufac-

turers' account, released by shipper," under which these bitters were shipped. No other article except wine was so classified and shipped.

- After the Act to Regulate Commerce**, the Official Trunk Line classification superseded the former classification, and bitters were classified in first class with other liquids similar in character, marketable value and manner of shipment. The class rates under the official classification are lower than under the one previously used.
- In October, 1888**, by a change in the official classification, bitters in car loads were placed in third class.
- On complaint** for unjust and unreasonable rates—*held*, that a former special and preferred rate is not a fair test of the reasonableness of a present rate.
- The proper classification** of an article is to be judged relatively by the classifi-

cation of other articles similar in character, quality and conditions of transportation.

7. **The rate on bitters** as at present classified, compared with analogous articles, is not so unreasonable as to demand a change of the classification of that particular article. The propriety and extent of a change can more appropriately be acted upon, in connection with other articles, in a general revision of the classification.

(Hearing at Washington, Jan. 10, 1889, on Depositions and Oral Testimony.—Decision, Feb. 23, 1889.)

PROCEEDING on complaint charging the exaction of unjust rates for the transportation of "Hostetter's Stomach Bitters." *Complaint not sustained.*

See complaint, *ante*, 151; answers, *ante*, 218.

Messrs. A. H. Clarke and James Watson for petitioners.

Mr. Hugh L. Bond, Jr., for B. & O. R. Co.

Mr. J. H. Reed for P. & L. E. R. R. Co.

Mr. J. T. Brooks for Penn. Co., Penn. R. Co., and N. Y. C. & H. R. R. R. Co.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

The complaint charges unreasonable and unjust transportation rates upon property shipped over the lines of the defendants from Pittsburgh, Pennsylvania, to different places in the United States. It sets forth that the petitioners are engaged in the manufacture and sale of a proprietary medicine known as Hostetter's stomach bitters, and that they and their predecessors have carried on the business at Pittsburgh for thirty years. It also states that prior to April 5, 1887, in the classification then used the bitters were rated fourth class in car loads and third class in less than car loads, but that by the classification in force since April 5, 1887, they were placed in first class both in car loads and less than car loads, and that by such classification the rates have been advanced to an unfair and unreasonable extent. Illustrations are given of the advances; for example: to Chicago from twenty-five cents per hundred to 42½ cents; to St. Louis from thirty-eight cents to 58½ cents; to San Francisco from eighty-three cents to \$1.60; to New Orleans from sixty cents to \$1.05.

The advances in rates are alleged to be excessive, unjust and unreasonable, and to be in contravention of the first, second and third sections of the Act to Regulate Commerce.

The answers of the several defendants set forth matters intended to justify the classification and rates complained of.

The material facts are as follows: the shipments of the stomach bitters by petitioners aggregate annually from 75,000 to 85,000 boxes. The boxes are of uniform size and weight, and contain twelve bottles of bitters securely packed, each bottle containing a pint and a half. A box of the bitters weighs about thirty-five pounds. A car load consists of about 700 boxes, weighing 24,500 pounds. When shipped in less than car loads they are sent in lots of fifty

boxes or over. The bitters are compounded of about 80 per cent of cologne spirits or high wines, reduced with water and with ingredients of roots, Peruvian bark, etc., for which the formula is a secret.

The cost of a box of bitters, including the manufacture, advertising and all the incidents of the business, is about \$6, or less, and it is sold to dealers at \$7.50 a box, transportation charges paid. The retail price is \$1 a bottle.

The business is prosperous, increasing yearly, and large profits are realized.

Prior to April 5, 1887, railroads in the territory in question worked under three different classifications. One was known as a local classification, that governed the traffic between local stations; another as the Middle and Western States' classification, under which the bitters of Hostetter & Company were shipped; the third was a through classification, that governed business from Chicago to the seaboard. In the classification that covered the bitters of Hostetter & Company they were shipped in the third class in less than car loads, and in the fourth class in car loads, and under written agreements between the shippers and the different roads, renewed annually, the goods were carried entirely at the owners' risk, the companies being released from claims for damages from the casualties of carriage and from shortage and pilfering.

When the Act to Regulate Commerce was passed the carriers found that uniform classification was necessary both for through and local business. The Official Trunk Line classification, prepared for the new conditions under the Act, with a less number of classes and applying to both east and west bound carriage, was accepted by all the roads that are parties to this proceeding, and superseded the former classifications, with their more numerous classes, that had been used. The goods of petitioners have since been carried under the official classification wherever that governed. Under this classification the bitters were placed in the first class both in car loads and less than car loads, and if taken at carrier's risk in less than car loads, in double first class. This change in classification increased the rates particularly on western and southwestern shipments.

Changes have been made in the official classification from time to time, and by changes that took effect October 18, 1888, the stomach bitters were placed in third class in car loads and first class in less than car loads. A material reduction in car-load rates followed this change of classification. The rates under the official classification are lower than they were on like numbered classes in other classifications before the Act to Regulate Commerce. The first class rates to certain points are now lower than the second class rates before that Act. At some terminal points the charges are higher. As illustrations, the rate to Buffalo, which was twenty-three cents per 100 pounds before the Act in less than car loads, is now thirty cents—an increase of seven cents produced by the necessity of conformity to the fourth section; while to all points east of Buffalo, including Boston, all Boston points, and New York and Philadelphia, the rate is considerably lower. The rate to Boston prior to April, 1887, was

seventy cents per hundred on less than fifty boxes, sixty-one cents on fifty-case lots or more, less than car loads. The less than car-load rate now is fifty-one cents per hundred. To New York the rate was fifty-one cents per hundred on fifty-case lots; now forty-one cents.

The car-load rates to Buffalo now are twenty cents per hundred; to New York thirty cents per hundred, being five cents less than before the Law. To Boston the rate was forty cents in car loads, now thirty-three cents. The rates on third class under the official classification, in which bitters in car loads are placed, are three cents per hundred lower than before the Act. Since October 18, 1888, when a change was made in the official classification and car load rates made for bitters, the rates from Pittsburgh to the principal points of shipment have been as follows:

| To— | Less than car loads. | Car loads. |
|---|----------------------|------------|
| Chicago..... | \$0.42½ | \$0.27½ |
| New Orleans..... | 1.05 | .75 |
| New York..... | .45 | .30 |
| Boston..... | .51 | .33 |
| Philadelphia..... | .39 | .28 |
| San Francisco, Cal., and Portland, Ore., till Jan. 1, 1889..... | 3.00 | 1.40 |
| Since January 1, 1889..... | 3.10 | 1.60 |

Shipments to Dallas, Texas, and other common points in Texas prior to October 15, 1888, were governed by the joint Texas classification, which classed bitters in glass, owner's risk of breakage, less than car loads, first class, \$1.50; car loads, fourth class, ninety-three cents. On October 15, 1888, the western classification as adjusted to Texas traffic was adopted, which classes bitters in glass or wood, owner's risk, first class for any quantity, rate \$1.50 per 100 pounds. January 20, 1889, the first class rate was advanced to \$1.63 per 100 pounds for any quantity. These rates are not controlled by the official classification.

The car-load shipments heretofore have been made to only a few points—San Francisco, California; Portland, Oregon; and Galveston, Texas;—less than car-load shipments to the principal cities at the West and Southwest.

Before the Act bitters generally were in first class, but had also another classification in the third class specified as follows: "Manufacturer's account, released by shipper," under which these bitters were carried at the lower rates of that class. Since the Law they have been classed with other analogous articles and take like rates. Some of these, contained in glass, boxed, are: acids; apple and fruit butter, jelly or sauce; shoe blacking; bromine; catsup; chowchow; cider; coffee, condensed; disinfecting liquids; drugs and medicines; glycerine; honey; ink; liquors or liquids, wines; milk food; mustard; oils; paints; pickles; prunes; snuffs; stereotype plates, boxed; syrups; and many others. The bitters are regarded by the railroads as desirable freight, and are conveniently handled; but their transportation is attended with some risks from pilferers, who open the boxes and remove bottles.

The statement of facts discloses the case so

fully and points so clearly to the conclusion necessary that little need be added by way of discussion. It is manifest from all the testimony that the manufacturers of the stomach bitters prior to the Act to Regulate Commerce were accorded exceptional transportation advantages. The favorable rates had little, if any, relation to the marketable value of the property, or to the charges for carrying analogous articles. They were part of the former railroad practices of affording special advantages to favored shippers, based upon no principle whatever, and in violation of their duty to the public to apportion their charges justly and with fair regard to the value of the service.

The same favoritism and lack of consistency also allowed a less charge for longer than for shorter distances, and gave to certain favored towns undue preferences over others entitled on just principles to equal or better rates. Since the Act these practices have been no longer possible without risks of prosecution and penal consequences. In the new adjustments made necessary by the Act, the commodity shipped by the petitioners being similar for transportation purposes to many others, and no adequate reason existing for giving it a class and rate of its own, was very properly classed with other things similar in commercial value, and in the character of the service required of the carrier.

The complainants insist that the evidence does not warrant a finding that the stomach bitters previous to the Act had a classification and rate that were special and lower than analogous articles; and testimony is cited to the effect that no rebates were asked for or received, that the shippers were never asked to pay any higher rate, and that the freight was sought after by the carriers at the rates then charged. This testimony is not at all inconsistent with the hypothesis that a favored rate was in fact accorded to these bitters. Whether or not the rate was preferential, and in that sense special, depends upon the character of the article, the manner in which it was shipped, and the classification of commodities similar in character and mode of shipment. If it had a classification distinct from property similar in these respects it had an advantage not founded on consistent principles of classification, but on considerations special in their nature that might have involved favor.

The Middle and Western States' classification, under which the article was shipped prior to April, 1877, shows that it was classified as follows: Bitters in glass, manufacturer's account, released by shipper, class 3. This did not apply to a variety of other articles, such as acids in carboys, apple or fruit butter in glass or stone, bromine, drugs and medicines, embalming fluids, extract of bark, glycerine in glass or tin, liquors, wines, high wines, and oils in glass, cans or jugs, packed in boxes, etc., which were all embraced in first class at owner's risk. Bitters in glass, owner's risk, without the specification "manufacturer's account, released by shipper," were also in first class. The distinguishing feature, therefore, of the special classification of the bitters in question was the *addendum* "manufacturer's account." This classification was also applied to wine in

cases, but to nothing else to which attention has been called. Wine, like bitters, without this specification was in first class. Whatever reason may have induced this mode of classification, the effect was to afford color for a reduced charge. Several other articles that are now in the first class had various lower classifications for which the reasons are not apparent.

Complainants also refer to opinions at one time expressed by traffic agents of some of the defendants as to the reasonableness of the old classification, and to the grounds specified by these agents for the change made. These opinions are to be weighed in connection with the facts on which they are based, and the reasons stated by witnesses for an act for which they are not responsible may be inadequate without impairing the propriety of the Act. So far as traffic agents may impute an increase of rates to the Law in any other sense than as a result of the removal of preferences, and the requirement of equality of charges for like service in respect to like traffic, the imputation is incorrect, if not disingenuous. The Law requires no increase of rates, but only equality under like conditions so that one shipper shall not have advantages at the expenses of another. Obviously the elimination of rebates and preferences to favored individuals or localities, and the payment by all shippers of like charges for like service, would seem to warrant cheaper service for the public at large without loss of revenue to the carriers.

In the reformed classifications prepared to meet the requirements of the Law, some mistakes doubtless were made in the difficult task of properly arranging traffic consisting of a very great number of commodities, some differing widely and some slightly in character, in a few general classes. Quite clearly it was error not to give a car-load rate to the bitters in the first instance. That, however, has been corrected. The double first class rate at first applied was also unreasonably high. If the case rested on the classification and rates in existence when the petition was filed, the complaint would probably have sufficient foundation to be sustained. But the changes made on the 18th of October, and in force since, have removed the substantial grounds of complaint. The petitioners, however, still insist that the present rates are unreasonable on west-bound and southwestern shipments. The rates on east-bound shipments, being confessedly less than they were prior to the Act, are not in question.

The western and southwestern car-load rates since October 18, 1888, so far as the official classification governs, leave little, if any, cause for comment. They are only a small advance above the favored special rates before the Law was in force, and resulted from the effort to combine and harmonize in one uniform classification several different ones, on some of which class rates were higher.

It is said, however, that car-load shipments are made to only few and far distant points—San Francisco, California; Portland, Oregon; and Galveston, Texas;—and to all other places in less than car loads, so that the car-load rates are of no benefit to the petitioners. Their shipments are stated to be as a rule in lots of 2 INTER S.

fifty boxes and over. No explanation was given why the goods are not shipped in car loads to large cities like Chicago, St. Paul, Kansas City, Omaha and many others to which frequent shipments are made. With a car-load rate open to the petitioners it would seem feasible and desirable to avail themselves of that mode if the difference in rates is deemed of material importance.

The principal contention is in respect to rates on less than car loads. The main if not the only ground on which they are assailed is that they are higher than the old rates accepted before the Act took effect, and which have been described. Larger sums in the aggregate have been paid by the manufacturers for the transportation of their commodity than under the former special rate, and the inference drawn is that the present rates are unreasonable and oppressive. That such an impression should exist is not perhaps unnatural. It is one of the fruits of the irregular practices antecedent to the Law, which often led shippers to believe that special transportation privileges were legitimate, and that what was conceded as a favor became thereafter matter of right. In many instances when shippers or localities have complained of the action of carriers under the Law, it has been found that the complaints have arisen from the necessary and intended effect of the Law in the suppression of unjust preferences and other abuses, and the equalization of charges under conditions substantially equal.

When the reasonableness of rates is questioned, therefore, the complaint should be based on other grounds than a former preferential rate, a cut rate, or any merely abnormal practice. The prohibition of rebates and of unjust discriminations and preferences has resulted in some instances in increased charges to individual shippers, or on some particular traffic; but if such advances are only caused by the discontinuance of abuses, and bear proper relation to the charges on other traffic and to the conditions of transportation, no injustice is done.

The case of the petitioners is within the application of this principle. The classification of the stomach bitters in less than car loads has been raised to first class for the reason that, all things considered, it properly belongs in that class, which includes a variety of similar articles, and because a lower classification without sufficient reasons to justify it would be an undue preference, and in violation of the Law.

By this classification it takes the rates of the other kinds of property in the class. These consist largely of articles in glass packed like the bitters in boxes for transportation. Among them are: acids, apple or fruit butter, bromine, cider, coffee condensed, drugs and medicines, honey, ink, liquors or liquids, milk food, oils, paints, pickles, prunes, syrup, and a variety of others. There is no apparent injustice in classifying the bitters with such articles. And a rate that is reasonable for the class is reasonable for an article properly included in the class. The petitioners suffer no injustice, therefore, peculiar to themselves, from the classification of their goods. If the classification of their bitters should be changed the same reasons would compel a like change of a large number of similar articles. No question of

that character is now presented. The question is simply whether the stomach bitters should be taken from the class in which it is placed, and given a lower class.

To reduce stomach bitters in less than car-load lots from the first class under the official classification, would be to take them from the position among analogous articles which they now occupy. The second class contains almost no articles that are liquids, or with which stomach bitters can fairly claim to be associated. The general question in respect to the entire list of articles above enumerated, of whether the difference between car load and less than car load classification is or is not too great, is one which cannot properly be passed upon without a much broader consideration of the subject than the facts respecting a single article can present.

The subject of the difference between car loads and less than car loads under the official classification has been extensively investigated and elaborately discussed in another case under consideration by the Commission awaiting decision, in which the general question can more appropriately be dealt with, and the principles

indicated that should be regarded in class distinctions. It is better that the margin of difference between car loads and less than car loads in respect to a single article should be reserved until the matter can be disposed of in a collective sense.

The conclusion of the Commission is that a change in the classification of the bitters should not now be ordered. The first class in the official classification is in fact more favorable to the shipper than the second class was in the classification under which it was formerly shipped. The testimony does not now show that the business of the petitioners has been injured. While the amount of freight charges paid is greater the profits of the business have also largely increased.

If it were necessary to make an order respecting the classification in force when the petition was filed, sufficient grounds might exist for sustaining the complaint or a portion of it. But, upon the classification of the goods in question, under the changes that took effect October 18, 1888, in force at the time of the hearing and still in force, the decision of the Commission is that *the complaint is not sustained.*

SUPREME COURT OF THE UNITED STATES.

P. C. KIMMISH, *Plff. in Err.*,

v.

JOHN J. BALL *et al.*

(From Lawyers' ed. U. S. Bk. 32.)

1. **The Statute of Iowa (§ 4059, Iowa Code), which provides that any person who has in his possession in that State any Texas cattle, which have not been wintered North, shall be liable for any damages that may accrue from allowing such cattle to run at large, and thereby spreading the disease known as the Texas fever, is not in conflict with the paramount authority of Congress to regulate interstate commerce.**
2. **There is no necessary dependence of the provisions of said section 4059, imposing a civil liability, upon those of section 4058 of the same Code, so that the one may not stand without the other.**
3. **Said section 4059 is not in conflict with section 2 of article 4 of the Constitution of the United States relative to the privileges and immunities of citizens of the several States.**

(Submitted Jan. 2, 1889. Decided Jan. 28, 1889.)

IN ERROR to the Circuit Court of the United States for the Southern District of Iowa. On a certificate of division in opinion as to the constitutionality of section 4059 of the Code of Iowa. *Reversed.*

Statement by *Mr. Justice Field*:

This case comes from the Circuit Court of the United States for the Southern District of Iowa. It involves the validity of a statute of that State, making a person having in his possession within it any Texas cattle which have not been wintered north of the southern bound-

2 INTER S.

ary of Missouri and Kansas, liable for any damages that may accrue from allowing them to run at large, and thereby spread the disease known as Texas fever. The statute is found in section 4059 of the Code of Iowa, which refers to the preceding section, 4058. The two sections are as follows:

"Sec. 4058. If any person bring into this State any Texas cattle, he shall be fined not exceeding \$1,000 or imprisoned in the county jail not exceeding thirty days, unless they have been wintered, at least one winter, north of the southern boundary of the State of Missouri or Kansas; *Provided*, That nothing herein contained shall be construed to prevent or make unlawful the transportation of such cattle through this State on railways, or to prohibit the driving through any part of this State, or having in possession, any Texas cattle, between the first day of November and the first day of April following.

"Sec. 4059. If any person now or hereafter has in his possession, in this State, any such Texas cattle, he shall be liable for any damages that may accrue from allowing said cattle to run at large, and thereby spreading the disease known as the Texas fever, and shall be punished as is prescribed in the preceding section."

The action is based upon this latter section. The petition of the plaintiff alleges that in June, 1885, the defendants were the owners of and had in their possession and under their control a herd of Texas cattle, which had not been wintered north of the southern boundary of Missouri or Kansas, and which were purchased at or near Fort Smith, in Arkansas; that said cattle, while in the possession and under the control of the defendants, were allowed by them to run at large in Union Township, Harrison County, Iowa, contrary to the provisions of section 4059 of its Code; and that the said cattle were infected by a disease

known as "Texas cattle fever," which was spread and disseminated by them among the cattle of the plaintiff, whereby they sickened and died, to his damage of \$5,000, for which he prays judgment.

To this petition the defendants demurred on the grounds: first, that sections 4058 and 4059 are in conflict with section 8, article 1 of the Constitution of the United States, in that the Legislature of Iowa undertakes by them to regulate and interfere with interstate commerce; and second, that the sections are in conflict with section 2 of article 4 of the Constitution of the United States relative to the privileges and immunities of citizens of the several States.

The demurrer was heard at March Term, 1888, of the circuit court, the court being held by two judges who were opposed in opinion upon the constitutionality of section 4059, on the grounds mentioned. The plaintiff electing to stand upon his petition, judgment was entered for the defendants, sustaining the demurrer, according to the opinion of the presiding judge. Thereupon, on motion of the plaintiff, it was ordered that the points of disagreement be certified to this court; and upon this certificate the case has been heard.

Mr. I. N. Flickinger, for plaintiff in error:

If, by a fair and reasonable interpretation, where the case is at all doubtful, it can be reconciled with the Constitution, it ought to be done.

Adams v. Storey, 1 Paine, 79; *Cooley*, Const. Lim. 4th ed. 182; *Gates v. Brooks*, 59 Iowa, 510.

Every statute is presumed to be constitutional.

Munn v. Ill. 94 U. S. 113 (24: 77).

Statutes will be declared unconstitutional only when clearly necessary.

State v. Davis Co. Judge, 2 Iowa, 280; *Stewart v. Polk Co.* 30 Iowa, 9.

Where part of a statute is unconstitutional, that fact does not authorize the court to declare the remainder void, if the provisions are distinct and severable.

Cooley, Const. Lim. 182; *Drady v. Des Moines & Ft. D. R. Co.* 57 Iowa, 393; *Penniman's Case*, 103 U. S. 714 (26: 602); *Duer v. Small*, 17 How. Pr. 205; *Allen v. La.* 103 U. S. 83 (26: 319); *Fla. Cent. R. Co. v. Schutte*, 103 U. S. 118 (26: 327); *Keokuk N. L. Packet Co. v. Keokuk*, 95 U. S. 89 (24: 381).

In the exercise of its police power a State may, absolutely and unconditionally, restrain any and all live stock from running at large; and this without any reason or grounds other than that of expediency—as determined by their legislative will.

Campau v. Langley, 39 Mich. 451; *Wilcox v. Hemming*, 58 Wis. 144; *Rockwell v. Nearing*, 35 N. Y. 302; *Campbell v. Evans*, 45 N. Y. 356; *Cook v. Gregg*, 46 N. Y. 439; *Varden v. Mount*, 78 Ky. 86; *Roberts v. Ogle*, 30 Ill. 459.

Mr. W. F. Sapp for defendants in error.

Mr. Justice Field delivered the opinion of the court:

In order to understand section 4059 of the Code of Iowa, it must be read in connection with the preceding section 4058, to which it refers. It must also be known what is meant by

"Texas cattle," and what influence a winter North has upon the disease called "Texas fever," with which such cattle are liable to be infected. Section 4058 is leveled against the importation of Texas cattle which have not been wintered north of the southern boundary of Missouri or Kansas. Any person bringing into the State Texas cattle, unless they have been thus wintered, is subject to be fined or imprisoned. When, therefore, section 4059 refers to the possession in the State of any "such Texas cattle" it means cattle which have not been wintered North, as mentioned in the preceding section. It is only when they have not been thus wintered that apprehension is felt that they may be infected with the disease and spread it among other cattle.

The term "Texas cattle" is not defined in the Code of Iowa; and whether used there to designate cattle from the State of Texas alone, or, as averred by the plaintiff in error, a particular breed or variety called Mexican or Spanish cattle, which are also found in Arkansas and the Indian Territory, is not material for the disposition of this case. Cattle coming from both of those States and from that Territory during the spring and summer months are often infected with what is known as Texas fever. It is supposed that they become infected with the germs of this distemper while feeding, during those months, on the low and moist grounds of those States and Territory, constituting what are called their malarial districts, which are largely covered with a thick vegetable growth. These germs are communicated to domestic cattle by contact, or by feeding in the same range or pasture. Scientists are not agreed as to the causes of the malady; and it is not important for our decision which of the many theories advanced by them is correct. That cattle coming from those sections of the country during the spring and summer months are often infected with a contagious and dangerous fever is a notorious fact; as is also the fact that cold weather, such as is usual in the winter north of the southern boundary of Missouri and Kansas, destroys the virus of the disease, and thus removes all danger of infection. It is upon these notorious facts that the legislation of Iowa for the exclusion from their limits of these cattle, unless they have passed a winter North, is based. See *Missouri Pac. R. Co. v. Finley*, 38 Kan. 556; also, First Annual Report to the Commissioner of Agriculture, of the Bureau of Animal Industry for 1884, p. 426, and Second Annual Report of same Bureau for 1885, p. 310.

Section 4059, with which we are concerned, provides that any person who has in his possession in the State of Iowa any Texas cattle which have not been wintered North shall be liable for any damages that may accrue, from allowing such cattle to run at large and thereby spread the disease. We are unable to appreciate the force of the objection that such legislation is in conflict with the paramount authority of Congress to regulate interstate commerce. We do not see that it has anything to do with that commerce; it is only leveled against allowing diseased Texas cattle held within the State to run at large. The defendants labor under the impression that the validity of section 4058, which is directed against

the importation into the State of such cattle unless they have been wintered North, is before us, and that a consideration of its validity is necessary in passing upon section 4059; but this is a mistake. Section 4053 is before us only that we may ascertain from it the meaning intended by certain terms used in the subsequent section referring to it, and not upon any question of its constitutionality.

Nor does the case of *Railroad Company v. Husen*, 95 U. S. 465 [24: 527], upon which the defendant relies with apparent confidence, have any bearing upon the questions presented. The decision in that case rested upon the ground that no discrimination was made by the Law of Missouri, in the transportation forbidden, between sound cattle and diseased cattle; and this circumstance is prominently put forth in the opinion. "It is noticeable," said the court, "that the statute interposes a direct prohibition against the introduction into the State of all Texas, Mexican, or Indian cattle during eight months of each year, without any distinction between such as may be diseased and such as are not." p. 469 [529]. It interpreted the Law of Missouri as saying to all transportation companies: "You shall not bring into the State any Texas cattle or any Mexican cattle or Indian cattle between March 1 and December 1 in any year, no matter whether they are free from disease or not, no matter whether they may do an injury to the inhabitants of the State or not; and if you do bring them in, even for the purpose of carrying them through the State without unloading them, you shall be subject to extraordinary liabilities." p. 473 [531]. Such a statute, the court held, was not a quarantine law, nor an inspection law, but a law which interfered with interstate commerce, and therefore invalid. At the same time the court admitted, unhesitatingly, that a State may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it. p. 472 [530]. No attempt was made to show that all Texas, Mexican, or Indian cattle coming from the malarial districts during the months mentioned were infected with the disease, or that such cattle were so generally infected that it would have been impossible to separate the healthy from the diseased. Had such proof been given, a different question would have been presented for the consideration of the court. Certainly all animals thus infected may be excluded from the State by its laws until they are cured of the disease, or at least until some mode of transporting them without danger of spreading it is devised.

Railroad Company v. Husen gives no support to the contention of the defendant. There is no necessary dependence of the provisions of section 4059, imposing a civil liability, upon those of section 4058, so that the one may not stand without the other. If the criminal liability created by section 4058 is open to doubt, which we do not affirm, the civil liability may remain for the damages caused by the willful conduct designated in section 4059. *Keokuk N. L. Pack et Co. v. Keokuk*, 95 U. S. 80 [24: 377]; *Allen v. La.* 103 U. S. 80 [26: 318].

The case is, therefore, reduced to this: whether the State may not provide that whoever permits diseased cattle in his possession to run

at large within its limits, shall be liable for any damages caused by the spread of the disease occasioned thereby; and upon that we do not entertain the slightest doubt. Our answer, therefore, to the first question upon which the judges below differed is in the negative, that the section in question is not unconstitutional by reason of any conflict with the commercial clause of the Constitution.

As to the second question, our answer is also in the negative. There is no denial of any rights and privileges to citizens of other States which are accorded to citizens of Iowa. No one can allow diseased cattle to run at large in Iowa without being held responsible for the damages caused by the spread of disease thereby; and the clause of the Constitution declaring that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States does not give non-resident citizens of Iowa any greater privileges and immunities in that State than her own citizens there enjoy. So far as liability is concerned for the act mentioned, citizens of other States and citizens of Iowa stand upon the same footing. *Paul v. Va.* 75 U. S. 8 Wall. 168 [19: 357].

It follows that the judgment below must be reversed and the cause remanded for a new trial.

Walter H. STOUTENBURGH, Intendant of
the Washington Asylum, *Plff. in Err.*,

vs.
William J. HENNICK.

1. **Congress has express power to exercise exclusive legislation over the District of Columbia;** but, in creating the District of Columbia a body corporate for municipal purposes, Congress could only authorize it to exercise municipal powers.
2. **Congress did not delegate to the Legislative Assembly of that District the power to enact clause 3 of section 21 of the Act of that Assembly requiring commercial agents to pay \$200 annually for a license.**
3. **Although by several Acts Congress repealed or modified other parts of said Act of said Assembly which were within the scope of municipal action, such congressional legislation did not ratify the above mentioned objectionable clause.**
4. **While the power to make laws cannot be delegated, the creation of municipalities exercising local self government cannot be held to trench upon that rule.**

(Doc. No. 722, Oct. Term 1888.)

(Decided January 14, 1889.)

IN ERROR to the Supreme Court of the District of Columbia, to review a judgment of that court discharging from custody Hennick, the defendant in error, who was convicted in the Police Court of that District for engaging in the business of a commercial agent without

having obtained a license, contrary to an Act of the Legislative Assembly of that District. *Affirmed.*

This case was reported below, *sub nom.* *Re William J. Hennick*, in 1 Interstate Com. Rep. 66; in 7 Cent. Rep. 357; in 5 Mackey, 489; and full report of briefs and opinion of the court by *Mr. Chief Justice Fuller*, and dissenting opin-

ion by *Mr. Justice Miller* in the Supreme Court of the United States, may be found in 129 U. S. 141 (32 L. ed. 637). Inasmuch as the decision of this court affirms the judgment of the Supreme Court of the District of Columbia, which was fully reported as above, it is thought unnecessary to give more here than the above syllabus.

THE INTERSTATE COMMERCE COMMISSION.

CHICAGO BOARD OF TRADE

v.

CHICAGO & ALTON R. CO.; Chicago, Burlington & Quincy R. Co.; Chicago, Milwaukee & St. Paul R. Co.; Chicago, Rock Island & Pacific R. Co.; Chicago St. Paul and Kansas City R. Co.; Chicago, Santa Fé & California R. Co.; Illinois Central R. Co.; Wabash R. Co. (John McNulta, Receiver); and Chicago & Northwestern R. Co.

(No. 175).

COMPLAINT filed February 27, 1889, alleging unjust discrimination against the transportation of live hogs as compared with "packing house product."

To the Honorable The Interstate Commerce Commission:

The petitioner, the Board of Trade of the City of Chicago, in the State of Illinois, respectfully shows unto your honorable Commission, as follows:

1. That your petitioner is a corporation duly incorporated and established by an Act of the General Assembly of the State of Illinois, approved February 18, 1859, to which Act of incorporation your petitioner begs leave to refer and make a part of this petition.

2. That the facilities possessed at and in the vicinity of Chicago, by members of this association engaged in the slaughtering of hogs and the packing of pork, are very large.

3. That the Chicago & Alton Railroad; Chicago, Burlington & Quincy Railroad; Chicago, Milwaukee & St. Paul Railway; Chicago, Rock Island & Pacific Railway; Chicago, St. Paul & Kansas City Railway; Chicago, Santa Fé & California Railway; Illinois Central Railroad; the Wabash Railway (John McNulta, Receiver) and the Chicago & Northwestern Railway Companies, are common carriers of freight between the cities of Kansas City, Missouri; Leavenworth and Atchison, Kansas; St. Joseph, Missouri; Council Bluffs and Sioux City, Iowa; Omaha, Nebraska, or some of said cities, and intermediate points; and the City of Chicago, and are subject to the Act to Regulate Commerce approved February 4, 1887.

Your petitioner charges that each and all of said common carriers have been, and are, guilty of violating the provisions of the Interstate Commerce Law which forbid unjust discrimination, and the giving of undue advantage to particular localities or description of traffic, in that said common carriers demand and collect a much greater compensation for services rendered in the transportation of live hogs from the cities of Kansas City, Mo.; Leavenworth and Atchison, Kas.; St. Joseph, Mo.; Omaha, Neb.; Council Bluffs and Sioux City, Iowa, or

from some of said cities, and from points east thereof, to Chicago, than for like and contemporaneous service rendered in the transportation of packing house product. The term "packing house product," as defined by said common carriers, embraces the following commodities: bacon, in barrels, boxes, casks or crates; beef, dried, loose, or in sacks, boxes, brls., casks or crates; beef, pickled; grease, in buckets, tubs, pails or brls.; hair, hogs'; hams and shoulders, in bags, boxes, brls., crates or casks; hides and sheep pelts, green; lard, in crocks, buckets, boxes, brls. or casks; meats, canned; meats, dried or salted, in bags, boxes, brls., crates, casks, or in bulk; pigs' feet, in bulk, to be loaded and unloaded by owner; pork, packed; sausage, dried; stearine; tallow; in refrigerator or ordinary cars. (One thousand pounds of salt used as a preservative transported free.)

The rates in force January 1, 1889, and at present in effect, being as follows:

In Cents per 100 Pounds.

| To Chicago From. | Live Hogs. | Packing House Product. | Difference. |
|--------------------------|------------|------------------------|-------------|
| Kansas City, Mo. | 25 | 20 | 5 |
| Leavenworth, Kas. | 25 | 20 | 5 |
| Atchison, Kas. | 25 | 20 | 5 |
| St. Joseph, Mo. | 25 | 20 | 5 |
| Omaha, Neb. | 27½ | 20 | 7½ |
| Council Bluffs, Ia. | 27½ | 20 | 7½ |
| Sioux City, Ia. | 27½ | 20 | 7½ |
| Sioux Falls, Dak. | 27½ | 20 | 7½ |
| Cedar Rapids, Ia. | 25 | 15 | 10 |
| Burlington, Ia. | 19 | 13 | 6 |
| Oskaloosa, Ia. | 25 | 16 | 9 |
| Keokuk, Ia. | 19 | 14 | 5 |
| Dubuque, Ia. | 20 | 12½ | 7½ |
| Galena, Ill. | 17½ | 12½ | 5 |
| Fort Dodge, Ia. | 30 | 19 | 11 |
| Marshalltown, Ia. | 25 | 16 | 9 |
| Grinnell, Ia. | 25 | 16 | 9 |
| Des Moines, Ia. | 25 | 18 | 7 |

To emphasize the discrimination as against Chicago packing interests, some of said common carriers have put in effect from Kansas City, Leavenworth, and other southwestern Missouri River points, to St. Louis and other Mississippi River points, a rate of fifteen cents per 100 lbs., upon both live hogs, in car loads, and upon packing house product, in car loads, while denying to Chicago the benefit of like rates upon the two commodities.

Your petitioner alleges that the practice of charging to Chicago, by said common carriers, higher rates on the "raw material" than upon the "manufactured product," gives undue and unreasonable preference and advantage to the Western pork packing industries, located on the Missouri River and vicinity, at interior points, and at St. Louis and other points on the Missis-

ssippi River, and subjects the Chicago packers to unreasonable disadvantage by reason thereof.

Your petitioner alleges that the discriminating practice of demanding and collecting a higher rate for the transportation of live hogs than for the transportation of packing house product, is perpetrated and perpetuated under an agreement by and between said common carriers; that they, jointly working under such agreement, are unable to agree to an equalization of the rates to Chicago upon the two commodities, although individually, several of the roads admit that injustice is done to Chicago packers, and express a desire to make one and the same rate per 100 lbs. applicable to both live hogs and packing house product on shipment to Chicago.

No uniform difference in fixing the rates on the two commodities, from the different packing stations on their respective lines, has been recognized by said common carriers—the said difference ranging from five cents per 100 lbs. at Kansas City, Leavenworth, etc., to twice that amount at Cedar Rapids, $7\frac{1}{2}$ cents at Omaha, and eleven cents at Fort Dodge, Iowa; the fluctuations in the rates upon packing house product oftentimes increasing these amounts and making the difference 100 per cent; for some time prior to January 1, 1889, the rate on live hogs from Kansas City to Chicago being twenty-five cents per 100 lbs., against twelve cents per 100 lbs. on the product.

In contravention to this practice, your petitioner cites the following facts:

First, that the value per 100 pounds of live hogs is about \$4.50 to \$4.75, while an equal weight of the product—hog round—is worth about \$7.50. Your petitioner can recall no other instance where the higher priced manufactured article is transported at less freight rates than are provided for lower priced raw material.

Second, that the loading and unloading of live hogs costs the transportation companies comparatively nothing—this service being performed by and at the expense of the shipper or owner.

Third, that in addition to the expense of loading, unloading, etc., the owner of live hogs is subject to a yardage, commission and incidental charge at Chicago, amounting to about eight cents per 100 lbs., which additional charge in many instances adds one third more to the freight charges imposed; an expense to which many of the western shippers of packing house products are not subjected.

Fourth, that necessity and self interest compel the unloading of live hogs immediately upon arrival at Chicago, and the cars are at once at the disposal of the transportation company. As a matter of fact, within two (2) hours after arrival at the Union Stock Yards, Chicago, loaded, a train of stock cars is unloaded and ready to be returned, while each and every car load of packing house product is allowed forty-eight (48) hours for unloading, and like other bulk or dead freight is often subject to serious delay beyond the allotted time for unloading, and consequently enforced idleness of the cars is the result. This item alone is of no small importance in the estimation of said common carriers, each and all of

them being members of an association recently organized for the special purpose of hastening the unloading and return of cars.

Your petitioner states that the yield of the hog in product is about 72 per cent, and believes that this should be made the basis of fixing the freight rates upon live hogs and packing house product. That is to say, the amount of product obtained from the hog being about 72 per cent of the live weight, the rate on the live hogs, to be just and nonpreferential to shippers, packers, or localities, should be about 72 per cent of whatsoever rate is made upon packing house product.

Thus equalized, and the carriers standing in different—their only defensible position—it rests with the western and the Chicago packer, according to his ability and resources, to determine the point at which the live hogs shall be slaughtered, and if the Chicago packer can hold his own as against his western competitor, the transportation companies would be enabled to receive a revenue upon the entire hog instead of only upon the condensed product, which entails a loss of 28 per cent, or, a loss of twenty-eight in every 100 cars. Calculated upon this basis, the gain in tonnage to the railroad companies, had the hogs packed at Omaha and Kansas City during 1888 been hauled to Chicago, would have been approximately as follows: Omaha slaughtered 930,230 and Kansas City 1,909,164 hogs; averaging these at 250 pounds each, produces a total of 709,848,500 pounds; 28 per cent of this amount is 198,757,580 pounds, or, at the average weight of 16,000 pounds per car, 12,422 car loads, the freight charges on which at twenty-five cents per 100 lbs. would have amounted to \$496,893.95.

In the year 1880 there were twenty-two firms in Chicago engaged in killing hogs regularly. Between 1880 and 1883 nearly all of the twenty-two houses engaged in this industry had largely increased their capacity, some of them to the extent of double their previous capacity; but, at the present time, there are, in Chicago, only five houses killing hogs regularly; five others kill occasionally, and use their facilities for storage of the product of packing houses killing hogs at points west of Chicago. The balance no longer slaughter hogs at Chicago, but have either turned their houses into other uses, or use them for the storage of pork product, the out-put of houses west of Chicago.

From 639,332 hogs in 1865-66 the packing of Chicago had increased to 5,752,191 in 1880-81; but from 5,752,191 in 1880-81 the same had decreased to 3,732,244 in 1887-88, and a comparison of 1887-88 with 1886-87 shows a decrease of 693,697 hogs, or 15.67 per cent, while a comparison of the packing of Kansas City during the same period shows an increase of 172,666 hogs, or 9.94 per cent, and at Omaha an increase of 638,326 hogs, or 218.64 per cent.

The explanation of this wonderful change in affairs your petitioner believes, is found in the protection afforded the western packers by said common carriers, contrary to common fairness and public justice.

If it be assumed that the same or a greater difference in the rates on live hogs and packing house product existed in 1880, or during the period of the Chicago packers' greatest prosperity, your petitioner alleges that the circum-

stances and conditions then and at present existing are entirely dissimilar. In 1880 few packing houses were in operation west of Chicago; it mattered little to the Chicago packer what difference existed in the rates on the two commodities so long as there were no packing houses west of Chicago to take advantage of the lower rate on the product. To day the situation is such as to warrant the demand of the Chicago packer, that the rates per 100 lbs. on live hogs shall in no case be greater than the rates upon packing house product. Kansas City and Omaha are very extensive live-hog markets, and have unusually great facilities for packing hogs. The Chicago packer who chooses to purchase hogs in either of these western markets must pay the same price for them that his competitor on the ground pays, while such competitor can slaughter the hogs and place his manufactured product in Chicago at a rate of freight from five to 7½ cents per 100 lbs. less than the Chicago packer must pay to get his "raw material" to his packing house.

For several years past earnest efforts have been made by packing firms of Chicago to induce the railway companies leading into said city from the West, to remove the unjust discrimination herein complained of, and, as your petitioner thought, with fair hopes of success, for, on November 19, 1888, the Chicago packers were officially advised that the Western Freight Association (of which all of the railroad companies named in this petition are members) had taken up the subject at a meeting which terminated on November 16, 1888, and that it was agreed between the lines in interest that, taking effect January 1, 1889, the rates on packing house product and on live hogs per 100 lbs., should be the same from Missouri River points, —Kansas City to Sioux City, inclusive,—to Chicago, on the two commodities spoken of, and that this rule should also obtain from territory south of the line of the Chicago & Northwestern Railway, Clinton to Council Bluffs, and that as to the territory on the north of the Chicago & Northwestern Railway line spoken of, while it was not felt on the part of the railroads that it would be practicable to apply the same rate, nevertheless it was the view of the lines in interest that their rates should, on and after January 1, 1889, be made to conform as nearly as possible to the said basis. The concession embraced in said resolution, while not as favorable to Chicago packers as they felt they were of right entitled to, was, in their view, a very considerable step in the right direction.

But said common carriers, in violation of their resolution, have put into effect from Missouri River points and points east thereof to Chicago, rates on packing house product, in car loads, which are greatly lower per 100 lbs. than said common carriers exact upon live hogs, in car loads, as hereinbefore appears; and the said discrimination against Chicago packers still continues.

In the belief that existing facts constitute evidence that an undue and unreasonable preference and advantage is given to western packing points, and that thereby Chicago is subjected to unreasonable prejudice and disadvantage, complaint is hereby made to your honorable Commission, and an early investigation is respectfully requested, to the end that said com-

mon carriers may be ordered to cease and desist from violation of the Law, and to so adjust their rates for the transportation of live hogs and packing house product between the same initial and terminal points, in such manner that, not only in no case shall the rates per 100 lbs. be higher upon live hogs in car loads than upon packing house product in car loads, but, taking into consideration all the various circumstances surrounding the transportation of the two commodities, that your honorable Commission will order that the rates of freight upon the manufactured pork product shall be fixed at such percentage above the rates upon live hogs as shall be deemed just and equitable by the Commission. Your petitioner asks that the rates upon live hogs in car loads be established at not over 72 per cent of the rates charged upon shipments of pork product in car loads, and when such reasonable relative rates have been fixed upon, established and published by said common carriers, that any change in the rate of transportation for either of said descriptions of traffic shall be accompanied by a corresponding relative change in the rate and charges for the other commodity: And your petitioner prays for such other and further relief as in the judgment of your honorable Commission may be just and proper.

The Board of Trade of the City of Chicago.

By W. S. Seaverus, President.

Re Petition of PRODUCE EXCHANGE OF TOLEDO.

(No 106.)

1. **After a complaint upon elaborate pleadings and proofs has been heard and determined** by the Commission, and no party to the proceeding has applied for a rehearing, an application for a rehearing made by others who were not parties to the proceeding will not be granted.
2. **In such a case**, if upon a new or different complaint it should appear that any conclusion of the Commission in the case so decided has been erroneous, the Commission would feel it to be a duty to correct such conclusion.
3. **Where relative rates are the same at points not far distant from each other** on the same system of railroads, it is the practice of the Commission, in determining the reasonableness of rates upon a complaint made at one of these points, to consider the bearings and relative equality of rates at all of the points so situated, before ordering a change at any one of them, in order to avoid preference to one and prejudice to another.

(Decided March 2, 1889.)

APPPLICATION for a rehearing by others than the parties to the original proceeding, and also for relief as to matters not involved in the original proceeding.

Mr. Denison Smith for petitioner.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner :

This is an application made by the Produce Exchange of the City of Toledo "for the opening of the question of the division of the Chicago rate, east and west bound, so far as that rate affects Toledo and Detroit." So much of the application as relates to this matter seeks a rehearing of the report and conclusions of the Interstate Commerce Commission in the case of *The Detroit Board of Trade and The Detroit Merchants & Manufacturers' Exchange*, against the *Grand Trunk Railway of Canada and The New York Central & Hudson River Railroad Company*, decided October 22, 1888, and found in 2 Inters. Com. Rep. 199, 2 Inters. Com. Com. Rep. 315.

In support of this application the following grounds are stated in the petition:

"If the request is granted, the Exchange will ask for a reduction of the rate at Toledo and Detroit, from 78 to 75 per cent.

"If the Commission permits, the Exchange would hope to prove as reasons for the reduction: that there never was, and is not now, any valid reason, necessity or common sense in grouping Toledo and Detroit with a great many points in the West and Southwest under such uniform and arbitrary rate of division. That the position of Toledo and Detroit does not correspond in any respect to that of the western points, because they are large markets for the purchase and distribution of agricultural products.

"That the system was consented to by the Vanderbilt lines in a spirit of compromise, by which these lines were willing in a measure to prevent the traffic coming to the lake, where there was more active competition with them, and recovering it, and much more, by their direct connection between the Southwest and their lines east of Toledo, at Fremont, Sandusky and Cleveland.

"That the rates from southwestern points over their lines to the seaboard are so much lower, per mile, than the rates to the lake ports which are loaded down with the effect of the 78 per cent division of the Chicago rate, as to shut us out from participation in that business.

"That the local rates from all Illinois points to Chicago, and thence to the seaboard, compared with local rates to Toledo, and thence to the seaboard, also precluded our competition.

"These points, the Exchange hopes to present proof of, if the question is opened."

After stating the application for a rehearing and the grounds in support thereof, as above set forth, the petition proceeds as follows:

"Another Proposition."

"The Exchange would also like to make the proposition, that the competition to Chicago is of so unusual and irresistible a character as to justify her in asking that the local business on the Wabash and Clover Leaf Roads be transported to Toledo at rates corresponding to the price per mile charged on seaboard business.

"Another Proposition."

"The Exchange desires to present a complaint concerning Boston and other New England rates in their relation to Toledo, compared with other points.

2 INTER S.

"The additional rate charged at Toledo and Detroit, to Boston, and what are called Boston points, over the rate to the seaboard is five cents per 100 pounds. For example: the rate is now 19½c. per 100 pounds on grain, Toledo to New York, and 24½c. to Boston and New England points.

"The Exchange believes that indisputable proof can be made why there should be no addition to the Boston over the New York rate, and would heartily welcome an opportunity to do so, if the Commission permits, but in any event we desire relief on the case presented as follows, viz.:

"The railway lines from Buffalo east, make the rate to Boston and Boston points 2½c. per 100 pounds higher than to New York, while at Toledo and Detroit they insist on five cents per 100 pounds differential. The Exchange will prove what we charge, and we want relief.

"This addition of five cents per 100 pounds to Boston, etc., is seized upon and claimed by the Lake Shore Railway as a basis for a charge of ten cents per 100 pounds on grain, Toledo to Buffalo. The divisions of the 19½ cents per 100 pounds to New York give less than eight cents to Buffalo and less than nine cents on the Boston rate. The Lake Shore Road desires to make the rate from Toledo to New York 78 per cent of the Chicago rate, and then insists upon two cents over the division of that rate on grain from Toledo to Buffalo, thus piling up the percentage of discrimination against us.

"We hope the Commission will give Toledo an opportunity to present her case, on these propositions, by the proof of the facts charged."

We first consider so much of this application as relates to a rehearing in the case of the Detroit Board of Trade and the Detroit Merchants and Manufacturers' Exchange against The Grand Trunk Railway of Canada and The New York Central & Hudson River Railroad Company, to which we have already referred. That case was one in which a very large volume of testimony was taken by the parties at Detroit, to which afterwards was added the examination of a number of witnesses before the Commission at Chicago in July, 1888. It was elaborately argued by counsel, orally and on briefs. It was claimed in that case that Detroit was unjustly discriminated against by the defendants in making their rates on shipments originating at or destined to that city, 78 per cent of the Chicago rate on east as well as west bound freights; and it was insisted that, taking into consideration the distance and geographical position of Detroit, such percentage should be 70 per cent of the Chicago rate. It was also claimed in that case that Detroit was unjustly discriminated against by the defendants because the percentage of the through rate on freight passing through Detroit on east and west bound shipments, originating at Chicago or points west and northwest of Chicago, and destined to the seaboard at New York or New England points, or originating at New York or New England points and destined to Chicago or points northwest of Chicago, was not as high, according to length of haul for equal distances, as it was on freight originating at Detroit and destined to the points named, or originating at the points named and destined to Detroit.

The Produce Exchange of Toledo was not a party to that proceeding, but when it was heard by the Interstate Commerce Commission, at Chicago on the 31st day of July, 1888, a committee of the Produce Exchange appeared before the Commission and submitted a written argument, in which the relative position of Detroit and Toledo as to transportation facilities was discussed, and the rates prevailing at each of these cities, showing that the percentage was the same at Toledo as at Detroit, and insisting that if the reduction was made at Detroit it should also be made at Toledo, and expressing the opinion that both Toledo and Detroit had just cause of complaint for their treatment by the railroads in fixing the percentage of the Chicago rate. Although the Produce Exchange of the City of Toledo was not a party to that proceeding, the Commission heard and considered its argument in connection with all the evidence and arguments made in the case.

After such a case so presented has been decided by the Commission, it would be an anomaly in proceedings of this character, which are judicial in their nature, for a rehearing to be granted and the case subsequently opened by the Commission at the instance of one who was not a party to the original proceeding. No application for a rehearing has been made in that proceeding by the Detroit Board of Trade or the Detroit Merchants & Manufacturers' Exchange. It was a case in which a great deal of time was occupied, and labor and effort expended by the parties to it in presenting all the questions involved, in the most elaborate manner for the consideration of the Commission. In preparing its report and conclusions thereon, the Commission fully and carefully considered all the evidence and arguments presented in that proceeding.

We are now asked on the application of the Produce Exchange of the City of Toledo, which was not a party to that proceeding, but which had the opportunity to have been, if it had so desired, to set aside all that we did in that case in order that the questions involved in it may be again presented and heard and reconsidered by us. We know of no authority conferred upon us to grant a rehearing upon such an application. If it should appear, under a new, or different, or any, complaint, that our conclusions or any of them in that case are wrong or need modification, we should feel it to be our duty to correct them, and would not consider ourselves deterred from doing so by the fact that we made the decision we did in that case. That, however, is a very different proposition from the one here presented by this application for a rehearing.

It appears from this petition that the Produce Exchange of Toledo also desires to make several other complaints against the rates as they affect the business interests of the City of Toledo. These are outlined in the petition, extracts from which are above set forth. There is nothing that prevents the Produce Exchange of the City of Toledo from making these the subject of complaint to the Interstate Commerce Commission if it desires to do so. If the Produce Exchange of the City of Toledo also desires to complain before the Commission, of the manner in which the business in that city is affected by its percentage of the Chicago rate

on east as well as west bound freight, it can do so, and the Commission will consider it. The fact that the relative rates at Toledo and Detroit are the same is one that the Commission could not overlook in considering and determining any such complaint. In regard to all or any of these questions mentioned in the petition, the Produce Exchange of Toledo will have an opportunity to be heard concerning them, whenever it may seem proper to make complaint before the Commission; and this without the necessity of the Commission making any order for a rehearing in the case of the Detroit Board of Trade and the Detroit Merchants and Manufacturers' Exchange against the Grand Trunk Railway of Canada and the New York Central & Hudson River Railroad Company.

L. LIPPMAN & Co.

v.

ILLINOIS CENTRAL R. Co.

(No. 157.)

1. **A railroad company** is under special obligation to give reasonable rates for its local business; but there are many influences which may affect through rates while not bearing upon local rates at all, or if at all, in less degree.
2. **Through rates** are not necessarily illegal which when divided between carriers give them less than their local rates, *provided* that the through rate itself is not less than some one of the locals, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed.

(Decided January 3, 1889.)

MEMORANDUM BY THE COMMISSION.

By the Commission:

The complaint in this case is in the following words:

"The Illinois Central Railroad, charges \$1.85 per bale of cotton from this point to New Orleans, La.

"Steamboats on the Yazoo River issue bills of lading for cotton from points on the river north of here at the rate of \$1.85 per bale through to New Orleans by river and rail. The railroad pays the steamboats fifty cents per bale and pays ten cents per bale transfer from the steamboat landing to the cars. Consequently, for cotton shipped thus via Yazoo City she receives only \$1.25 per bale whilst she charges us here for the same service \$1.85 per bale."

This is the whole of the complaint except the formal beginning and conclusion.

It will be seen that no complaint is made that the rate from Yazoo City to New Orleans is too high, or is in any way unreasonable. Considered by itself the complaint is that it is more than is accepted by the railroad company as its division of through rates from points above Yazoo City. It is quite consistent with the complaint that the rate from Yazoo City is

a fair one, and that the rates from points above are unreasonably low, made so under the stress of competition or for other reasons. Cases of that kind are sometimes met with, especially where water competition exists.

But, independent of any such consideration, it is well known by all who are familiar with the influences which necessarily affect the making of rates that local rates cannot be the measure of what the railroad company shall accept as its division of through rates. In the first place the through rate is almost universally less in proportion to distance than the local rate; the carriers can afford to make it lower; if they were compelled to measure the one by the other, there would be no inducement to form through lines and shippers would be annoyed by having to deal with a succession of local roads instead of with one road acting for all. But if the through rate is less in proportion than the local, some of the carriers, if not all of them, must accept for their division of the through rate a sum less than the local rate. This is very manifest.

It is well known, also, that many influences affect the making of a through rate that may not bear at all, or if at all in less degree, upon the local rates. This is especially the case when there are competitive lines reaching points for which the through rate is made or through which the transportation is to be had. Such competition may in some cases force the making of a through rate which will barely pay the cost of moving the freight.

A railroad company is under special obligation to give reasonable rates for its local business. If it does that, it will not be illegal for it to accept business from other carriers on through rates which when divided between them will give to any one of them for its division less than its own local rates. This, however, is subject to the condition that the through rate is not in itself illegal, either because of being less than some one of the locals, or of being unjustly discriminating against individuals or localities, or so low as to burden other business with some part of the cost of the business on which it is imposed. The local shipper is not wronged by the carrier's accepting the through business provided the condition above stated is observed.

This point has been touched upon in several cases heretofore decided; among others in the *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754, 1 Inters. Com. Rep. 436; *Detroit Board of Trade v. Grand Trunk R.* 2 Inters. Com. Rep. 199, 2 Inters. Com. Rep. 315; and *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289, 2 Inters. Com. Rep. 375.

In the present case certain geographical facts appear which stand closely related to the tariffs of the Illinois Central Railroad as found on file in this office. A branch of that road bears to the northwest from Jackson, Mississippi, which strikes the Yazoo River at Yazoo City, distant forty-five miles, and continues north-erly to Parsons, seventy miles farther on, running generally some distance east of said river and touching it occasionally; one of the points of contact is Greenwood, eighteen miles south of Parsons. The railroad rate on cotton to New

Orleans is \$2.75 from Parsons, falling to \$2 at Greenwood, and remaining \$2 at all stations as far south as Yazoo City, where the rate, as above stated, is \$1.85.

A joint tariff on file, effective November 19, 1888, shows a through rate of \$1.85 by boat and rail from the river landings between Greenwood and Yazoo City to New Orleans, divided as follows:

| | Boat. | Transfer. | I. C. R. R. |
|---|-------|-----------|-------------|
| Landings between Green-wood and Belzonia,---- | .60 | .10 | \$1.15 |
| Landings between Belzonia and Yazoo City,---- | .50 | .10 | \$1.25 |

The case therefore presents an instance of grouped rates; first all rail, \$2 grouped from Greenwood, followed by joint tariff, boat and rail \$1.85, also grouped from Greenwood. The grouping of rates in this manner is at times justifiable, as the Commission has often had occasion to say, and there may be reasons adequate to justify it here. In a section of country like that between Greenwood and Yazoo City rail and water rates mutually influence each other, so that transportation by rail from Yazoo City may be worth as much to a shipper there as to a shipper at Greenwood. Without going further into the question, no reason is stated by petitioner why transportation by boat from Greenwood and intermediate landings as far south as Yazoo City may not fairly take a common rate to New Orleans; and if the boats instead of providing water carriage to New Orleans, elect to deliver the cotton to the railroad for transportation from Yazoo City, the division of the through rate is not of itself an evidence of injustice to local shippers at Yazoo City. It is not correct to say, as appears to be understood by complainants, that the railroad company charges local shippers \$1.85, and charges the boat lines only \$1.25 or \$1.15 for the same service. The true situation is that a through rate is made from river landings above Yazoo City no greater than from Yazoo City itself. This of itself without some substantial damage or injury resulting therefrom, does not constitute a contravention of the Act to Regulate Commerce. As has been repeatedly said by the Commission in respect to rates constructed like those now under consideration, such a situation only becomes illegal when it can be shown that illegal results follow from it. *La Crosse Mfrs. & Jobbers Union v. Chicago, M. & St. P. R. Co.* 2 Inters. Com. Rep. 9, 1 Inters. Com. Rep. 631; *Business Men's Assn. of Minn. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41, 2 Inters. Com. Rep. 52.

As the case is presented in the petition there is nothing which calls for an investigation by the Commission, and no order of notice will be made.

Wojta STRANSKY
v.

CHICAGO & NORTHWESTERN R. CO.
and THE FREMONT, ELKHORN &
MISSOURI R. CO.

(No. 177.)

COMPLAINT filed March 14, 1889, against the above named railway companies, alleg-

ing that the complainant had been previous to January 4, 1889, charged for the transportation of beer in barrels and kegs in car load lots from Milwaukee, Wis., to Chadron, Neb., at the rate of eighty-four cents per 100 pounds; and that on or about the first day of February, 1889, the rate was raised to ninety-four cents per 100 pounds; that either of said rates is unjust or unreasonable, and that seventy cents per 100 pounds would be a reasonable rate.

Complainant asks that the matter be investigated; and that an order be issued requiring the said companies to reduce their rate between said points to seventy cents per 100 pounds, or to such sum as may be found just and reasonable.

[Verified Feb. 27, 1889.]

A. LEONARD

v.

CHICAGO & ALTON R. CO.

(No. 178.)

COMPLAINT filed March 14, 1889, against the above railroad company, alleging that on the 21st day of January, 1889 it charged the complainant for twelve car loads of cattle from Mt. Leonard to Chicago, \$48 per car load the amount named by the agent of said company as the rate; and that said charge was unjust and unreasonable, and amounted to \$140.88 more than it should have been for the reason that the cattle he was then compelled to load into twelve cars would make only nine car loads of 20,000 pounds each, the amount allowed for a car load.

Complainant also alleges that the system of weighing adopted by the said company is unjust, and the service generally inequitable and unfair.

Complaint or petition closes with a prayer for investigation, and that the company be ordered to refund such sum as in the judgment of the Commissioners should seem just and proper.

Indorsed "Forwarded by Missouri Board of Railroad Commissioners."

[Verified March 4, 1889.]

Logan B. CHAPPELL

v.

CHICAGO & ALTON R. CO.

(No. 179.)

COMPLAINT filed March 14, 1889, against the above named railroad company that on the 21st day of January, 1889, it charged the complainant, on two car loads of cattle from Mt. Leonard to Chicago, twenty-four cents per 100 pounds, and that such rate was unjust and unreasonable and increased the rate per car load over and above the former customary regular rate, to wit: \$50 per car load.

Complainant asks that the difference of \$21.92 be refunded.

Indorsed "Forwarded by Missouri Board of Railroad Commissioners."

[Verified March 4, 1889.]

NORTH CAROLINA SUPREME COURT.

RICHMOND & DANVILLE R. CO., *Appt.*,

v.

Town of REIDSVILLE.

A municipal ordinance levying a tax of \$50 upon every railroad running

through the corporate limits, whether it be called a privilege tax or by some other name, being a tax imposed upon business in the town, if authorized by the state law, is not void as a tax on interstate commerce nor as a violation of the principle of uniformity of taxation.

NOTE.—*Municipal taxation of occupations.* The general rule is that the powers of a municipal corporation are to be construed with strictness as to their right to impose taxes on occupations. *Latta v. Williams*, 87 N. C. 126; *New Iberia Trustees v. Miques*, 32 La. Ann. 923; *Cooley*, Taxn. 574. A municipal corporation has no inherent power to tax. *Vance v. Little Rock*, 30 Ark. 435; 2 *Desty*, Taxn. 1382. The authority granted is subject to the limitations implied in the commercial clause of the Federal Constitution. *Goodale v. Finnell*, 27 Ohio St. 426. It can impose no tax on any occupation unless authorized to do so by its charter. Mayor of *Plaquemine v. Roth*, 29 La. Ann. 261. If it is not manifest that there has been a purpose by the Legislature to give authority for collecting a revenue by taxes on specified occupations, any exaction for that purpose will be illegal. *Kip v. Patterson*, 26 N. J. 298. For the general principle, see *Robinson v. Franklin*, 1 *Humph.* 156; *St. Louis v. Laughlin*, 49 Mo. 559; *Dubuque v. Life Ins. Co.* 29 Iowa, 9; *Charleston v. Oliver*, 16 S. C. 47. Authority given in the charter of a city to raise money for its purposes by taxes and assessments in such manner as the common council shall deem expedient in accordance with the laws of the State and of the United States will authorize license fees. *Ould v. Richmond*, 23 *Gratt.* 464; *W. U. Tel. Co. v. Same*, 26 *Gratt.* 1. The statute contemplates in its policy both the earning of revenue and protection to resident traders. *Temple v. Sumner*, 51 *Miss.* 13; 1 *Desty*, Taxn. 302. The Legislature has the con-

stitutional power to tax occupations, and to authorize municipal corporations to tax them, and to license trades and professions in the absence of constitutional prohibition. *San Jose v. S. J. & S. C. R. Co.* 53 *Cal.* 481; *People v. Coleman*, 4 *Cal.* 46; *Sacramento v. Cal. Stage Co.* 12 *Cal.* 134; *Sacramento v. Crocker*, 16 *Cal.* 120; *Ex parte Hurl*, 49 *Cal.* 557; 1 *Desty*, Taxn. 302; *Fretwell v. Troy*, 18 *Kan.* 271; *Ex parte Montgomery*, 64 *Ala.* 463; *Gilman v. Sheboygan*, 2 *Black.* 510; *Lonte v. Allegheny Co.* 10 *Pittsb. L. J.* 241; *Durach's Appeal*, 62 *Pa.* 491. See *Hodgson v. New Orleans*, 21 *La. Ann.* 301. Or it may restrict the power of taxation. *Goodale v. Finnell*, 27 *Ohio St.* 426. It is the occupation that is taxed, and not the goods; and it is incumbent upon him who engages in the business, whether he be agent or owner, to take out the license. *Temple v. Sumner*, 51 *Miss.* 13. When the power to license occupations is given, it involves the determination of the extent or duration, and the sum to be paid, and it must be exercised exclusively by the common council. *Darling v. St. Paul*, 19 *Minn.* 389. And the power may be extended over persons plying vocations within the corporate limits, whether they actually reside there or not. *Edenton v. Capehart*, 71 *N. C.* 156. An act which simply enumerates certain businesses and occupations, and declares what should be paid for licenses by each, does not operate as a repeal of a statute which authorizes municipal corporations to fix the sum to be paid for licenses, except to the extent of the business specified. *Ex parte Bernert*, 62 *Cal.* 524.

(December 3, 1888.)

APPEAL by plaintiff, from a judgment of the Superior Court of Rockingham County (Connor, J.), in favor of the defendant, on a submission, under the Code, of a controversy without action, to determine the validity of a tax imposed by a municipal ordinance. *Remanded for amendment.*

The facts agreed are set forth in the opinion. *Messrs. F. H. Busbee and D. Schenck* for appellant.

Messrs. Boyd & Johnston for appellee.

Smith, Ch. J., delivered the opinion of the court:

This proceeding is, under section 567 of the Code, a submission of a controversy without action between the parties, and its object is to obtain the decision of the court upon the question of the validity of a tax imposed on the plaintiff by a municipal ordinance passed by the defendant. The facts agreed are as follows:

(1) The Town of Reidsville is a municipal corporation organized under the Laws of North Carolina. Its charter, marked "Exhibit A," is annexed as part of this case. (2) It has passed an ordinance, levying \$50 tax on every railroad company running its road through its corporation. Ordinance, marked "B," is hereunto annexed. (3) The Piedmont Railroad Company is a corporation organized under the Laws of North Carolina, and its track runs through the Town of Reidsville. (4) The Piedmont Railroad Company has depots, tracks, roadbed, and other corporate, tangible property in Reidsville, which is taxed by the State, county and town as other corporate property, *ad valorem*, under the Constitution. For taxation the road is valued at \$10,000 per mile by the properly constituted assessors. (5) The Richmond & Danville Railroad Company is the lessee of the Piedmont Railroad, and is in possession thereof. The plaintiffs resist this tax as unconstitutional, and the matter in difference is submitted without action, under section 567 of the Code.

D. Schenck, attorney for plaintiffs.

Boyd & Johnston, attorneys for defendant.

May 17, 1888.

Piedmont Railroad Company, and Richmond & Danville Railroad Company, Lessees Thereof, v. The Town of Reidsville.

W. P. Watt, being duly sworn, says that he is Mayor of the Town of Reidsville; that the controversy submitted without action, in the above entitled action, is real, and the proceedings in good faith to determine the rights of the parties.

W. P. Watt.

Sworn and subscribed before me this 22d day of May, 1888.

H. B. Burnett, Notary Public.

Superior Court; Rockingham County.

July Term, 1888.

Piedmont Railroad Company and Richmond & Danville Railroad Company, Lessees Thereof, v. The Town of Reidsville. (Judgment.)

This cause coming on to be heard, upon the statement of facts admitted in the controversy

without action, and after argument of counsel, it is ordered, adjudged and decreed, that the Town of Reidsville is authorized to levy the tax of fifty dollars imposed under the ordinance of said town against plaintiff company, and that the same is not unconstitutional.

It is further ordered that the action be dismissed, and that the plaintiff pay the cost thereof.

H. G. Connor, Judge Presiding.

This method of procedure, introduced in the Code as a summary and inexpensive way of securing a judicial determination of matters in law, contemplates somewhat as in a proceeding in the nature of a special verdict under our former system, a complete and concise statement of all the facts necessary to a solution of the controversy. The statement before us refers to Exhibits A and B, said to be, but which are not, annexed, nor in the title. Again, in the case on appeal, wholly unnecessarily, it is left to either party to add to the facts in the case agreed, the public laws taxing railroads, and any action taken by the board of appraisers and assessors in the valuation of the plaintiff company; thus introducing new matter in the case agreed, which is wholly inadmissible, because the controversy is to be determined solely upon the facts therein contained. For these reasons the cause must be dismissed or remanded; and we prefer the latter course, because, when amended so as to present all the facts, not by reference to be hunted up, but in direct and positive form, it may be decided in the court below, and reviewed on appeal in this.

We are unable to see any well grounded objection founded upon the Constitution of the United States, or of this State, to the tax put upon the plaintiff. It is in no sense a tax upon interstate commerce; that is, upon freight or passengers conveyed out of this State into another State, or brought from the latter into this State, nor upon the coaches and cars, instruments of such commerce, employed in such transportation. The tax is upon the corporate body created by the State, and doing business within the corporate limits of the town; and this liability cannot be evaded by the fact that the road transports beyond as well as within the boundaries of the State. It is such commerce as is carried on between the States as a distinct species of taxable property that is protected by the Constitution of the United States from state assessment when separately taxed, or when intermingled with that which is purely and solely state.

In *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 [21 L. ed. 164], a tax upon the gross receipts of a railroad, though entering into the aggregate are sums derived from a transportation beyond the state lines, is held not to be an invasion of the exclusive right to regulate commerce between the States; and the distinction is taken between a tax upon freights carried between States, because of their carriage, and a tax upon the fruits of such transportation after they have become intermingled with the other property of the carrier.

Again; a tax of one fourth of one per cent in addition to other taxes, upon the value of every share of its stock, with a proviso that, when

the road so taxed lay partly within and partly without the State, the company should only be responsible to the State levying the tax upon such number of shares as would be in the same ratio to the whole as the number of miles of its track in the State bore to the entire line of the road, was upheld as not interfering with interstate commerce. *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206 [21 L. ed. 888].

So it has been decided that a railroad 455 miles in length, of which forty-two only were within the State that incorporated the company, was "doing business within the latter State, and subject to a tax imposed upon" all railroad companies "doing business within the State, and upon whose road freight may be transported." *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 492 [22 L. ed. 595].

It is then manifest that the municipal tax imposed by the defendant invades no prohibitory provision contained in the Constitution of the United States.

We are equally clear that it is not repugnant to our own organic law, nor does it depart from the principle of uniformity therein recognized. The tax is imposed upon every railroad "running its road through its corporate limits;" and whether it be called a privilege tax, or by some other name, it is imposed upon its business in the town; or if the road simply passes over the corporate territory, in view of the perils to the place, it is a tax which the State can authorize, and, when imposed under such authority, is valid. Nor is it wanting in uniformity, as the term is defined by *Mr. Justice Miller*, speaking for the court in *State Railroad Tax Cases*, 92 U. S. 575 [23 L. ed. 663], and followed by this court in *Worth v. Wilmington & W. Railroad Company*, 89 N. C. 291.

While we give our opinion upon the point intended to be presented, for reasons stated the case must be remanded, and it is so ordered.

UNITED STATES DISTRICT COURT, DISTRICT OF OREGON.

THE CITY OF SALEM—A. F. REED,
Libellant.

(....Sawy,.....Fed. Rep.)

*1. **The power to regulate commerce among the several States** comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried; and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure

and maintain the safety and convenience of the waterway; which regulations are so far applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce.

2. **The regulation contained in § 4465 of U. S. Rev. Stat.,** forbidding a steamboat to carry more passengers than allowed in her certificate of inspection, held, to apply to such boats engaged in carrying passengers on a navigable water of the United States between ports of the same State only.

(February 12, 1889.)

*Head notes by DEADY, J.

NOTE.—*Regulation of steam vessels. U. S. Rev. Stat. title 52.* By title 52 of the Revised Statutes, prescribing the regulation for steam vessels, masters, chief mates, engineers and pilots are required to be licensed as officers, and penalties are attached for their serving without proper license. *U. S. v. Huff*, 13 Fed. Rep. 632. The object of the Act is to protect the health and lives of passengers from becoming a prey to the avarice of ship owners. *U. S. v. The Neurea*, 60 U. S. 19 How. 94 (15 L. ed. 532). By section 4399 of the Revised Statutes every vessel propelled by steam in whole or in part is a steam vessel within the meaning of this title. *Joslyn v. Nickerson*, 1 Fed. Rep. 137. The application for and use of the certificate of inspection, required by another section of the same statute here sought to be enforced against such a steamboat, is sufficient to require the conclusion that the steamboat is subject to such provisions of statute, and liable for a violation of them. *The Hazel Kirke* (N. Y.), 25 Fed. Rep. 601. The statute gives a separate penalty for every violation of the Act (*Pollock v. The Sea Bird*, 3 Fed. Rep. 573), and a direct remedy in admiralty against the vessel for the recovery of the penalty (*Pollock v. The Sea Bird*, 3 Fed. Rep. 573, citing *The Missouri*, 3 Ben. 508, 9 Blatchf. 433; *U. S. v. The Queen*, 4 Ben. 237, 11 Blatchf. 416); and any admiralty court in which the vessel may be has jurisdiction. *Pollock v. The Sea Bird*, 3 Fed. Rep. 573.

Navigable waters. The waters of Jamaica Bay, New York, are public navigable waters of the United States, within the meaning of section 4400 of the Revised Statutes. *The Hazel Kirke* (N. Y.) 25 Fed. Rep. 601. The Fox River and also the Grand River, a small navigable stream wholly within the State of Michigan, flowing into Lake Michigan, is a "navigable water" of the United States. See *The Montello*, 78 U. S. 11 Wall. 411 (20 L. ed. 191) and particularly the same case, 87 U. S. 20 Wall. 430 (22

L. ed. 391); *U. S. v. Burlington & H. Co. Ferry Co. (Iowa)* 21 Fed. Rep. 332.

Regulations of supervising inspectors. The rules of navigation established by the supervising inspectors under section 4412 of the Revised Statutes are valid and binding, in so far as they do not conflict with the statutory rules of navigation in section 4233. *The Milwaukee*, 1 Brown, Adm. 313; *The Grand Republic* (N. Y.) 16 Fed. Rep. 424. The manifest object of section 4405 is, as its very language imports, to secure, "in the most effective manner," a compliance with the various general provisions of title 52; and for that purpose it authorizes the board to establish all necessary regulations to carry out those specific provisions. "Regulations to be observed by all steam vessels in passing each other." These regulations, when not inconsistent with the specific statutory rules, are held valid and enforced. *The Grand Republic*, 16 Fed. Rep. 424, 427; *The B. B. Saunders*, 19 Fed. Rep. 118, 121. So far as they may be in conflict with the statutory provisions, they are null and void. *The Atlas*, 4 Ben. 28, 30; *The Milwaukee*, 1 Brown, Adm. 313, 321; *The American Eagle*, 1 Low. 425, 427; *U. S. v. Miller*, 26 Fed. Rep. 97. In proceedings to recover a penalty for violations of the navigation laws, the burden of proof is on the prosecution. *The Pope Catlin* (Georgia) 31 Fed. Rep. 408.

Inspection. Under sections 4426 and 4470, Revised Statutes, the steamboat inspectors may require ferryboats to be provided with the same precautions against fire, so far as applicable, that are expressly provided in reference to any other steam vessels carrying passengers; and when the boat passes inspection on the basis of having a steam pump provided in accordance with section 4471, the boat is bound to maintain it in the condition required by that section. *The Garden City* (N. Y.) 26 Fed. Rep. 766.

Examination of applicants for license. A system of examinations is provided for, and an oath must

LIBEL against a steamboat and owner for penalties under section 4465, U. S. Rev. Stat. *Exception to libel disallowed.*

The case is fully stated in the opinion.

Mr. W. Scott Beebe, for libellant, cited—*Pollock v. The Sea Bird*, 3 Fed. Rep. 573; *Hatch v. The Boston*, 3 Fed. Rep. 807; *The Laura M. Starin*, 11 Fed. Rep. 177; *United States v. Ferry Co.* 21 Fed. Rep. 331; *U. S. v. McLane*, 31 Fed. Rep. 763; *Same v. Same*, 31 U. S. 6 Pet. 404 (8 L. ed. 443); *Lord v. Steamship Co.* 102 U. S. 541 (26 L. ed. 224).

Mr. Charles J. Macdougall for owner and claimant.

Deady, J., delivered the following opinion:

This suit is brought by the libellant, A. F. Reed, against the steamboat City of Salem and Robert Thompson, her owner, to recover sundry penalties for carrying more passengers than is allowed by the vessel's certificate of inspection.

An exception is filed to the libel, to the effect that the transportation of passengers in question was wholly within the State, and was therefore not within the grant of power to Congress to regulate commerce nor the jurisdiction of this court.

Section 4399 of the Revised Statutes declares: "Every vessel propelled in whole or in part by steam shall be deemed a steam vessel within the meaning of this title" (52); and section 4400 of the same provides: "All steam vessels navigating any of the waters of the United States, which are common highways of commerce or open to general or competitive navigation, excepting public vessels of the United States, vessels of other countries, and boats . . . for navigating canals, shall be subject to the provisions of this title" (52).

It is also provided in this title that there shall be an inspector of hulls and one of boilers in each district who shall inspect all steam vessels, and when they "approve a vessel and her equipment" they shall make a certificate to the collector to that effect. Rev. Stat. § 4421.

In case of a steamer "carrying passengers, other than ferryboats, the number of passengers of each class that any such steamer has accommodation for, and can carry with prudence and safety," shall be stated in said certificate (Rev. Stat. § 4466); and if any steamer shall "take on board" any more passengers than the number stated in the certificate of inspection, the owner shall be liable to any person who may sue for the same, in the penalty of \$10 for each such passenger (Rev. Stat. § 4465), and such penalties shall be a lien on the vessel. Id. § 4469.

It appears from the libel that on July 4, 1888, the City of Salem was a vessel wholly propelled by steam and engaged in navigating the Willamette River, and was duly enrolled and licensed therefor; that by her certificate of inspection she was only entitled to carry sixty passengers; that on said day this vessel was engaged in carrying passengers from the Port of Portland to other points and places on said river and within this district, and did on four such trips carry in the aggregate, 2910 more passengers than allowed by her certificate.

The precise question raised in this case has never been passed on by the supreme court. In the district courts there have been apparently conflicting decisions on the point.

In *The Gretna Green*, 20 Fed. Rep. 901, it was held that a steamboat "regularly enrolled and licensed" for the navigation of the Ohio River, "and subject to the Laws of Congress," was not liable, under § 4492 of the Revised

be taken before the granting of the license; and boards of inspectors are given power to investigate acts of incompetence and misconduct of these licensed officers. Rev. Stat. §§ 4438, 4452. But these and similar provisions do not create any new or other officers on shipboard than existed before the passage of the Acts. *U. S. v. Huff* (Tenn.) 13 Fed. Rep. 632, 633. An indictment under Revised Statutes, 4438, which provides that it shall be unlawful to employ any person, or for any person to serve, as a master, chief mate, engineer, or pilot on any steamer, who is not licensed by the inspectors, need not charge that the employment was with knowledge that the employé had not been licensed as the statute required. *U. S. v. Sims* (Ohio) 9 Fed. Rep. 443. Section 4441 provides that the inspector shall examine the applicant for license as an engineer, and also requires the engineer, when employed on a vessel, to place his certificate of license in some conspicuous place in such vessel, where it can be seen by passengers at all times. *U. S. v. Sims* (Ohio) 9 Fed. Rep. 444. Inspectors of the United States have authority to issue a license to the master of a steamship to act as pilot between Boston and Havana. Rev. Stat. § 4443; *Joslyn v. Nickerson* (Mass.) 1 Fed. Rep. 133.

Interstate commerce. A steamboat employed by a railroad company to transport passengers on Jamaica Bay, Long Island (which is an inlet of the Atlantic Ocean entirely within the State of New York), in connection with a railroad forming a part of the railroad system of the whole country, is engaged in interstate commerce to an extent sufficient to bring her within the provisions of sections 4465 and 4469 of the Revised Statutes, prescribing penalties for steamers carrying more passengers than allowed by their certificates of inspection. *The Hazel Kirke* (N. Y.) 25 Fed. Rep. 601.

Provisions against carrying excess of passengers. A steamboat, having obtained a certificate as a general passenger boat, and not as a ferryboat, does not come within the exception in section 4464.

2 INTER S.

The Hazel Kirke (N. Y.) 25 Fed. Rep. 601. An oral permission to carry an excess of passengers is not admissible as a defense. *Pollock v. The Laura*, 5 Fed. Rep. 133. In estimating the number of passengers on a steamer no deduction is to be made for children or persons not paying, but those employed in managing the vessel are not to be included; and in estimating the tonnage the measurement of the custom house at the port of arrival is to be taken. *U. S. v. The Louisa Barbara*, Gilp. 332. When a steam ferryboat, contrary to the provision of Revised Statutes, § 4466, carries passengers on an excursion, largely in excess of the number allowed by her permit, and fails to carry the required number of life preservers, she is guilty of a marine tort, and a United States District Court has jurisdiction of a libel *in personam* against her owners and master to recover the penalty prescribed by section 4460. *U. S. v. Burlington & H. C. Ferry Co. (Iowa)* 21 Fed. Rep. 332. Under section 4466 of the Revised Statutes, where a passenger steamer does not carry, or purpose to carry, a number of passengers additional to the number authorized by its certificate, and does not go or purpose to go out of the waters where it is authorized by its certificate to ply, it is not an "excursion" in the meaning of the statute, and no special permit in writing is necessary. *The Pope Catlin*, 31 Fed. Rep. 408.

Remedy by action for penalty. An action for the penalty need not be prosecuted in the name of the United States. *Hatch v. The Boston* (Pa.) 3 Fed. Rep. 807. In an action for the penalty, under section 4465 of the Revised Statutes, the United States is not a necessary party. *The Laura M. Starin*, 11 Fed. Rep. 177; *Pollock v. The Sea Bird* (N. Y.) 3 Fed. Rep. 573. The secretary of the treasury may remit claims of informers (Rev. Stat. § 5294), and of the United States, (to penalties and forfeitures incurred, under sections 4465 and 4469 of the Revised Statutes, for carrying a greater number of passengers than the certificate of inspection permits; and such remission will operate as a full discharge.

Statutes, for carrying passengers in barges in tow, the same not being equipped as prescribed by the supervising inspectors, between different ports of the same State. But the opinion leaves it in doubt whether the steamboat would be liable for carrying passengers on her own decks between the same points, contrary to the Laws of the United States on the subject.

After substantially admitting that Congress has the power to prescribe the law of the highway, so far as may be necessary to protect interstate commerce, the court says: "The steamer which had these barges in tow, being subject to the navigation Laws of the United States, the mere fact that she took in tow the barges had nothing to do with any interference with the proper navigation of the Ohio River."

In *United States v. Burlington Ferry Company*, 21 Fed. Rep. 331, it was held that the owners of the vessel engaged in navigating the waters of the Mississippi, carrying passengers between two ports in the State of Iowa, in excess of the number authorized by a permit issued under section 4466 of the Revised Statutes, are liable for the penalties prescribed in section 4500 of the same.

The court held that Congress has power to regulate the navigation of vessels on the navigable waters of the United States, when engaged exclusively in interstate commerce, and that when a steam ferryboat, contrary to section 4466 of the Revised Statutes, carries passengers between ports of the same State, in excess of the number allowed in her permit, she is guilty of a marine tort, and a District Court of the United States has jurisdiction of a suit in admiralty against her owners to recover the penalty prescribed by section 4500 of the Revised Statutes for the same.

In *The Seneca*, 1 Biss. 371, it was held that a steamboat employed in carrying passengers between two ports of the State of Wisconsin was

not liable to a penalty for not having her hull and boilers inspected under the Steamboat Act of 1852.

In the case of *The Oyster Police Steamers of Maryland*, 31 Fed. Rep. 763, it was held that three steam vessels belonging to the State of Maryland not engaged in carrying freight or passengers, but used to enforce the State Fishery Laws in the Chesapeake Bay, are liable to the penalties prescribed by § 4499 of the Revised Statutes, for failing to have their hulls and boiler inspected by the United States inspectors, under sections 4417 and 4418 of the Revised Statutes.

The court held that the "supreme and exclusive control" of Congress of the navigable waters of the United States "might be defeated or rendered less effective for its objects, if there were to be recognized a class of vessels privileged to use them, without being subject to those provisions which Congress determines are required for the safety of all. I am, therefore, unable to assent to the contention that the fact that the vessels in the present case are not used in commerce, but solely for the police purposes of the fishery force, prevents Congress from having the constitutional power to legislate with regard to them. It is not their use, but the fact that they navigate the highways of commerce, which brings them within the constitutional grant of power, and within the language of section 4400 of the Act of Congress."

In *Lord v. Goodall Steamship Company*, 102 U. S. 541 [26 L. ed. 224], it was held by the supreme court, in the language of the syllabus, that "While navigating the high seas, between ports of the same State, a vessel of the United States is, together with the business in which she is engaged, subject to the regulative power of Congress." *Mr. Chief Justice Waite*, in speaking for the court said, in substance, that The Ventura, while navigating the Pacific Ocean,

The Laura, 8 Fed. Rep. 612. It is not, however, a power to pardon. *Pollock v. The Laura*, 5 Fed. Rep. 133. The general proposition that the power to pardon is subject to such a limitation is well supported by authorities. *Howell v. James*, 2 Strange, 1272; 3 Coke, Inst. 236, 237, 238; *U. S. v. Harris*, 1 Abb. U. S. 110; *U. S. v. Lancaster*, 4 Wash. C. C. 66; *Shoop v. Com.*, 3 Pa. 126; *Rowe v. State*, 2 Bay. L. (S. C.) 565; *Pollock v. The Laura* (N. Y.) 5 Fed. Rep. 136.

Proceedings in rem. *Proceedings in rem* may be maintained in the district court for the penalty provided by section 4465, Revised Statutes of the United States, for taking on board a steamer a greater number of passengers than that stated in the certificate of inspection. Section 4469 of the Revised Statutes has provided that the penalty imposed by section 4465 shall be a lien upon the vessel, and authorizes a bond to be given to secure the judgment as in other cases. *The Laura M. Starin* (N. Y.) 11 Fed. Rep. 177. Nor will the bringing of an action of debt against the master and owners of the boat, and prosecuting the same to judgment, release the lien given by section 4469, Revised Statutes. *Hatch v. The Boston* (Pa.) 3 Fed. Rep. 807. Such lien was not devested by a sale to a *bona fide* purchaser. *Id.* It is not necessary that the vessel should have been attached, before the filing of the libel, to enforce the statutory lien. *Id.* That the libellant did not proceed against the vessel until the recovery of the judgment, in the personal action against the master and owners, did not constitute laches. *Id.* Where the claimant pleaded, in his answer to a libel filed under the Revised Statutes, section 4465, an oral permission to carry additional passengers on excursions, under Revised Statutes, section 4466, which requires that the permission should be in writing: this defense could not avail the claimant, and that part of the answer must be stricken out upon exception as immaterial. *Pol-*

lock v. The Laura (N. Y.) 5 Fed. Rep. 134. In a suit for carrying an unlawful number of passengers, it appearing that the persons were intruders against the will of the officers of the boat, and that the boat moved from her landing to another convenient place to avoid a crowd of people who it was feared might force their way upon her and endanger her, the penalties were not incurred. *Poor v. The Geneva* (Pa.) 26 Fed. Rep. 647. The libel need not allege that the libellant was a passenger on such steamer, or that he was an informer, or that he sued as such; nor need it set out the names of the passengers. *Pollock v. The Sea Bird*, 3 Fed. Rep. 573. It is sufficient if it sets forth the offense in the words of the statute which creates it, with sufficient certainty as to the time and place of its commission. *U. S. v. The Neurea*, 60 U. S. 19 How. 94 (15 L. ed. 532).

Prohibition of petroleum on passenger vessels. In an action to recover penalties for the violation of section 4472, Revised Statutes, which prohibits the carrying of petroleum and other dangerous articles upon passenger vessels, although there was an all-rail route over which the petroleum might have been transported, yet, if the rates charged for transportation by rail were so high as to amount to a prohibition of the traffic in that article, it was held that it was not a practicable mode of transportation within the meaning of the section. *United States v. Wise* (Ohio) 7 Fed. Rep. 190. Same case, 6 Fed. Rep. 41. The word *practicable* in that section, is used in a commercial or business, and not in a mechanical, sense. *Id.* 191.

Injury to employes. The remedy given by section 4493 for an injury to an employe on a steam vessel is merely cumulative, and does not exclude the right to any other remedy for such injury which may be given by the general admiralty law. *The Clatsop Chief* (Or.) 8 Fed. Rep. 767.

although bound from and to ports in the State of California, was without the State and on a highway of Nations, and therefore "engaged in commerce with foreign Nations, and as such she and the business in which she was engaged were subject to the regulating power of Congress."

This case falls within the language of the statute (§§ 4399, 4400, Rev. Stat.), defining what vessels shall be subject to the provisions of title 52.

The City of Salem is a vessel propelled by steam. On the occasion in question she was navigating the Wallamet River, a navigable water of the United States (*Hatch v. Wallamet Iron Bridge Co.* 7 Sawy. 136; *Wallamet Iron Bridge Co. v. Hatch*, 9 Sawy. 648), which "is a common highway of commerce and open to general and competitive navigation."

Unless the Act of Congress, so far as the carriage of the passengers in question is concerned, is unconstitutional, the vessel is liable for the penalties prescribed for carrying more passengers than the law allows.

In my judgment, the solution of this question depends wholly on whether the regulation limiting the number of passengers which a steamboat may carry over a navigable water of the United States, between ports of the same State, is necessary to maintain this highway of foreign and interstate commerce in a safe and desirable condition, for the use of vessels and persons engaged in the same.

The power to make this regulation cannot, in my judgment, be derived from the grant of admiralty jurisdiction. The admiralty jurisdiction of the United States is a part of its judicial power and not its legislative. It extends "to all cases of admiralty and maritime jurisdiction." U. S. Const. art. 3, § 2.

And while it does not authorize Congress to create admiralty cases, yet if in the exercise of its power derived from other clauses of the Constitution it should do so (as the power to regulate commerce), the grant of judicial power would extend to them and include them; because of their nature and constituents they would be cases of admiralty and maritime jurisdiction.

Take this case as an illustration: The City of Salem is alleged to have violated a Law of the United States, to which a penalty is affixed and made a lien on the vessel. The act was committed on a navigable water of the United States and the admiralty had jurisdiction of the case—to hear and determine it. But if Congress had not the power to pass the law in question, the suit must fail, because no wrong was in fact committed.

The power to make this regulation must be derived, if at all, from the power granted to Congress "to regulate commerce with foreign nations and among the several States." U. S. Const. art. 1, § 8.

In *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 724 [18 L. ed. 99], *Mr. Justice Swayne*, speaking for the court, said: "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all navigable waters of the United States, which are accessible from a State, other than those in which they lie. For this purpose they are the

public property of the Nation and subject to all the requisite legislation of Congress."

And in the case of *The Daniel Ball*, 77 U. S. 10 Wall. 564 [19 L. ed. 1001], *Mr. Justice Field*, speaking for the court, said: The power to regulate commerce "authorizes appropriate legislation for the protection of either interstate or foreign commerce; and for that purpose such legislation as will insure the convenient or safe navigation of all navigable waters of the United States, whether that legislation consists in regulating the removal of obstructions to their use, in prescribing the form and size of vessels employed upon them, or in subjecting the vessels to inspection and license in order to insure their proper construction and equipment."

That in the case of steamboats, the inspections of their hulls and boilers, the licensing of their pilots and engineers, the carrying of prescribed lights, and the giving and answering of prearranged signals when meeting and passing, do materially increase the safety and convenience of navigable water, considered as a highway of commerce, there is no doubt, and therefore there is no question that Congress may make regulations on these subjects, which are applicable to vessels engaged in intrastate commerce as well as foreign or interstate commerce.

The power to regulate the navigation of the waters of the United States being comprehended in the grant of power to regulate commerce, not merely as an incident but a part of it, Congress has power "to make all laws which shall be necessary and proper for carrying into execution" such power. U. S. Const. art. 1, § 8.

In *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 421 [4 L. ed. 579], *Chief Justice Marshall* said: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional." And again (*Id.* 423): "But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

Upon this exposition of the law, is this regulation, limiting the right of steamboats to carry passengers on a navigable water of the United States, to the number prescribed by the certificate of inspection of the local inspectors, a necessary and proper regulation of navigation, when such boat is engaged in carrying passengers on such water between different ports of the same State, only?

That it is so, is at least not so apparent as in the instances mentioned, in which it appears there is no doubt on the subject.

In what particular a boat carrying more passengers than allowed by her certificate of inspection or special permit affects the safety or convenience of the highway has not been suggested by counsel. That the passengers so carried are inconvenienced, and it may be endangered, is likely. But the question is, How is the safety and convenience of the highway thereby unfavorably affected as to other vessels

engaged in interstate or foreign commerce thereon? If it was shown that an overloaded boat was more difficult to handle or more likely to become unmanageable or burst her boiler or steam chest, the danger resulting to other vessels on the highway would be apparent. But there is no proof on this subject, and I am not satisfied that it is within the limits of judicial knowledge.

One thing is probable: if a steamboat is allowed to carry passengers between the ports of any State, over the navigable waters of the United States, in excess of the number prescribed in its certificate of inspection, the boats running between said ports, and from or beyond, to ports of another State, will be compelled to do the same thing or substantially abandon what may be called their way business. For anyone can understand that a vessel can carry 200 passengers much cheaper per head than another one of the same character and dimensions can carry half the number. The result would be to nullify the regulation or make its enforcement difficult in cases where it is admitted to be legal and presumably beneficial.

It may be said that when it is determined that the carrying of passengers between different ports of the same State is not within the power of Congress to regulate, the State will make proper regulations on the subject. But it is not probable that any state regulation on

this subject would be either effective or well enforced.

Congress has expressly declared (§§ 4399, 4400, Rev. Stat.) that this regulation shall apply to steamboats carrying passengers over any part of a navigable water of the United States. The regulation, when applied to the carriage of passengers between ports of the same State, is a beneficial one, and its enforcement tends to the safety of human life. Without it, the excursion boats, which on festive occasions ply between ports of the same State, would often become floating coffins. If this regulation, as applied to vessels engaged in intrastate commerce, is really calculated to promote the safety and convenience of interstate and foreign commerce, in any appreciable degree, the enactment of it is within the discretion of Congress. And while I am not as clear in my mind on this point as I would like to be, I have an impression, which I feel more certainly than I can express, that the regulation in its effect and operation does materially tend to maintain the safety and convenience of this highway of interstate and foreign commerce—the Wallamet River.

On this view of the matter I do not feel warranted, sitting here in the district court, in declaring this Act of Congress unconstitutional. It is a proper case to go to the supreme court.

The exception is disallowed.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI.

UNITED STATES

v.

George K. TOZER.

(....Fed. Rep.....)

1. An indictment under section 2 of the Interstate Commerce Act, for "unjust discrimination," need not aver by what particular device the defendant man-

aged to discriminate in favor of a particular shipper.

2. Counts under the third section, for "undue and unreasonable preference" and for "undue or unreasonable prejudice or disadvantage," need not allege that the service for which a different rate was charged was rendered "under substantially similar circumstances and conditions"—those words being only

NOTE.—*Interstate Commerce Act construed.* The purpose of the Interstate Commerce Act requires that when circumstances will fairly admit of it, charges to all points for like services should be made relatively equal. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703. Discrimination must consist in the doing for or allowing to one party or place what is denied to another; it cannot be predicated of action which in itself is impartial. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 704. Less desirable traffic must be accepted upon reasonable terms, as well as that which is more desirable. *Riddle v. New York L. E. & W. R. Co.* 1 Inters. Com. Rep. 787. "Goods of like description" and "goods of same description" refer not to the contents of the parcels, but to the parcels themselves—that is, like or different for the purpose of carriage. *Great Western R. Co. v. Sutton, L. R. 4 H. L. 226*; *Nitshell etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & McN. 39; *Merry v. Glasgow R. Co.* 4 R. & Can. Traf. Cas. 383. To render a preference of one over another unlawful, under the Act to Regulate Commerce, it is not necessary that it should be accomplished by any "device"; and it is equally true that the ingenuity of man cannot invent a "device" for the perpetration of an unlawful preference on the part of a carrier engaged in interstate commerce, without incurring the penalties prescribed by the statute. *Scofield v. Lake Shore & M. S. R. Co.* 2 Inters. Com. Rep. 67. The offense under the second section of the Act consists in charging, demanding, collecting or receiving by a common carrier to which the Act applies, from any person or persons, a greater or

less compensation for service rendered or to be rendered, in the transportation of persons or property subject to the Act. *Griffec v. Burlington & M. R. R. Co.* 2 Inters. Com. Rep. 194. So, a discount allowed by a railroad company where consignments of coal in one year shall amount to 30,000 tons or upwards is an unjust discrimination. *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363. A common carrier by rail, to which property is offered for transportation, cannot in any indirect manner and by refusal to perform obligations imposed by law upon it, enforce its contracts, but must for that purpose resort to the customary remedies. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 102. Nor can a common carrier, as a reason for refusal to afford to another common carrier the customary reasonable and equal facilities for the interchange of traffic, assign the fact that such other common carrier supplies no public necessity, the public having been fully accommodated without it. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 Inters. Com. Rep. 103. The provisions of section 1, requiring charges to be reasonable and just, and of section 2, forbidding unjust discrimination, apply when exceptional charges are made under section 4, as they do in other cases. *Re Southern R. & Steamship Asso.* 1 Inters. Com. Rep. 278.

Rates must be reasonable, and be fairly adjusted. Whether railroad companies combine or act separately in making rates and charges is not important; the essential requirement is that however made they shall be reasonable of themselves, and so fairly ad-

found in the fourth section, in relation to greater charge for shorter haul.

3. **A count under the third section** is sufficient if it shows with requisite certainty by any apt language that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage.

4. **A count under the third section**, charging the subjection of a certain locality to an undue prejudice, by charging its merchants a higher rate for transporting property to a certain point than was exacted from residents of a certain other locality, must show with precision that the lower rate was for transportation between the same points as the higher rate.

5. **A count under the sixth section**, alleging the allowance of a rate less than the established and published rate which "was in force on that day," sufficiently negatives the inference that the rate might have been reduced by the carrier without notice, as permitted by that section.

6. **When an agent of a railroad is prosecuted** under the Interstate Commerce Act, it is not necessary either to allege or prove that the particular unlawful act complained of was done under authority conferred by its principal or by its direction; it is sufficient to show that the accused was in fact an agent of a railroad subject to the Act, and that the wrong was committed under color of his office or agency.

justed as to be reasonable in their relations to each other and in their results. *New Orleans Cotton Exchange v. Cincinnati etc. R. Co.* 2 Inters. Com. Rep. 289. Rates should be so relatively reasonable as to protect communities and business against unjust discrimination. *Boards of Trade Union v. Chicago etc. R. Co.* 1 Inters. Com. Rep. 608. The relative reasonableness of rates on shipments from western points to cities on the Atlantic seaboard is to be determined by all the circumstances and conditions that affect the traffic to the respective points between which the rates are questioned, and not solely by one standard of comparison. *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754. Making of freight rates may be affected by a variety of practical considerations, as: the sparsely settled character of the country; the articles of freight upon which the railroad must depend as compared with other roads transporting similar commodities through more populous communities; the relation of local and through freights; the mode of shipping and delivering, as wheat from elevators, and wheat in sacks; and expenses of hauling empty cars. *Evans v. Oregon R. & Nav. Co.* and *Reed v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641; *Hayes v. Pennsylvania Co.* 12 Fed. Rep. 309; *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571; *Mo. Pac. R. Co. v. Texas & P. R. Co.* 30 Fed. Rep. 2; *Girardot v. Midland R. Co.* 4 R. & Can. Traf. Cas. 291; *Greenock v. S. E. R. Co.* 2 Nev. & McN. 319; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122. A variety of practical considerations must enter into making of freight rates and determine to a great extent whether rates are reasonable. *Evans v. Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641. The question of the reasonableness of rates is always a perplexing one; a great variety of considerations are necessarily involved in each instance; theory and conjecture merely are not enough; a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than approximation. *Howell v. New York etc. R. Co.* 2

2 INTER S.

(February 6, 1889.)

ON demurrer to an indictment in five counts, under the Interstate Commerce Act. *Demurrer overruled, except as to one count.*

The case is fully stated in the opinion.

Messrs. Thomas J. Portis and W. A. Martin for defendant, for the demurrer.

Messrs. Thomas P. Bashaw, U. S. Dist. Atty., and Chas. Claffin Allen for the United States, *contra*.

Thayer, D. J., delivered the opinion of the court:

This is an indictment containing five counts founded on the Interstate Commerce Act approved February 4, 1887. 24 U. S. Stat. at L. p. 379.

A demurrer has been filed to the several counts which raises the various questions to be decided.

The first count charges the defendant, who is alleged to be an agent of the Missouri Pacific Railway Company, with unjust discrimination in that he charged the Hayward Grocery Company or suffered and permitted it to be charged at the rate of forty-six cents per 100 pounds on sugar shipped from Hannibal, Missouri, to Helper, Kansas, over the line of the Missouri Pacific Railway, whereas at or about the same date he charged the Chicago, Burlington & Quincy Railroad for transportation of sugar between the same points and over the same line, at the rate of only thirty-four cents per 100 pounds.

The particular objection made to this count appears to be that the count does not show whether the discrimination was accomplished by granting to the Chicago, Burlington &

Inters. Com. Rep. 162. The length and character of the haul, the costs of service, the volume of business, the conditions of competition, the storage capacity and the geographical situation of the different terminal points are all elements of importance bearing upon the relative reasonableness of the respective charges for transportation. *Boston Chamber of Commerce v. Lake Shore & M. S. R. Co.* 1 Inters. Com. Rep. 754. *A prima facie* case of unreasonableness of rates is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier. *Howell v. New York etc. R. Co.* 2 Inters. Com. Rep. 162.

Difference in rates; when justified. Different rates may be charged where shippers own private side tracks and return cars more promptly. *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 11 App. Cas. 102. A difference in the cost of service will justify a carrier in making a reasonable difference in its rates. *Chicago & A. R. Co. v. People*, 67 Ill. 11-24; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 11 App. Cas. 107, 36 Am. & Eng. R. R. Cas. 283; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Ransome v. Eastern Counties R. Co.* 2 Nev. & M. 202; *Girardot v. R. Co.* 4 R. & Can. Traf. Cas. 291; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 11 App. Cas. 101, 102; *Ransome v. Eastern Counties R. Co.* 1 Nev. & M. 63, 1 C. B. N. S. 437, 26 L. J. C. P. 91; *Foreman v. Great Western R. Co.* 2 Nev. & M. 202; *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & M. 39; *Beilsdyke Coal Co. v. North British R. Co.* 2 Nev. & M. 105; *Bell v. London etc. R. Co.* 2 Nev. & M. 185; *Holland etc. R. Co. v. Festiniog R. Co.* 2 Nev. & M. 287; *Lotspeich v. Central R. & Bigg. Co.* 73 Ala. 306, 18 Am. & Eng. R. R. Cas. 490; *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329; *Providence Coal Co. v. Providence & W. R. Co.* 1 Inters. Com. Rep. 363. The difference in rates must bear some proportion to the difference of the cost to carriers. *Re Harris & Cocker mouth, & W. R. Co.* 1 Nev. & M. 97-102, 3 C. B. N. S. 633; *Garton v. Bristol & E. R. Co.* 1 Nev. & M. 227, 6 C. B. N. S. 639-655; *Nicholson v. Great Western R. Co.*

Quincy Railroad a "special rate, rebate or drawback" or by some other device.

The point is obviously not well taken, as section 2 of the Act, under which the count is framed, makes it utterly immaterial how the discrimination was effected, whether by a special rate accorded to one shipper and denied to another, or by a "rebate, drawback or other device." The offense defined by the second section consists in an "unjust discrimination" no matter how it is effected, whether directly or indirectly; and for that reason it is unnecessary to aver in an indictment by what particular device the defendant managed to discriminate in favor of a particular shipper.

The second, third and fourth counts of the indictment are founded on the third section of the Act, which declares it to be unlawful for a carrier subject to the provisions of the Act, "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, . . . in any respect whatever, or to subject any particular person, company, etc. . . . to any undue or unreasonable prejudice or disadvantage, in any respect whatever."

The second count charges that defendant willfully and unlawfully gave an undue and unreasonable preference and advantage to the Chicago, Burlington & Quincy Railroad Company in that he charged the Hayward Grocery Company at the rate of forty-six cents per hundred for the transportation of one barrel of sugar from Hannibal, Missouri, to Helper, Kansas, and at or about the same time only charged

the Chicago, Burlington & Quincy Railroad Company at the rate of thirty-four cents per 100 for the transportation of two barrels of sugar between the same points.

The third count is of the same tenor as the second, except that it charges the defendant, by the same Act mentioned in the second count, with subjecting the Hayward Grocery Company "to an undue and unreasonable prejudice and disadvantage."

The fourth count charges the defendant with subjecting a locality, to wit: the City of Hannibal, to an undue and unreasonable prejudice and disadvantage, by demanding and collecting of divers merchants doing business in Hannibal, greater compensation for transporting property from Hannibal to Helper, Kansas, than he demanded and collected of the Chicago, Burlington & Quincy Railroad, "for the transportation of property, transported for divers persons in the City of Chicago . . . over the lines of railroad of said Chicago, Burlington & Quincy Railroad Company and said Missouri Pacific Railway Company to said Town of Helper."

It is insisted that the second, third and fourth counts are each bad, because the pleader does not aver, in the language of the statute, that the service referred to as having been rendered for the parties named, and charged for at a different rate, was rendered "under substantially similar circumstances and conditions."

If these counts were framed under the fourth section, for violation of the long and short haul clause of the Act, in which section the words

1 Nev. & M. 185; Denaby Main Colliery Co. v. Manchester, S. & L. R. Co. L. R. 11 App. Cas. 122; Baxendale v. R. Co. 1 Nev. & M. 202; Ransome v. Eastern Counties R. Co. 1 Nev. & M. 69. Less rates may be charged for furnishing freight in fully loaded trains at regular intervals. Nicholson v. Great Western R. Co. 5 C. B. N. S. 366. A difference in charge is justified where the transportation is over steep grades. Bellsdyke Coal Co. v. North British R. Co. 2 Nev. & M. 105; Nitshill Coal Co. v. Caledonian R. Co. 2 Nev. & M. 39. A difference in bulk will justify difference in rates. Lotspeich v. Central R. & Bkg. Co. 73 Ala. 306. Or difference in expense of loading and unloading. Chicago & A. R. Co. v. People, 67 Ill. 26. Or when return loads could not be had. Chicago & A. R. Co. v. People, 67 Ill. 24; Girardot v. Midland R. Co. 4 R. & Can. Traf. Cas. 291. Railroads have a right to grant special privileges to religious teachers. *Re Religious Teachers*, 1 Inters. Com. Rep. 21.

Classification. There is nothing illegal or wrongful in a railroad company making a rate for immigrants as a class, and declining to give the same rate to others for whom different accommodations are furnished. *Savery v. New York Cent. & H. R. R. Co.* 2 Inters. Com. Rep. 211. The difference in classification adopted by the "western classification" (which applies to business from the Pacific Coast to all points west of the Missouri River) between "raisins" and "dried fruits" is, in connection with the different rules of the classifications as to mixed-car loads, an unreasonable discrimination. *Martin v. Southern Pac. R. Co.* 2 Inters. Com. Rep. 1. Rates established for the purpose of keeping up a line of road material (as railroad ties) for which the road itself has use, or to keep the price thereof low for its own advantage, cannot be justified. *Reynolds v. Western N. Y. & P. R. Co.* 1 Inters. Com. Rep. 685. The classification of railroad ties in a different class from other lumber, thus imposing a higher rate upon ties than upon other lumber, is an unjust discrimination. *Reynolds v. Western N. Y. & P. R. Co.* 1 Inters. Com. Rep. 685. Classification of coals as gas coal and common coal is, under the facts of the case, improper. *Nitshill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & M. 39.

Preference as to localities. Preferences to localities in furnishing facilities or rates for the shipment of goods are prohibited. *Hozier v. Caledo-*
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nian R. Co. 17 Sess. 702, 24 L. T. 339, 1 Nev. & M. 27; *Re Jones & Eastern Counties R. Co.* 3 C. B. N. S. 718, 1 Nev. & M. 45; *Nicholson v. Great Western R. Co.* 5 C. B. N. S. 366; *Richardson v. Midland R. Co.* 4 R. & Can. Traf. Cas. 1; *Girardot v. Midland R. Co.* 4 R. & Can. Traf. Cas. 291. A railway company must give equal facilities and similar rates to all persons in receiving and delivering goods. *Cooper v. London & S. W. R. Co.* 4 C. B. N. S. 738, 27 L. J. C. P. 324, 1 Nev. & M. 185; *Bell v. London etc. R. Co.* 2 Nev. & M. 185. To constitute an unreasonable preference, there must be inequality in the charge for traveling over the same line, or the same portion of the line. *Catherham R. Co. v. London, B. & S. C. R. Co.* 1 C. B. N. S. 410, 1 Nev. & M. 32; *Finnie v. Glasgow & S. W. R. Co.* 2 Macq. 177, 26 L. T. 14. A tariff naming a rate from one locality lower than that enjoyed by its neighbor, when the circumstances are the same, tenders a preference or advantage to the first; and when any shipper is damaged by the exaction of an additional burden the preference becomes undue and unreasonable, unless it can be justified upon some sound and substantial ground. *Re Tariffs of the Transcontinental Lines*, 2 Inters. Com. Rep. 203. What amounts to an undue preference is a question of fact and not of law. *Diphwys Casson Slate Co. v. Festiniog R. Co.* 2 Nev. & M. 73, 32 L. T. N. S. 271; *Watkinson v. Wrexham etc. R. Co.* 3 Nev. & M. 5; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 3 Nev. & M. 441. When a railroad company in establishing its charges on the different branches of its road so adjusted them as to divert trade and business to one locality, such unreasonable preference for one place is not excused by the fact that the rates are the result of competition with other carriers. *Raymond v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 627. Rates that are just and reasonable from selected manufacturing points through the entire territory east of Missouri River and west of the Atlantic seaboard, are *prima facie* just and reasonable from all other points in the same territory. *Re Tariffs of the Transcontinental Lines*, 2 Inters. Com. Rep. 203. The Commission is not willing to determine the relative reasonableness of rates at many stations, and in a large extent of territory, upon the mere face of tariffs, and without further proof. *Spartanburg Board of Trade v. Richmond & D. R. Co.* 2 Inters. Com. Rep. 193.

Distributing trade centers not entitled to preference.

"under substantially similar circumstances and conditions" are used to describe the offense—the point made would be well taken.

But in framing a count under the third section it is not necessary to use the language last quoted. A count under the third section is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage. The second and third counts of the present indictment clearly show that defendant charged and received of the Hayward Grocery Company a greater rate of compensation than he charged and received of the Chicago, Burlington & Quincy Railroad Company, for transporting the very same class of goods between the same points and over the same route. These counts are sufficient in law although the pleader does not aver that the service rendered to each party was rendered "under substantially similar circumstances and conditions." The fact that it was so rendered sufficiently appears without that averment.

The fourth count, in my opinion, lacks the requisite precision of statement, and as it is demurred to on that ground, as well as on the ground last mentioned, it will be adjudged insufficient. It is uncertain whether the pleader intended to charge that defendant demanded of merchants doing business in Hannibal greater compensation for the transportation of goods from that city to Helper than he demanded of

the Chicago, Burlington & Quincy Railroad Company for the transportation of goods between the same points, or greater compensation than he demanded of the latter company for transporting goods from Chicago to Helper. The fourth count appears to be susceptible of either construction and for that reason, if for no other, the demurrer ought to be sustained.

The fifth count of the indictment is based on the sixth section of the Act and alleges, in substance, that the defendant on June 15, 1887, as agent of the Missouri Pacific Railway Company, charged and collected of the Chicago, Burlington & Quincy Railroad a less rate of compensation for the transportation of goods from Hannibal to Helper, than the "established and published" rate of freight charges over the Missouri Pacific Railway between those points.

To this count the objection is made that it is not averred that the Missouri Pacific Railway had not, on that date, reduced its published freight rate between Hannibal and Helper, as it was privileged to do under the sixth section, without notice.

This objection is not tenable for the reason that the pleader does allege that a given freight rate of forty-six cents per 100 pounds between the two points last named, had been "established and published" prior to June 15, 1887, and that said rate "was in force on that day" when the unlawful charge is said to have been made. This averment deprives the objection of the force it would otherwise have. It shows

Trade centers, or large commercial towns, are not, as a matter of right, entitled to have more favorable rates than the smaller towns for which they form distributing centers; and if carriers shall give to such smaller towns rates as favorable as to the larger, the Commission will not interfere. *Martin v. Chicago, B. & Q. R. Co. ante, 32.*

It is not ground of complaint against a railroad that it equalizes its rates as between small and large towns, even though the effect may be prejudicial to the large towns which before had been specially favored. *Crews v. Richmond & D. R. Co. 1 Inters. Com. Rep. 703.* When the reasonableness of rates is in question, charges on long through lines cannot offer a just basis for comparison with local rates for relatively short distances. *Crews v. Richmond & D. R. Co. 1 Inters. Com. Rep. 703.* The principles laid down in this case restated and reaffirmed in *Martin v. Chicago, B. & Q. R. Co. ante, 32.* The apportionment of rates to different parts of a through line do not determine the charge to the public, but may be significant on the question of reasonable rates for the whole distance. *Brady v. Pennsylvania R. Co. ante, 78.*

Jurisdiction and power of Commission. The Act includes only such carriers as use a railway or a railway and water craft "under common control, management or arrangement for a continuous carriage or shipment" from one State to another. *Ex parte Kocher, 1 Inters. Com. Rep. 28; Mo. & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co. 1 Inters. Com. Rep. 607.* So far as a railroad whose line is entirely within one State issues through bills of lading to points in other States and makes through rates, it falls under the provisions of the Act. *Re Annapolis, W. & B. R. Co. 1 Inters. Com. Rep. 315.* The word "line" means a physical line, not a business arrangement; and one line of a road may be part of several lines. *Boston & A. R. Co. v. Boston & L. R. Co. 1 Inters. Com. Rep. 571.* That the ultimate destination of freight delivered to a carrier, for transportation from one point to another in the same State, is in another State does not bring the transportation by such carrier within the jurisdiction of the Commission. *Mo. & I. R. Tie & Lumber Co. v. Cape Girardeau & S. W. R. Co. 1 Inters. Com. Rep. 607.* The power of the Commission to relieve from hardships under the Act is strictly limited. *Re Iowa Barb Steel Wire Co. 1 Inters. Com. Rep. 605.* It has no power to require adoption

of an equal and uniform mileage basis. *La Crosse Manufacturers & J. Union v. Chicago, M. & St. P. R. Co. ante, 9.* Damages will not be awarded by the Commission where defendants are entitled to have the amount assessed by a jury. *Riddle v. N. Y. L. E. & W. R. Co. 1 Inters. Com. Rep. 787; Heck v. East Tenn. V. & G. R. Co. 1 Inters. Com., Rep. 775.* A claim for damages for ejection of passenger from a car will not be entertained; he will be left to his remedy in the courts. *Council v. Western & A. R. Co. 1 Inters. Com. Rep. 638.* The Act does not afford a remedy for transactions occurring before it took effect. *Ottinger v. Southern Pac. R. Co. 1 Inters. Com. Rep. 607; Traders & T. Union v. Philadelphia & R. R. Co. 1 Inters. Com. Rep. 371; Holbrook v. St. Paul, M. & M. R. Co. 1 Inters. Com. Rep. 323.* The Commission will not express its opinion in a case not within its jurisdiction. *Re Iowa Barb Steel Wire Co. 1 Inters. Com. Rep. 605.* A collateral inquiry raised by the evidence will not be determined until the parties have been furnished with an opportunity to be heard in a proceeding brought under the statute. *Business Men's Assn. v. Chicago & N. W. R. Co. ante, 48.* Where the parties neither by evidence nor argument supply the Commission with information as to the question propounded it will not be decided. *Rice v. Louisville & N. R. Co. 1 Inters. Com. Rep. 722.*

Complaint. The person aggrieved should complain in his own name; complaint by a ticket broker will not be entertained. *Ottinger v. Southern Pac. R. Co. 1 Inters. Com. Rep. 607.* The complainant need not necessarily have a pecuniary interest to be entitled to a hearing. *Boston & A. R. Co. v. Boston & L. R. Co. 1 Inters. Com. Rep. 571.* The burden of proving the exaction of unreasonable rates is on petitioner. *Harding v. Chicago etc. R. Co. 1 Inters. Com. Rep. 375.* A complaint, of which no reasonable ground for investigation appears, will not be filed. *La Crosse Manufacturers & J. Union v. Chicago, M. & St. P. R. Co. ante, 10.* The Act contemplates that a carrier complained of for charging exorbitant rates may change rates before a hearing. In such case the petition may be dismissed. *Fulton v. Chicago etc. R. Co. 1 Inters. Com. Rep. 375.* The burden is on the carrier to justify any departure from the rules prescribed by the statutes. *Re Southern R. & Steamship Assn. 1 Inters. Com. Rep. 278.*

that no reduction in the established rate had taken place, and that the rate accorded to the Chicago, Burlington & Quincy Railroad was not given in conformity with a general reduction in freight rates, but was an advantage allowed to it over other customers.

A further and final objection made to the whole indictment is that it does not show that the defendant, as agent of the Missouri Pacific Railway Company, had any authority to do the acts charged in the various counts.

This objection does not strike me with any force.

It is alleged in each count that defendant was agent of the Missouri Pacific Railway Company and had general charge of its freight office at Hannibal, Missouri.

Section 10 of the Interstate Commerce Act renders any agent of a railroad company that is subject to the provisions of the Act, amenable to the penalties denounced therein, if he, either alone or with any other person or cor-

poration, willfully does any of the acts prohibited or declared to be unlawful.

When an agent of a railroad is prosecuted under the statute for an unlawful act, it is not necessary, in my opinion, either to allege or prove that the particular unlawful act complained of was done under authority conferred by his principal or by its direction. It is sufficient to show that the accused was in fact an agent of a railroad subject to the provisions of the Act, and that the wrong was committed under color of his office or agency. Whether in the particular matter complained of the agent exceeded his power, is certainly immaterial in a prosecution against the agent. If it has any bearing on the question at issue, the fact that the agent has exceeded his powers in violating the law ought to aggravate the offense rather than excuse it.

The demurrer is overruled as to all the counts except the fourth, as to which it is sustained, for the reasons before stated.

SOUTH CAROLINA SUPREME COURT.

E. STERNBERGER, *Appt.*,

v.

CAPE FEAR & YADKIN VALLEY R. CO., *Resp't.*

(From Lawyers' Reports, Annotated.)

(....S. C....)

The South Carolina Railroad Commission has no jurisdiction of a complaint against a railroad partly in another State, for charges for transportation partly in such other State—such transportation being interstate commerce although part of a transportation, by connecting lines, between points both in South Carolina.*

(Decided October 30, 1888.)

APPEAL by plaintiff, from a judgment of the Common Pleas Circuit Court of Marlborough County (Hudson, J.), dismissing, on appeal from the State Railroad Commission, a complaint to the Commission which had been sustained by it. *Affirmed.*

The facts are stated in the opinion.

Mr. Jos. H. Earle, Atty-Gen., for appellant.

Mr. Knox Livingston for respondent.

Simpson, Ch. J., delivered the opinion of the court:

The plaintiff (appellant) who lives at Tatum, Marlboro County, had consigned to him from Charleston, S. C., a ton of commercial fertilizers. The railroad route from Charleston to Tatum, over which this fertilizer was transported, was first over the Northeastern Railroad and the Cheraw and Darlington Railroad to Cheraw, both roads being entirely in South Carolina; thence from Cheraw over the Cheraw & Salisbury Railroad to Wadesboro, in North Carolina, this road being partly in this State and terminating in North Carolina, at Wadesboro;

thence over the Carolina Central Railroad, being entirely in North Carolina, to Shoe Heel, in North Carolina; thence over the Cape Fear & Yadkin Valley Railroad, principally in North Carolina, to Tatum, in South Carolina, which point is about six miles from Bennettsville, S. C., where the railroad terminates.

The freight charged to plaintiff on his ton of fertilizer to Tatum was \$4.40, while the freight to Bennettsville, six miles further, on the same article, was only \$4. Under these circumstances, the plaintiff complained to the railroad commission that the defendant was violating section 1443, General Statutes, which forbids common carriers to charge more freight on the same goods for transporting the same a shorter than a longer distance in one continuous carriage.

This complaint was investigated by the railroad commission, the defendant resisting the complaint upon the grounds: (1) that Bennettsville was a competitive terminal point, and therefore exempt from the provisions of section 1443, General Statutes, by the terms of the proviso to said section; and (2) that the railroad state commission had no jurisdiction of the matter, inasmuch as it involved interstate commerce. These defenses were overruled by the railroad commission, and the defendant was required to correct its rates, and to refund the excessive charges. From this judgment the defendant appealed to the Circuit Judge of the Fourth Circuit, who, after full testimony upon the question whether Bennettsville was a competitive terminal point, sustained defendant's appeal upon both the grounds taken; holding that Bennettsville, being a competitive terminal point, was exempt from the operation of section 1443, General Statutes, and also that the matter involved was interstate commerce, and therefore beyond the jurisdiction of the state railroad commission. He consequently decreed and adjudged that the judgment of the commission be reversed.

From this decree and judgment the plaintiff has appealed to this court, assigning error to the Circuit Judge in overruling the two grounds

*See *Lehigh Valley R. Co. v. Commonwealth of Pa.*, appended to report of *Delaware & Hudson Canal Co. v. Commonwealth of Pa.* 1 L. R. A. 232.

upon which the judgment of the commission was based.

We will take up these grounds in the inverse order in which they were discussed by the Circuit Judge. And, first, did the railroad commission have jurisdiction?—or did the matter involve or belong to interstate commerce, and thereby deprive the state commission of jurisdiction?

The word *commerce* is a term of broad signification. It embraces considerably more than the mere bargain and sale of goods and merchandise and other property between individuals. Yes, it includes all the instruments by which it may be conducted. It embraces transportation by railroads, steamboats, ferries, etc., and all common carriers. It may be carried on between individuals in the same State, or over railroads lying in the same State. It is then internal commerce, and is under the control of state legislation. Or it may be conducted and engaged in between individuals living in different States, or transported over railroads lying in and running through different States. It is then interstate commerce, and its regulation belongs to Congress.

Now, here was a purchase by the plaintiff, a citizen of South Carolina, of a ton of commercial fertilizer, from a citizen in Charleston, both of the same State. Thus far, this transaction belonged to internal or domestic commerce, and would be subject to state control, if any. But the plaintiff lived at Tatum, in Marlboro County, some distance from Charleston, and to reach him his fertilizer had to be transported by railroads to him; and, as it turns out, by railroads, some entirely in South Carolina, some in North Carolina, and others partly in both.

Now, while it is admitted that our state railroad commission has jurisdiction over all railroads commencing and terminating in the State, and over all transportation between points within the State, yet it is equally true that it has no jurisdiction over transportation running from the State into another State, or from another State into this State, or running entirely in another State. Transportation like that suggested in the two first classes mentioned would be interstate commerce, while that in the last class would be the domestic commerce of the State in which it might be conducted.

Applying these principles to the case in hand, it seems that only two of the railroads over which this ton of fertilizer was transported commence and terminate within the limits of the State—the Northeastern and the Cheraw & Darlington; and if the question here had originated out of the freights of these two roads only, one or both, then there could have been no doubt as to the jurisdiction of the commission. But the Cheraw & Salsbury road is partly in this State and partly in North Carolina, and the Carolina Central road, from Wadesboro to Shoe Heel, is entirely in North Carolina, and then the Cape Fear & Yadkin Valley is partly in the two States. Our com-

mission has no right to adjudicate questions of freight on roads like these last three, for the simple reason that they are not South Carolina roads.

Suppose that the plaintiff had purchased this ton of fertilizer at Cheraw, and had then consigned it to himself at Wadesboro, in North Carolina; could our railroad commission have regulated the freight on that transportation? We think not. Or suppose he had purchased at Wadesboro, and shipped to Shoe Heel; certainly upon that transportation our commission could have taken no jurisdiction, let the freight have been as exorbitant as possible. Neither would shipping from Shoe Heel to Tatum, the road running from North Carolina into our State, have given the commission jurisdiction. See our own case of *Railroad Commissioners v. Charlotte Railroad Company*, 22 S. C. 220, where this court said:

“Any regulation of freights for the transportation from Columbia, in this State, to points in the State of North Carolina, by the statutes of this State is beyond the power of the State, because of its being an invasion of the power exclusively vested in Congress by the Constitution of the United States.” See also decision of *Mr. Justice Field* in the case of *Pacific Coast Steam-Ship Co. v. California R. Comrs.* 18 Fed. Rep. 10 (decided September 17, 1883, Dist. Ct. Cal.); *Lord v. Goodall N. & P. SteamShip Co.* 102 U. S. 541 [26 L. ed. 224].

We think this ton of fertilizer, in its transportation from Charleston to Tatum, has practically taken the course indicated. First it reached Cheraw on South Carolina roads; then it was substantially shipped anew into North Carolina, halting at Wadesboro, to be reshipped to Shoe Heel; and thence back into South Carolina to Tatum; the route being partly on roads over which the freight thereon would be subject to the supervision of the commission if the charges complained of had been made there, and partly on roads over which the commission has no jurisdiction. The charges complained of arising on settlement with one of these last roads, the judgment of the Circuit Judge is sustained, upon the ground that the railroad commission was without jurisdiction.

Having reached the conclusion above, it is needless to discuss or adjudicate the other question as to whether Bennettsville is a competitive terminal point in the sense of the proviso to section 1443, and therefore exempt from said section. In fact, if the commission had no jurisdiction, the case was not properly before that commission, and the question suggested could neither have arisen before it, nor have been legally considered by it. We do not regard said question as before us. We therefore pronounce no judgment thereon.

It is the judgment of this Court that the judgment of the Circuit Judge be affirmed, upon the ground hereinabove given.

McIver and McGowan, JJ., concur.

THE INTERSTATE COMMERCE COMMISSION.

MICHIGAN CONGRESS WATER CO.

v.

CHICAGO & GRAND TRUNK R. CO.

(No. 128.)

I. Where a complaint is made against the reasonableness of through rates agreed upon by several connecting lines, it is necessary to make all of such connecting lines parties defendant. Citing and affirming the rule laid down on this subject in 1 Inters. Com. Rep. 621, 631, 773, 1 Inters. Com. Com. Rep. 199, 237, 490.

II. Unauthorized declarations of a depot agent, implying that a tank car, which has just returned from one long journey, is in a safe condition to be loaded and started on another long run, are not binding upon the railway company.

III. After a freight tank car has just returned from one long journey it is the duty of the carrier, before permitting it to start out loaded on another distant run, in which the lives and safety of brakemen, trainmen and the property of the shipper will be involved, to have such car carefully inspected by a competent inspector in order to ascertain whether it is in a safe condition for such service.

IV. On all the facts in this case, *held*:

(1) That the tank car of complainant when loaded was not in a safe condition to be transported by the defendant in April, 1888, and that it was not the duty of defendant to transport it at that time, but it was the duty of complainant to have it repaired before insisting upon its being transported by defendant;

(2) That neither the defendant nor any of its officers and agents have been engaged, as complained, in combinations with connecting lines, or other parties, to prevent complainant from obtaining reasonable rates and facilities for the transportation of its mineral water, or to give other mineral waters a preference in rates and facilities over those accorded to complainant;

(3) That defendant's officials and agents have not acted in a malevolent spirit toward complainant in throwing obstructions in the way of its transporting mineral water over defendant's line and its connecting lines.

(Submitted Feb. 5, 1889. Decided March 23, 1889.)

PROCEEDING on complaint alleging the imposition of an unjust and exorbitant rate upon mineral water in tank cars, and an improper classification of mineral water. *Petition dismissed.*

See abstract of complaint. 1 Inters. Com. Rep. 797; abstract of answer, 2 Inters. Com. Rep. 12.

2 INTER S.

Mr. William S. Edwards for petitioner.
Messrs. E. W. Meddaugh and **A. C. Raymond** for defendant.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The material questions presented by the complaint in this proceeding as amended and by the answers thereto are:

1. Are the rates charged complainant for transporting mineral water unreasonable?

2. Did the defendant violate the statute in refusing to transport over its lines a tank car of mineral water for the complainant in April, 1888?

3. Has the defendant been engaged in unlawful combinations with other carriers or parties to prevent complainant from obtaining fair and reasonable rates in the transportation of mineral water, or to give other mineral waters a preference in rates over those accorded the complainant?

4. Has the course pursued toward the complainant by the officials and agents of defendant been malevolent in spirit and indicative of a disposition to throw obstructions in the way of complainant's shipping mineral water over defendant's line, or to prevent complainant from having fair and reasonable rates in transporting mineral water over defendant's line?

A great deal of evidence has been taken in this case, much of which is immaterial and irrelevant. We find the material facts to be, that complainant owns and operates a valuable mineral artesian well at the City of Lansing, in the State of Michigan, from which for many years past it has been furnishing this water in considerable quantities in various portions of the country by shipment over rail lines, as well as in the State of Michigan. In the State of Michigan the established price of this water is ten cents per gallon; in bulk, when transported in quantities of 3,000 gallons in a tank car to market in other States, it is worth about 16½ cents per gallon; and when bottled up for the market in other States it is worth about thirty cents per gallon. Until about three or four years ago its shipments of this water were chiefly over the Lake Shore & Michigan Southern Railway, and since then have been over the line of defendant and its connecting lines. The Chicago & Grand Trunk Railway extends from the City of Chicago, in the State of Illinois, to Fort Gratiot, in the State of Michigan, a distance of 335 miles, and by its connecting lines reaches many of the eastern cities and seaboard points. To points off its main line, which extends, as already stated, from Chicago to Fort Gratiot, its rates are made by agreement with connecting lines. The rates specifically complained of in this proceeding are made by agreement with its connecting lines and relate to instances of shipments to New York in a tank car owned by complainant. In a general way, but not upon specific allegations, complaint is also made of rates charged by defendant and its connecting lines on shipments in barrels, bottles and jars, less than car loads, over defendant's line, and its connecting lines.

The answer to the original complaint in this

proceeding distinctly gave notice to the complainant, as matter of fact and by way of defense, that all the rates complained of in this proceeding were made by the defendant by agreement with its connecting lines, and that defendant alone was not responsible for them. Notwithstanding this, the complainant continued to prosecute its complaint against the defendant alone without making any of its connecting lines parties to the proceeding, thereby taking issue to this averment of the complaint and denying its truth. The complainant filed a supplemental complaint, and in this it made none of the connecting lines of the defendant parties. The proof abundantly sustains this averment of the answer, and there is no evidence in conflict with it. Upon the case as thus made, we can enter into no consideration or determination of the reasonableness of the rates complained of. Other carriers that are connecting lines with the defendant are interested in these rates and are entitled to be heard regarding their reasonableness. After the complaint was made, the proof shows that the defendant made earnest efforts to have the tank-car rate reduced by its connecting lines from fourth class to sixth class, but only succeeded in having it reduced to fifth class, which was a reduction of from thirty-three cents per 100 pounds to 28½ cents per 100 pounds on mineral water shipped from Lansing, Michigan, to the City of New York.

It appears that the first shipment of mineral water made in a tank car by complainant from Lansing to New York was on the 15th of September, 1886. Then there was no prescribed rate for such freight, and the agent of the defendant at Lansing gave a rate on it of 28½ cents per 100 pounds to New York, amounting to the sum of \$57 for the car. Subsequently rates were made and prescribed by the defendant and its connecting lines under what is known as the official classification by which the rate was fixed at thirty-three cents per 100 pounds on mineral water from Lansing to New York, and under this prescribed and published rate complainant shipped another tank car of its mineral water on the 11th day of June, 1887, from Lansing to New York, and according to this rate the charge was \$79.20 for the car.

About the month of August, 1888, the rate on this water in tank cars from Lansing to New York was reduced to 28½ cents per 100 pounds by the defendant and its connecting lines, as already stated. The complainant claims that the charge of \$79.20 per car in the instance mentioned, being at the rate of thirty-three cents per 100 pounds, was an overcharge, and was unreasonable, and as evidence of this relies upon the subsequent reduction, and claims that the defendant agreed to refund the difference between the rate of 28½ cents per 100 pounds and of thirty-three cents per 100 pounds on the car load of water. As the defendant's connecting lines are interested in this question and are not parties to this proceeding, we can enter into no investigation or determination of it.

Many reasons are given by the defendant in its answer, as well as in evidence, why it and its connecting lines refuse to allow mileage on the tank car of complainant and only return it empty, free of charge, and why defendant and its connecting lines make the rates that they do

upon the water when shipped in this tank car. We enter upon no consideration of these reasons at this time, because, as already stated, the connecting lines of defendant are not parties before us in this proceeding.

The refusal of defendant to transport the tank car of complainant over its line in the month of April, 1888, presents a different question. This refusal was based upon the condition of the car at that time; and if in this defendant erred, it is responsible. The great preponderance of evidence shows that it was then an old and dilapidated car. It had been originally a circus car, constructed for the transportation of circus wagons, which are not heavy freight, and for this reason it had not been strongly built. Afterwards it was changed to be used in carrying two tanks filled with mineral water of 3,000 gallons and weighing from 20,000 to 24,000 pounds. The car was fifty-one feet nine inches in length, being about one third longer than an ordinary freight car. The iron tank held 2,500 gallons and the smaller tank 500 gallons. This iron tank was twenty-nine feet in length, so that it did not extend from one end of the car to the other, and in this way failed to rest upon both of the burden bearing points of the car. It had been condemned once by the defendant's car inspector, in the summer of 1887, as unsafe to be transported over its lines, and after having been repaired, was then taken by the defendant and its connections with a load of mineral water to New York. While in the yards at Jersey City in February, 1888, it was seriously crushed, knocked off its trucks and again underwent repairs and was returned to Lansing, empty, in April, 1888. Immediately after it returned to Lansing, at the request of one of complainant's agents, it was placed upon the side track, by defendant's depot agent, to be again loaded with mineral water. No inspection of it appears to have been made until after it was loaded.

After it was loaded with mineral water by complainant it was then inspected by the car inspector and superintendent of defendant's road. At that time it was found that three of the six sills of the tank car were broken and had been repaired before its last return to Lansing by bolting other pieces of timber so as to lap over the sides of these broken sills. The pieces of timber thus bolted to the broken sills did not reach the transoms. One of the transoms of the car was broken over the center bolt. There was on this car a caboose for the purpose of carrying the bottles and machinery to bottle the water. This car is about two feet lower than a refrigerator car, and about one foot lower than an ordinary freight car. There was a ladder made of sheathing nailed with cut nails instead of being fastened with bolts. The brakeman had to climb this ladder in passing over the caboose in going the length of the train. The foothold afforded by the steps of the ladder was only three fourths of an inch for the toe of the shoe.

After the defendant had refused to haul the tank car in April, 1888, on account of its then unsafe condition, the complainant appealed to the engineer of the State of Michigan (an officer of the State appointed by the railroad commission of Michigan to examine cars for the purpose of determining whether they are in a

condition to be safely transported over railroads) in order that this engineer might make a report to the Railroad Commission of Michigan, upon which the commission would order the defendant to move this tank car. The state engineer—who we must presume, in the absence of evidence to the contrary, was a competent officer for this work, and whose report and testimony indicate that such was the fact—made a careful examination of the car, and decided, on account of its defects, that it would be unsafe to order defendant to move the car, and made a report in writing to this effect to the Railroad Commission of Michigan.

In this condition this tank car remained there loaded from about the 20th of April, 1888, until the month of December of the same year. The ladder might have been repaired and made safe at an expense of \$2 or \$3. The expense that would have been necessary to have put the entire car in a safe condition for transportation at that time would have been very considerable. There is no evidence that the complainant directed the defendant to have these repairs made or undertook itself to have this tank car repaired and put in a condition to be safely transported over defendant's line and its connecting roads.

We feel compelled to find the facts to be that this tank car at the time defendant was called upon by complainant to transport it in April, 1888, was not then in a condition to be safely carried, loaded as it was, over the line of defendant and its connecting lines, and that defendant was justified by its condition in refusing to move it at that time. The theory of the complainant is that the transom of the car was broken by the defendant's agents or servants after it arrived at Lansing in April, 1888; but the evidence does not sustain this theory of the case; on the contrary, the evidence strongly tends to show that it had been broken before that time. If evidence not before us would show that defendant was responsible for the breaking of this transom, then the remedy of complainant for damages on account of that would have been in the courts, and not before the Interstate Commerce Commission.

We do not find the facts to be, upon the evidence in this proceeding, that either the defendant or any of its officers or agents have been engaged directly or indirectly in any combinations with connecting lines or other parties to prevent complainant from obtaining reasonable rates and facilities for the transportation of its mineral water, or to give other mineral waters a preference in rates and facilities over those accorded the complainant. The fact is established by the evidence that the defendant has used its best endeavors to furnish complainant lower rates than could be obtained from connecting lines.

We do not find the facts to be that defendant's officials and agents have acted in a malevolent spirit toward complainant and have thrown obstructions in the way of its transporting mineral water over defendant's line or its connecting lines.

In the light of all the evidence, the conduct of the brakemen and freight conductor who denounced complainant's tank car in April, 1888, when they were required to place it on the track to be loaded, and expressed the wish that instead of being there for that purpose it

might be blown up with dynamite, was fairly attributable to their opinion of the unsafe and dangerous condition of the tank car, and to the personal hazard attending the transportation of it over defendant's line, rather than to any malevolent spirit they entertained toward complainant or its business. They evidently considered it a dangerous car which they and their comrades were expected to operate; and, in language more forcible than decorous, they took occasion to express their opinion of it.

I. We briefly state our conclusions and opinion in this proceeding. We have repeatedly decided that we can make no order on a question of rates where the necessary parties are not before us. In *Allen v. Louisville, New Albany & Chicago Railway Company*, 1 Inters. Com. Rep. 621, 1 Inters. Com. Com. Rep. 199, we held that all the roads constituting the line which makes the through rates complained of should be parties to the complaint which seeks to compel a reduction of the through rates.

Again, in the case of *Harrell v. Columbus & Western Railroad Company*, 1 Inters. Com. Rep. 631, 1 Inters. Com. Com. Rep. 237, we held that the parties affected are entitled to be notified in case a change in rates is asked; and that we would not make an order correcting an alleged unjust discrimination, unless the proper parties were before us.

And again, in the case of *Riddle, Dean & Company v. Pittsburgh & Lake Erie Railroad Company*, 1 Inters. Com. Rep. 773, 1 Inters. Com. Com. Rep. 490, we decided that where the relation of any carrier to the matter complained of is such that it is in whole or in part materially responsible for the alleged grievance, and has a direct interest in any investigation of the subject matter involved, that carrier should be a party to the proceeding, and if not a party no relief can be given against it. The rule as to proper parties in such a proceeding as this is plain, simple and elementary. There is no difficulty in observing it, and especially where, as in this proceeding, the defense set up in the answer shows that all the necessary parties had not been made defendants. This put the complainant upon an inquiry which it should at once have made, and amended its complaint to correspond with the facts, unless it was prepared to prove that this averment of the answer was untrue.

II. The theory upon which complainant insists that the defendant was bound to take the tank car and transport it after it had been loaded by complainant with the knowledge of defendant's depot agent in April, 1888, without regard to its actual condition, is one that cannot be sustained. It is narrow and technical and has no semblance of reason or justice to support it. It overlooks considerations that are vital to the rights of the defendant as well as to the public. The depot agent had not examined the condition of the car. It was not his business to examine its condition. The company had an inspector of cars and a superintendent whose duty it was to examine the condition of this car and determine whether it was in a condition to be safely transported over defendant's line.

The day after its arrival at Lansing in April, 1888, complainant's agent stated to the depot

agent of defendant that he was ready to load the car and asked the depot agent to have it moved to the side track where it could be loaded by complainant. To this the depot agent replied "All right," and had the car switched to the side track where complainant's agents loaded it. Within a few days afterwards, the foreman of car inspectors and superintendent of defendant examined the car and found it unsafe to be transported when loaded, but there is no evidence that this was reported immediately to the depot agent. But whether it was reported to him and he failed to mention it to complainant's agent when the latter went to him for a billing receipt for the loaded car and he refused to give the billing receipt, because, according to his opinion, based on his own ideas, or those of the switchmen, that the caboose and ladder were dangerous and would have to come off, is wholly immaterial. His judgment or his opinion about it amounted to nothing. The defendant had the right to rely for its own protection, that of complainant and of the public, in this matter, upon the judgment of its car inspector and superintendent who were trained and experienced experts in the repairing and building of cars, and whose eyes and minds were skilled in detecting defects in cars and in determining whether they were in a condition to be safely transported, and who, alone, the defendant had selected to perform this duty.

In order to be reasonably assured of its safe condition it was the duty of the defendant to have such a car, which had just returned from one long journey, carefully inspected by its inspector before starting out on another, in which the lives and safety of brakemen, trainmen, and engineers, and the property of complainant would be involved. No unauthorized declarations or statements of the depot agent could dispense with such a duty as this, or work a parol estoppel, or verbal admission regarding it. And when the report of this car inspector and superintendent, to say nothing of the state engineer, had established the fact that this car was in an unsafe condition, then the complainant should have had it promptly repaired.

III. The findings of facts we have made fully disposes of the other questions in this proceeding, and it is unnecessary to say more regarding them. All questions as to the reasonableness of rates are left open and undecided, and may, if the complainant sees proper, be made the subject of complaint against the necessary parties as herein indicated.

The order of the Commission is that this petition must be, and the same is hereby, dismissed.

T. M. C. Logan, F. D. Babcock, and E. M. Parsons, Executive Committee of the
NORTHWESTERN IOWA GRAIN &
STOCK SHIPPERS' ASSO.

v.

CHICAGO & NORTHWESTERN R. CO.

(No. 132.)

1. **The service may be rendered under such dissimilar circumstances** as to make it lawful to charge more for the
- 2 INTER S.

same distance on one line or branch than on another line or branch of the same road.

2. **A departure from the rule of equal mileage rates** as applied to the several branches of a road is not conclusive that such rates are unlawful; but the burden is on the company making such departure to show its rates to be reasonable when disputed.
3. **A railroad company**, while long maintaining a rate without the presence of competition on other than equal terms, is making evidence that such rate is not too low.
4. **The Chicago & Northwestern R. Co.** has two routes or lines between Chicago and Sioux City formed by its main line and different branch lines, and a greater charge for a shorter than for a longer distance in the same direction, the shorter being included in the longer distance, on either of said routes or lines is unlawful under the fourth section of the Act to Regulate Commerce.
5. **Two of the south branch lines** of said Railway Company are crossed by the main line of the Chicago, Milwaukee & St. Paul R. R. Co. From points on these branch lines the Northwestern Company comes in competition with the St. Paul Company, from its main line points; *held*, that the charges on these branches do not establish a standard of reasonable rates for like distances from points on a north branch of the same company where no such competition exists.
6. **Said Railway Company had in force** from Nebraska points to Turner, Illinois, a tariff sheet directing corn destined to the seaboard to be billed from such Nebraska points to Turner at different rates when destined to different seaboard points. The corn was carried from Nebraska to Chicago where the rebilling and transferring was done. No shipments could be made under this tariff from Iowa points. *Held*, that as billed, the shipment was to Turner; that by billing at different rates to Turner, an illegal preference was given; and that Iowa grain growers were subjected to unreasonable disadvantage in marketing corn.

(Case heard at Dubuque, Iowa, July 26, 1888—Decided March 22, 1889.)

PROCEEDING on complaint alleging unjust discrimination and violation of section 4 of the Act in rates upon shipments of corn and oats. *Readjustment of rates directed.*

See abstract of complaint, *ante*, p. 14; abstract of answer, *ante*, p. 19.

Mr. **W. C. Goudy** for defendant.

REPORT AND OPINION OF THE COMMISSION.

Morrison, Commissioner:

The complainants are the officers, president, secretary and treasurer, of the Northwestern

Iowa Grain & Stock Shippers' Association. Together they are the Executive Committee of the Association, and in its behalf authorized to institute these proceedings in the interest of its membership.

They allege that the Chicago & Northwestern Railway Company is a common carrier of freight and passengers from Council Bluffs and other Missouri River and Western Iowa points to Chicago and other eastern points over the lines and branch lines of railway operated and owned or controlled by it and marked in light red lines on the map of the State of Iowa printed as part of the State Railroad Commission's Report for 1887, and made "Exhibit A" to their complaint;

That said railway company has charged and continues to charge the members of said association for transportation on its branch lines north of its main line and west of Carroll Station greater rates than it charges for like service for relatively the same distances on its branches south of the main line and west of Carroll, or on its main line from Council Bluffs and Carroll and intervening stations;

That the rate on grain in car loads to Chicago from all of said points on main line and branches was twenty-two cents per 100 pounds at the time the Act to Regulate Commerce became operative, and so remained until August 1, 1887, when it was reduced to eighteen cents from the points on the main line and on the Audubon and Kirkham branches south of main line, while it remained at twenty-two cents from the points on the lines or branches north of main line;

That on August 25, 1887, the rates were made twenty-one cents from points on lines and branches north and nineteen cents by the rate sheets from points on main line and branches south, while the eighteen cent rate was the actual rate on south branches and main line points until November 1, 1887, when there was a readjustment on the basis of the August 25 rate sheets, and the rates from the main line and south branch points were made nineteen cents and from the north branch points twenty-one cents;

That on February 29, 1888, the defendant company in connection with the Sioux City and Pacific Railroad Company issued a joint tariff making a rate on cattle, hogs and sheep to Chicago of \$30 per car from Council Bluffs, Omaha and Sioux City; and while this rate was still in force defendant's rate from Onawa, River Sioux, Ida Grove, Wall Lake and Holstein was \$45 per car for the shorter distance to Chicago over the same line, and in conflict with the 4th section of the Act to Regulate Commerce;

That the defendant, in connection with the branch and continuing lines it controls, on December 30, 1887, issued its special tariff on corn and oats when destined to New York, Boston, Philadelphia and Baltimore, at eleven cents per 100 pounds from Blair and other points in Nebraska to Turner Junction or Rochelle, Illinois, the corn and oats to take Chicago rates east from Rochelle and Turner. This special tariff, which was available and in force from points in Nebraska west of Iowa on defendant's road and roads controlled by it, was not published at Carroll, Maple River Junction, or other

points in Iowa, and no shipments of corn and oats destined for eastern seaports could be made on this road from Iowa points to Rochelle or Turner;

That said Company had in effect, from February 17 to March 1, 1888, at Carroll and Missouri Valley and intervening Iowa stations on its main line, a joint tariff of 36½ cents per 100 pounds on corn and oats through to New York via Chicago, which rate was not available to complainant for shipments they desired to make from Odebolt, Arthur and Ida Grove, stations less distant from Chicago than Missouri Valley. The complainants offer the rate sheets or tariffs of defendant as exhibits in support of their complaint, and as evidence of the unjust discriminations, of the violations of the 4th section of the Act to Regulate Commerce, and of the other wrongs alleged against said railway company.

The defendant, for answer, admits that it is a common carrier of freight from points in the State of Iowa on the Missouri River to the City of Chicago over its own lines and lines controlled by it; that such lines are indicated on a map of the State of Iowa made Exhibit A to the petition and the distances between the points mentioned in said petition are approximately as stated therein. And it further admits that the various exhibits made are correct copies of tariffs and rate sheets issued by the defendant company.

The defendant, further answering, admits that previous to August 1, 1887, the rates on corn from Western Iowa stations (on main line and all branches) were the same, and on that date such rates from Council Bluffs and Carroll and intermediate stations on the main line and from all points on the (Kirkham & Audubon) branches south were reduced from twenty-two to eighteen cents, because of reductions on other railroad lines from Council Bluffs, one of which, the Chicago, Milwaukee and St. Paul Railway, crosses the defendant's Audubon and Kirkham branches at Manning Station, and that this reduction was not put in force from Ida Grove, Odebolt or any other station on lines or branch lines north of main line not crossed by lines running from Council Bluffs. That on the 25th day of August, 1887, the rate on corn at Sioux City, Ida Grove and other stations on Northern Iowa branches, was reduced from twenty-two to twenty-one cents, and again on October 4, 1887, from twenty-one to twenty cents; and that on November 1, 1887, another adjustment of rates on corn was made from all Western Iowa points. The rates from points on main line and south branches were then fixed at nineteen cents, from Ida Grove and stations other than Odebolt on branches north of main line at twenty-one cents, from Odebolt at twenty cents.

Further answering, the defendant says that in December, 1887, it was compelled to make, and did make, with railroads running from Chicago to the Atlantic seaboard through arrangements, and with such railroads established rates from points in Nebraska to Baltimore, Philadelphia and New York via junction points in Illinois, and joined in making the same rate from Rochelle and Turner that was made by other carriers from Peoria. That this arrangement and rates so made did not apply to Ida Grove

or other stations on the "Northern Iowa Division" north of, and not on, the main line of defendant's road.

And the defendant, answering, further denies that its rates on stock from River Sioux, Onawa, or other points have been made in violation of the Act of Congress as alleged in the petition, and in support of its denial calls attention to its rate sheet taking effect February 29, 1888, and exhibits of complainants, in which it is expressly stated: "The above rates will be the maximum for intermediate points in the same direction on the direct line and all points on branches south of main line, Council Bluffs to Chicago." And it further denies that in the differences in rates made, their application or adjustment, there is or has been any unjust discrimination or any violation of the 4th section of the Act of Congress; and denies that the complainants or any of them have been damaged in any respect so as to make the defendant liable as claimed in the petition; and denies that any discrimination has been made against either one of the petitioners.

In addition to the statements made in the complaint and admitted in the answer, it appears from the exhibits and from testimony heard that:

| | |
|--|-------------|
| (1) Carroll, distant from Chicago | .395 miles, |
| Maple River | " " " |
| Junction, " " " | .398 miles, |
| Dennison, " " " | .423 " |
| Missouri Valley, " " " | .467 " |
| Council Bluffs, " " " | .488 " |
| on the main line, | |
| Audubon, distant from Chicago | .431 " |
| on the Audubon branch, and | |
| Kirkham, distant from Chicago | .430 miles, |
| on the Kirkham branch,—are points from which | |
| a lower rate is charged; that | |
| Odebolt, distant from Chicago | .425 miles, |
| Arthur, " " " | .430 " |
| Ida Grove, " " " | .437 " |
| Mapleton, " " " | .460 " |
| on the Sioux City and Mapleton line, | |
| Holstein, distant from Chicago | .451 miles, |
| Correctionville, " " " | .475 " |
| Moville, " " " | .496 " |
| on the Kingsley and Moville line, and | |
| Onawa, distant from Chicago | .480 " |
| River Sioux, " " " | .490 " |
| on the Sioux City and Pacific line,—are points | |
| from which the greater charges complained of | |
| are made. | |

(2.) The main line of defendant's road extends from Chicago, Illinois, to Council Bluffs, Iowa. The branches south are the Kirkham and Audubon branches, which are one and the same line from the main line at Carroll to Manning, eighteen miles, then a branch southeast from Manning eighteen miles to Audubon, and a branch southwest from Manning seventeen miles to Kirkham. The branches north are the Sioux City & Pacific Railroad from Missouri Valley on main line seventy-five miles to Sioux City. The "Sioux City & Mapleton line" from Maple River Junction on main line eighty-one miles to Onawa on Sioux City & Pacific Railroad; and the Kingsley & Moville line from Wall Lake on the Sioux City & Mapleton line, eighty miles to Moville. These lines are operated and are owned or controlled by the Chicago & Northwestern Railway Company.

(3.) The defendant has two lines or routes from Sioux City to Chicago. One over the Sioux City & Pacific Railroad to junction with main line at Missouri Valley, thence over main

line to Chicago. The other, over the Sioux City & Pacific Railroad to Onawa Station, then over the "Sioux City & Mapleton line" to the main line, and over main line to Chicago, is the shorter of the two lines.

(4.) The defendant had in force, under its tariff sheet taking effect February 29, 1888, a rate of \$30 per car load of cattle, hogs or sheep, to Chicago from Sioux City, while it maintained a higher rate of \$45 for the shorter distance from Ida Grove and other points on the "Sioux City & Mapleton line." From Wall Lake Station on said Sioux City and Mapleton line shipments were made at \$38, while the rate from Sioux City was \$30—and on said rate sheet of February 29, 1888, was the following: "The above rates will be the maximum for intermediate points in the same direction on the direct line and all points on branches south of main line, Council Bluffs to Chicago."

(5.) That the eleven cent rate on corn and oats destined to eastern ports, which took effect December 30, 1887, from Nebraska points to Rochelle or Turner, Illinois, over defendant's main line and connecting lines controlled by it (the through rate being from Rochelle or Turner to New York 27½, to Boston 32½, to Philadelphia 25½, to Baltimore 24½), was never published at, nor could any shipment at such rate be made from, Western Iowa points on defendant's road or branches. No billing or rebilling was done at Rochelle or Turner. The carriage was through from Nebraska to Chicago where the transfer was made. While such eleven-cent rate was in force from Nebraska points, E. M. Parsons, secretary and member of said association, had at Carroll and Maple River Junction, Iowa, large quantities of corn, 1,374,505 pounds, to be shipped, and which he offered to defendant for shipment to New York by way of Rochelle or Turner, which was refused. He shipped to Chicago at the nineteen-cent rate and could only ship to New York at a rate eight cents above the rate from Nebraska points.

(6.) From February 17 to March 1, 1888, defendant had in force a joint through tariff from Nebraska points over its main line and connections to New York at 36½ cents per 100 pounds of corn and oats in car loads, and during that time carried from Carroll, Iowa, on main line, at least one shipment at that rate without billing. During said period from February 17 to March 1, 1888, Gray, Babcock & Sears, grain dealers, offered to defendant for shipment from Odebolt, Arthur and Ida Grove to New York large quantities of corn at the same rate given by defendant to shippers from Nebraska points and at Carroll, but which the defendant refused to transport at other than the local rates to Chicago added to the rate thence to New York.

(7.) The defendant issued its rate-sheet, putting and continuing in force from March 5, to 18, inclusive, a rate from Northwestern Iowa and Missouri River points to Turner, Illinois, on corn and oats in car load lots destined for New York and other eastern ports, which rates from points on main line and south branches of defendant's road were two cents lower than from points equally distant on north branches. The rate sheets directed the freight to be billed to Turner, but at different rates as it might be destined respectively to Boston, New York,

Philadelphia or Baltimore. At the bottom of the rate sheet was a memorandum of rates from Turner, Illinois, to New York 27½, Boston 32½, Philadelphia 25½, Baltimore 24½ cents per 100 pounds.

(8.) In August, 1887, Gray, Babcock & Sears, grain dealers, had for shipment and shipped to Chicago large quantities of corn from Odebolt, Arthur and Ida Grove on the "Sioux City & Mapleton line" at twenty-two and twenty-one cents, when from Missouri Valley, Council Bluffs and points on the main line, more distant from Chicago than Odebolt, Arthur and Ida Grove, defendant's rate was but eighteen cents. In September, October, November and December, 1887, while the published rate from Carroll and other Western Iowa points on the main line, including Dennison, was nineteen cents, shipments were made from Dennison at eighteen cents.

The facts found on investigation and stated above, chiefly relate to details, the parties being nearly agreed upon the main facts. The grain and stock shippers complain of a difference in rates or unequal charges for equal distances. The charges to Chicago from Northwestern Iowa being higher for the same distances from stations on the railway company's north branch lines than from stations on its main line and branches south. The difference against the north branches as now adjusted is \$5.60 on the car load of corn. This is complained of as so much greater compensation paid, and to be paid, by some persons than by others for a like service and is alleged to be unjust discrimination and unlawful. In the State of Iowa the rate per 100 pounds to all persons shipping car loads must be equal for equal distances on the same class of freight over the same road—main line and branches. The people are accustomed to regard this provision of law with favor, as an approach to the general rule that charges under the same circumstances ought to be the same per ton per mile. Shippers, when it is for their interest, are accustomed to insist on the rigid enforcement of the rule, yet the fact is recognized in that State that unequal charges for equal distances may be made without unjust discrimination.

In regulating railroad transportation for Iowa the board of railroad commissioners authorize some roads to charge 15 per cent and some 30 per cent greater rates than others, and any road may receive \$7 more for carrying fourteen tons (a car load) of corn across the State than it takes for hauling coal of equal weight the same distance over the same line. If some conditions make it lawful to require the defendant railway company to take \$5.20 (15 per cent) less than its rival, the Chicago, Milwaukee & St. Paul Railway Company, may take for hauling a car load of corn 350 miles between Council Bluffs and Clinton, Iowa, the same or other conditions might make it lawful to charge more for the same distance on one line than on another line, or branch line, of the same company.

A departure from the rule of equal mileage rates as applied to the several branches of a road or system of roads is not conclusive of the unlawfulness of rates, but the company making such departure should have satisfactory reasons for such variance of rates, and must show them

to be reasonable when disputed. This burden is, by the Act to Regulate Commerce, put on carriers when they "charge and receive as great compensation for a shorter as for a longer distance." The same burden is on the company making a greater charge for one of two hauls of equal distances.

The company defends, as legal and reasonable, its adjustment of rates, nineteen cents on main line and branches south, and twenty-one cents on branches north, all of which previous to August 1, 1887, were twenty-two cents, because other roads made reductions in the rates from Council Bluffs to Peoria and St. Louis. Its competitors at Council Bluffs, for Chicago and other business, are subject to the same regulations as the defendant and with one exception their lines are longer than defendant's line. None of them have advantages over the defendant which enable them to force rates upon it. It has, without the pressure of competition other than on equal terms, long continued this rate and as long been making evidence that this nineteen cent rate is not unreasonably low. It does not deny that nineteen cents is both reasonable and remunerative from Council Bluffs and intermediate main line stations; but does deny that there is any unjust discrimination in the difference made between this rate and the two cents greater rate on north branch lines.

One of the north branch lines, the Sioux City & Mapleton line, is a part of a through line between Chicago and Sioux City over which the defendant carries freight to and for Sioux City and for points beyond. It is not shown or claimed that freights to Ida Grove and other points on this Sioux City & Mapleton part of the through line between Chicago and Sioux City, is carried under any circumstances or conditions which make the carrying to these points more expensive or at greater risk than to points equally distant from Chicago on main line, and no reason is found to exist why the charges for substantially the same distances should not be the same on these two lines, the main line and the Sioux City & Mapleton line.

The Kingsley & Menville line, or north branch, is an indirect line eighty miles long terminating at an interior village. At various stations along this line, corn and other freight is collected for transportation to and over the main line. The taking up, carrying over and transferring from this short line must be done at some greater cost than from places equally distant from Chicago on the through lines to Council Bluffs and Sioux City. The complainants aver that transportation from places on both the main line and on the Kirkham & Audubon, south branch lines, is done under like circumstances as to cost of the service, and that the nineteen cent rate on these south branches establishes a rate for like distances on north branches. It can hardly be successfully claimed, that the company can maintain a separate equipment and carry from points on these branch lines to the main line for transfer and forwarding, at as low cost as it could take up and carry a like quantity of freight from points equally distant on its main line, as from the points where the freight was taken up on the branches.

Had we found the rates on the south branches something higher for the same distances than

on the main line, we would not for that reason alone disturb them. No complaint is made that nineteen cents from Council Bluffs and main line points is an unreasonable rate, and no complaint is made that the twenty-one cents is unreasonable on north branches except in comparison with the nineteen cents.

The main line of a rival road from Council Bluffs to Chicago crossing the south branches as it, the Chicago, Milwaukee & St. Paul, does, can take the freight at a lower rate with equal profit. From south branch points, defendant must therefore carry at the same rate (nineteen cents) as the competing or main line of the rival road, to get any share of the business. Here this is done at a rate which yields some profit, not at a loss to be made up from some other business. No legal objection, it is believed, can be urged against its being so done.

The charge or receipt for greater aggregate sums for shorter than longer distances made unlawful by the 4th section of the Act to Regulate Commerce alleged in the complaint, is denied in the answer. The defendant relies upon a qualifying memorandum or modification indorsed upon its rate sheets, making the long distance rates the maximum, in support of its denial and as evidence of its observance of that section. In this memorandum copied above (No. 4 facts found), "direct line" is used for "same line" in the Law. In its effect on shipments from Sioux City to Chicago, it was apparently intended to apply to defendant's line from Sioux City via Missouri Valley, on which no greater charges are shown to have been made for shorter than for longer distances.

The claim to observance of the 4th section is justified on the assumption that the route by way of Missouri Valley is defendant's only line between Sioux City and Chicago. This assumption is not warranted by the facts or defendant's course of business which is largely over the route from Sioux City by way of the Sioux City & Pacific Road to Onawa, the junction of the Sioux City & Mapleton line, and by that line east to the main line. The general freight agent of the road, a witness, thought Sioux City traffic "in getting to Chicago" was "about equally divided" between these two routes. Necessarily a greater charge for the shorter distance, the shorter being included in the longer, on either line over which traffic in getting to Chicago from Sioux City, is about equally divided, is in conflict with the 4th section of the Act; and the receipt at Wall Lake, and the maintenance of a higher rate at Ida Grove and other points on the line by way of Onawa and thence east, was and is contrary to the provision of said 4th section.

The putting in force in December, 1887, from Nebraska points over its main line to Turner and Rochelle, Illinois, a tariff of rates the same from time to time as the rates over competing roads from the same Nebraska points to Peoria is admitted in the answer of defendant company and claimed as a part of an arrangement for through traffic in corn from Nebraska to seaboard points. The rates to Turner and Rochelle were shown to be eleven cents per 100 pounds. It is, also, admitted that this rate did not apply at Ida Grove or other Iowa stations not on main line of the defendant's road. Evidence was offered tending to

show that it did apply at stations on the main line which was neither denied nor admitted in the answer. The proof is conclusive that it was not in force or available to shippers from Iowa points either on the main line or branches. The same is true of the 36½ cent rate, through from Nebraska points to New York, put in force February 29, 1888, under which a single shipment was made from Carroll Station, Iowa. Neither does it appear that any shipments were made from Iowa under the tariff taking effect March 5, 1888, between Iowa points and Turner, Illinois, for corn and oats destined to seaboard points. Nor were tariff sheets of such rates or rates from Nebraska points posted at Iowa Station, nor was the public otherwise notified that such rates were in force or shipments possible at such rates from Iowa points either to Rochelle or Turner, Illinois, or to the seaboard. All the details of this traffic do not fully appear. The tariff sheet taking effect March 5, 1888, directs that grain destined to seaboard points be waybilled to Turner, Illinois, but at different rates as it might, or may be, destined respectively to various eastern ports. The method of conducting this traffic from Nebraska was substantially as here indicated. The freight went through, without change of cars or rebilling at Turner, to Chicago where the transfer was made and rebilling was done. Shipping and waybiling to Turner as directed was a shipment to Turner, and such a shipment is in no legal sense a through shipment to the point of ultimate destination at the seaboard. Freight taken and billed from the same place in Nebraska or Iowa, to Turner, Illinois, at lower rates if destined to one place than to another is given an illegal preference. It is claimed by the defendant that these shipments were intended to be through from the place of shipment to the seaboard, and that the charge to Turner indicated the defendant's share of the through rate. The complainants insist that the course of business attending the traffic has the appearance of a device to cut legitimate and agreed rates by which the carrier east might give the defendant's line more than its fair division for the carriage west of Chicago. But whether the carrying as it was done to Turner, Illinois, or was, as is claimed, a through carriage to the seaboard, grain growers in Iowa had, and have, a right to share in it on equal terms with those in Nebraska, having due regard to the circumstances, if any, which might vary the reasonable rate from different points of shipment. This was denied to the complainants and they were unlawfully subjected to unreasonable disadvantage in marketing corn.

The complainants have been subjected to losses from defendant's overcharges at Ida Grove and other points on the Mapleton and Sioux City branch line, and by the defendant's refusal to receive and transport to Turner and Chicago, Illinois, corn from Western Iowa in like manner as it received and transported corn from Nebraska. The state of the Law as it was at the filing of this complaint gave this Commission no authority to make an award for the losses to which complainants have been subjected by the unlawful acts of the defendant.

The company should so readjust its northwestern Iowa rates as to make them substan-

tially the same to Chicago for approximately the same distances from stations on the company's main line and Sioux City & Mapleton line west of Maple River Junction and east of Onawa, and should make such further readjustment that its compensation shall not be greater in the aggregate for the transportation of passengers or a like kind of property for a shorter than a longer distance in the same direction over its line to Chicago from Sioux City by Onawa and the Sioux City & Mapleton line, or over its line from Sioux City to Chicago by Onawa and Missouri Valley.

JAMES & ABBOTT

v.

EAST TENN., VA. & GA. R. CO *et al.*

(No. 173.)

COMPLAINT, filed February 18, 1889, alleging violation of section 4 of the Interstate Commerce Act:

That said railroad company, the Norfolk & Western R. Co., the Shenandoah Valley R. Co., the Cumberland Valley R. Co., the Pennsylvania R. Co., the New York, New Haven & Hartford R. Co. and the New York & New England R. Co., are common carriers and engaged in interstate commerce, and subject to said Act;

That complainants have a large amount of money invested, and are doing a large lumber business at Johnson City in the State of Tennessee;

That they are charged thirty-six cents per 100 pounds on lumber in full car-load lots from said Johnson City to Boston, a distance of 911 miles;

That on the same line and in the same direction the same company, the East Tennessee, Virginia & Georgia R. Co., charge a through rate of only twenty-four cents per 100 pounds on lumber in full car-load lots from Atlanta in the State of Georgia to Boston, a distance of 1240 miles, and thirty-six cents per 100 pounds on lumber in full car-load lots from Macon in the State of Georgia to Boston, a distance of 1328 miles, being the same carriers, and on the same line, thereby charging and receiving the same sum for 911 miles' haul that they charge and receive for like service over 1328 miles, the shorter haul being included in the longer;

That the complainants made formal demand that said Johnson City rate be reduced, and were refused.

Complainants pray that such charges be investigated, and for such relief as shall seem meet in the premises.

[Verified Feb. 15, 1889.]

IMPERIAL COAL CO. and Andrews,
Hitchcock & Co.

v.

PITTSBURGH & LAKE ERIE R. CO.
and New York, Lake Erie & Western R.
Co., Lessee of New York, Pennsylvania
& Ohio Railroad.

(No. 139.)

1. **A group rate for a particular dis-**
2 INTER S.

trict upon a commodity for which a large demand exists, and intended to place producers in the district upon an equality among themselves and with producers of the same commodity from other districts, all competing in a common market, is not unlawful merely on account of differences in the geographical location of different producers and their respective distances from the market.

2. **Actual undue prejudice** or damage of which the rate is the cause must result to the more favorably situated producers to render a group rate unlawful.

3. **In determining the question of undue prejudice** from a rate, distance is only one of the factors, and other material facts, such as character and quality of the commodity, cost of production, extent and nature of the competition in the business itself and by other transportation lines, and the interests of the public in the use of the commodity and its market cost, are to be considered.

4. **A rate of ninety cents a ton on coal** shipped to Lake Erie, for a district covering a radius of forty miles around Pittsburgh, Pennsylvania, embracing a large number of mines of substantially like cost of production and like character of coal, has prevailed since the Act to Regulate Commerce took effect. The coal from the different mines is in competition at Lake Erie, and is transported over several different and competing lines of railroad, all carrying at the same rate. The coal from the district is also in competition with similar coal from the Hocking Valley district in Ohio, and from other districts. The complainants' mines are near the center of the district, and some mines in competition with them are at a greater distance from the lake, varying from twenty miles to forty-three miles. On all the facts of the case, *held*, that the rate in itself not being unreasonable it does not appear that it subjects the complainants to undue prejudice, or that it gives an unreasonable preference to the more distant mines.

5. **The question of a greater charge** in the aggregate for a shorter than for a longer distance over the same line in the same direction is not to be determined by the proportions allotted to different roads on the line, but by the rate as an entirety.

(First Hearing, at Washington, July 18, 1888. Order Made for Additional Testimony to be Taken October 23, 1888. Final Hearing, at Washington, January 11, 1889.—Decided March 23, 1889.)

PROCEEDING on complaint alleging unjust and excessive rates for and discrimination in the transportation of coal. *Complaint not sustained.*

See complaint, *ante*, p. 18; answers *ante*, p. 92.

Mr. John Dalzell for complainants.

Mr. J. H. Reed for P. & L. E. R. R. Co.

Mr. Charles Steele for N. Y., L. E. & W. R. R. Co.

Mr. H. L. Bond for B. & O. R. R. Co.

Mr. J. T. Brooks for Pa. Co.

Mr. W. A. Stone for Port Royal & Youghiogheny Coal Co.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

The complaint sets out that the Imperial Coal Company is a corporation of the State of Pennsylvania, engaged in the business of mining, shipping, and selling bituminous coal, and that the firm of Andrews, Hithcock & Company are dealers in coal doing business in the City of Cleveland, Ohio, and purchase large quantities of coal from the Imperial Coal Company and ship the same to Cleveland.

The charge of the complaint is that the rate charged on coal mined and sold by the Imperial Coal Company to Andrews, Hithcock & Company and others, and shipped to Cleveland, is unjust and excessive, and that there is and has been a discrimination against the Imperial Coal Company and the firm of Andrews, Hithcock & Company and others dealing with the Imperial Coal Company, in favor of miners and shippers of coal whose freights originate east of the City of Pittsburgh and are delivered in the City of Cleveland and other points.

Said unjust and excessive rate and said discrimination are charged to be as follows: Said Pittsburgh & Lake Erie Railroad Company leases and operates the Pittsburgh, McKeesport & Youghiogheny Railroad, running from the City of Pittsburgh east upwards of forty miles. The said Pittsburgh & Lake Erie Railroad Company makes and charges a uniform rate of ninety cents per ton on coal destined for Cleveland and originating at any point on the said Pittsburgh, McKeesport & Youghiogheny Railroad and the Pittsburgh & Lake Erie Railroad, which is divided between the roads carrying the same as follows:

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| Pittsburgh, McKeesport & Youghiogheny Railroad Company, 43 miles..... | 25 cents |
| Pittsburgh & Lake Erie Railroad Company, Pittsburgh to Youngstown, 68 miles..... | 32.5 " |
| New York, Lake Erie & Western Railroad Company, Lessee of the New York, Pennsylvania & Ohio Railroad, Youngstown to Cleveland, 68 miles..... | 32.5 " |
| 179 miles..... | 90 cents. |

On coal shipped from Montour Junction to Cleveland the rate charged is 76½ cents, which is divided between the roads carrying the same as follows:

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| Pittsburgh & Lake Erie Railroad, Montour Junction to Youngstown, 56 miles..... | 36.72 cents. |
| New York, Lake Erie & Western Railroad, Lessee of the New York, Pennsylvania & Ohio Railroad, Youngstown to Cleveland, 68 miles..... | 39.78 " |
| 124 miles..... | 76.50 cents. |

Petitioners therefore ask that an order be made declaring that the rate charged on coal shipped as aforesaid from Montour Junction to Cleveland is excessive, unjust and unfair discrimination, and that a just and fair rate be fixed therefor.

The answers in substance are that the Pittsburgh & Lake Erie Railroad Company leases and operates the Pittsburgh, McKeesport &

Youghiogheny Railroad, for the lease of which latter road it pays a fixed rental not based or dependent upon its earnings, nor does the Pittsburgh, McKeesport and Youghiogheny Railroad receive any portion of said earnings. The two roads form one continuous line and any division of the rate is for the purpose of accounts, and does not affect or concern the shippers over the line of railroad or the leased line of the respondent. That the works of the Imperial Coal Company are located upon the Montour Railroad, a road owned by a company in which some or all of the stockholders of the Imperial Coal Company are stockholders, and is operated in the interest of the Imperial Coal Company, which is the only coal shipper on the line of said road. At Montour Junction said railroad connects with the main line of the Pittsburgh & Lake Erie Road, and upon all shipments of coal from the works of the Imperial Coal Company to Cleveland a through rate of ninety cents per ton is charged by the three railroad companies, to wit: the Montour Railroad Company, the Pittsburgh & Lake Erie Railroad Company, and the New York, Lake Erie & Western Railroad Company; which is divided between them, the sum of 13½ cents per ton being allowed to the Montour Company. That all the coal mines in the vicinity of Pittsburgh are in the same district and are in direct competition with each other, and that if rates based solely on distance were fixed and charged some of said mines situated within a short distance of others, would be able by the use of different railroads to gain an advantage over such other mines, although in the same region. That the miners of coal who ship to Cleveland for lake shipment are brought into direct competition with the miners who ship to Lake Erie, at Toledo, from what is known as the Hocking Valley region in the State of Ohio; and, to enable all shippers in the Pittsburgh region to compete with the Hocking Valley shippers, the only practicable method was found to be to fix a uniform rate from the Pittsburgh region so that, not only as between themselves but as competing with the Hocking Valley region, the coal shippers from the Pittsburgh district might have an equal and fair chance to reach the market.

The material facts are as follows: the Imperial Coal Company is a corporation organized under the laws of Pennsylvania, and owns and operates two extensive coal mines known respectively as the Montour mine and the Cliff mine, located on the Montour Railroad about eleven miles from its junction with the Pittsburgh & Lake Erie Railroad, twelve miles west of Pittsburgh. The Montour Railroad is owned and operated by the stockholders of the Imperial Coal Company, and is used exclusively by that company.

The two mines, which are about three miles apart, embrace about 1,000 acres of coal lands, and the whole property, including other lands, consists of about 3,200 acres. The entire investment is about \$1,000,000, which includes all the lands, upwards of 200 buildings (mostly dwellings), 102 coke ovens, a large car equipment, locomotives, and all things necessary for working the mines. The capacity of the mines is considered to be about 1,500 tons a day.

The other mine is located on a road called

the Pittsburgh, Chartiers & Youghiogeny Railroad, which also connects with the Pittsburgh & Lake Erie Railroad about six miles nearer Pittsburgh than the Montour Road. The mine is located about nine miles from its junction with the latter road at Chartiers. The present capacity of this mine is about 500 tons a day, which can be increased to 1,000 tons a day.

The distance from the Imperial coal mines on the Montour Road to Cleveland over the Pittsburgh & Lake Erie Road, is about 182 miles from the Cliff mine, and 135 miles from the Montour mine, and the distance from the mine on the Chartiers Road is about 136 miles. Pittsburgh is about twelve miles from Montour, so that the distance from Pittsburgh to Cleveland is practically the same as from the complainant's mines.

Coal from the mines was formerly extensively sold at Pittsburgh, Youngstown and the Mahoning Valley in the vicinity of Youngstown, and at intermediate points, but since natural gas has come into general use at those places within the last three or four years the use of coal has been very generally abandoned, except at certain mills in Youngstown, and it is sent to Cleveland and other points on Lake Erie for sale there, and from thence large quantities of it are shipped over the lakes to various places.

The expense of mining coal in the complainant's mines is seventy-four cents a ton from the first of May to the first of November, and seventy-nine cents a ton during the rest of the year. The price for the work of mining is fixed by the miners. Before prices were so fixed the cost was from five to ten cents per ton less at the complainant's mines. This sum covers only the price paid the miners for their work. In addition to this there is a considerable expense for what is called dead work, which embraces opening of mines, cost of props, laying roadways, hauling coal, and everything else necessary to get the coal to the cars. This dead work usually amounts to about thirty cents a ton. In complainants' mines, and most of the other mines, the miners are paid by the ton. In a few mines they are paid by the bushel, there being $26\frac{1}{2}$ bushels in a ton; but the aggregate price amounts to about the same sum. In one mine only two cents a bushel or fifty-two cents a ton, is paid.

The rate for the transportation of coal from complainant's mines to Cleveland and other lake ports is ninety cents per ton, which has been the uniform charge since April 1, 1887. Out of this rate $13\frac{1}{2}$ cents per ton was allowed and paid to the Montour Road for the haul over that road to the junction with the Pittsburgh & Lake Erie Road, until July 7, 1888, when the allowance to the Montour Road was increased to 16.65 cents per ton, and the same increased sum was allowed to other mines correspondingly situated on other branch roads.

For the purpose of coal transportation to the lakes the rate is grouped for an extensive district called the Pittsburgh district, including a radius of forty miles around Pittsburgh, and embracing territorially the Counties of Allegheny, Beaver, and portions of the Counties of Washington, Westmoreland and Butler, and taking in small portions of West Virgin-

ia and Ohio. The complainants are located near the center of the district. The district contains a very large number of mines owned and worked by different proprietors, and although the coal is all bituminous and of the same general character there are some differences in its quality in different portions of the district, and differences in the character of the mines, that affect more or less the market price of the coal and the cost of production.

Coal exists very abundantly in nearly the whole district, and in many instances the mines are near each other. From the center of the district at Pittsburgh the coal veins become thinner going westward toward the lakes, and thicker going south and east from Pittsburgh. At complainant's mines about twelve miles west of Pittsburgh veins are about $3\frac{1}{2}$ to four feet in thickness, while at distances of thirty to forty miles east and southeast of Pittsburgh, where some of the mines in the group are located, the veins are six feet and seven feet in thickness, and in some other places eight or nine feet in thickness. The thickness of the vein, other things being equal, is of material importance to the value of the mine and the cost of production. A vein four feet in thickness will yield about 4,000 tons of coal to the acre; a vein five feet in thickness will yield about one third more than that amount; and a vein eight feet in thickness will yield more than double the amount of a vein four feet in thickness.

On the other hand the mines west and northwest of Pittsburgh, containing the thinner veins of coal, have certain advantages which counterbalance to a considerable extent, if not entirely, the thicker veins. They are what are known as drift mines, and are worked horizontally at a saving of expense for machinery, labor, and mining appliances. The mines south and east of Pittsburgh, containing the thicker veins of coal, are known as shaft mines, and other items of expense are necessary in working these mines that are not required in the drift mines. Taking the mines of the Port Royal Company as an illustration it is shown that the shaft in this mine is 200 feet deep, and machinery is required for hoisting the coal and water, the roof is more expensive to maintain, more and larger props are necessary, fans operated by steam are used, also Bridis cloth to clear up veins in the entries and carry air in and take gas out, also safety lamps on account of fire damp. Several pumps are required not needed in the drift mines. Considerable more labor is employed, such as additional fire bosses, cagers, and assistants to both, and men to work the hoisting machinery and pumps. The veins of coal also dip in different directions, so that mules cannot be used in hauling it. The vein in this mine is from six feet to $7\frac{1}{2}$ feet thick, but from $1\frac{1}{2}$ to two feet at the bottom of the mine is inferior coal of which only a part is sent out, and the balance not used, leaving five feet of valuable coal. It is shown that the additional cost of working this mine over the Imperial mine is \$43.85 per day for labor.

The evidence does not show whether all the shaft mines require the same additional expense as the Port Royal mine, although the proof is to the effect that the cost in all the

mines, with the exception of three or four, is substantially the same.

The testimony shows that the selling price of coal at the lakes is fixed by an understanding or combination among the various operators, to which nearly all of them are parties.

The price of coal lands enters to a considerable extent into the general cost of production, and much diversity of price was shown to exist. This diversity was caused principally by the distance of the lands from the lines of railroad, and by the thickness or thinness of the veins of coal. As a general rule the price of the lands containing the thinner veins of coal is considerably less than for that containing the thicker veins, and the distance from the line of railroad to which the coal has to be taken largely affects the price. In the locality where the complainant's mines are situated the average price, as nearly as can be gathered from the testimony, is from \$100 to \$150 per acre, while in the Youghiogheny region, where the mines are served by the Baltimore & Ohio Road, and where the thicker veins exist, the average price is in the neighborhood of \$300 an acre. The testimony is too indefinite, however, to give the average cost of the different coal lands with any degree of exactness.

The capacity and the actual out-put of the various mines also vary very largely. The testimony generally shows that all of the mines have producing capacity considerably beyond the actual out-put. This applies to the mines in all the different portions of the district.

Coal from the complainant's mines is transported over the following lines of railroad: over the Montour Road eleven miles to its junction with the Pittsburgh & Lake Erie Road; thence over the latter fifty-six miles to Youngstown; and thence over the New York, Pennsylvania & Ohio Road, operated by the New York, Lake Erie & Western, sixty-eight miles to Cleveland; the whole distance being 135 miles, and the distance over the defendant roads 124 miles.

At Pittsburgh the Pittsburgh & Lake Erie Road connects with the Pittsburgh, McKeesport & Youghiogheny Railroad, over which coal is transported from many mines in the grouped district south and east of Pittsburgh to Pittsburgh, and then over the line of the Pittsburgh & Lake Erie and the New York, Pennsylvania & Ohio to Cleveland.

The distances of the various mines in this portion of the district vary. The longest distance is forty-three miles from Pittsburgh, and the whole distance from the most remote mine to Cleveland 178 miles, or about forty-four miles further than the complainant's mines. The Pittsburgh, McKeesport & Youghiogheny Road is under lease to and operated by the Pittsburgh & Lake Erie Company at a fixed annual rental without regard to earnings, and all the earnings go into the treasury of the Pittsburgh & Lake Erie Company. The proportion of the coal rate of ninety cents a ton allotted to the Pittsburgh, McKeesport & Youghiogheny Road is twenty-five cents a ton.

The proportion of the same rate allotted to the Pittsburgh & Lake Erie Company for the coal originating on the Pittsburgh, McKeesport & Youghiogheny Road is 32.5 cents per ton, and the same amount to the New York, Lake Erie & Western Company as the lessee

of the New York, Pennsylvania & Ohio Company.

Coal is shipped from twenty-four different mines in the grouped district over the lines of the defendant roads to the two lake ports of Ashtabula Harbor and Cleveland. These mines are located as follows: on the Montour Road the complainant's two mines, respectively 132 miles and 135 miles from Cleveland; on the Saw Mill Run Railroad two mines 135 miles from Cleveland; on the Pittsburgh, Chartiers & Youghiogheny Railroad ten mines varying from 138 miles to 145 miles from Cleveland; and on the Pittsburgh, McKeesport & Youghiogheny Railroad ten mines varying from 159 to 178 miles from Cleveland.

There are other competing lines of road largely engaged in carrying coal to the lake ports from the same district, and many of the mines that use these competing lines are only short distances apart. Several are only from four to ten miles from complainant's.

The Baltimore & Ohio Railroad, by its own road and its connections, the Pittsburgh & Western Railroad and the Pittsburgh, Cleveland & Toledo Railroad, carries coal from twenty-two mines, seven on the Wheeling & Pittsburgh Division, and fifteen on the Pittsburgh Division, to the two lake ports of Fairport and Cleveland, the distances carried varying from 178 miles to 211 miles. The most distant mines in the Youghiogheny region are reached by this road.

The system of roads operated by the Pennsylvania Company carries coal from twenty-seven mines in the district to the three lake ports of Erie, Ashtabula Harbor and Cleveland, both via Pittsburgh and via Stubenville, Ohio, the distances via Pittsburgh to Cleveland varying from 157 to 175 miles. Of these mines eighteen are on the Pittsburgh, Cincinnati & St. Louis Division, or Pan Handle Road, and nine on the Chartiers Division.

Coal is also taken to the lakes over the Allegheny Valley Railroad.

All these lines carry at the same rate of ninety cents per ton, and the coal is all in competition at the lake. Coal is also taken to Buffalo at the same rate.

The rate for coal transportation over the lakes is likewise grouped at all the points of shipment from Buffalo to Toledo.

The coal from the Pittsburgh district is all in direct and sharp competition with the coal of the same general character, but somewhat inferior quality, from the Hocking Valley mines in Ohio. The Hocking Valley district is smaller than the Pittsburgh district, and the distance to the lake points to which the coal is shipped—Sandusky and Toledo—varies from 160 miles to 200 miles, according to the location of the mines. The rate charged for the transportation of the coal is eighty-five cents a ton, and is grouped for the district. The amount of coal shipped to Lake Erie from the Hocking Valley district was not accurately given, but was stated in general terms to be about two thirds the quantity shipped from the Pittsburgh district. The respective amounts for the past year were given at 633,000 tons from the Hocking Valley district and 1,000,000 tons from the Pittsburgh district.

Testimony was given for the purpose of show-

ing that the group rate of ninety cents a ton was fixed by the consent of the several producers of the Pittsburgh district at conferences held with officials of the railroad lines in the early part of March, 1888, and that the purpose was to secure equality of competition with the Hocking Valley coal at the lake ports. A majority of the coal operators examined as witnesses testified that the uniform rate for the grouped district was, as they understood it, assented to by all the operators or their representatives, and was satisfactory. Others, however, deny that such was the case, and claim that the conferences had in view relatively equal rates between the Hocking Valley coal and the Pittsburgh coal. The question of consent to the rate is not therefore so satisfactorily proven that it can properly be found as a fact in the case. As the general result of these conferences, however, the ninety cent rate from the Pittsburgh district, which had then been in existence nearly a year, was continued, and the Hocking Valley rate was established at 85 cents a ton.

The mines in competition with complainants, and which it is claimed are worked at materially less expense than theirs—although the claim is disputed by the testimony and the fact does not clearly appear—are the Eureka, the Waverly, the Port Royal and the Ohio & Pennsylvania mines, located on the Baltimore & Ohio Road and which ship by that line. The defendant roads are not responsible for the competition of those mines. The only mine on the line operated by the defendants clearly shown to be worked at less cost than the complainant's mines is the Rainbow or Whitsett mine, located about forty-three miles southeast of Pittsburgh. The mining cost of this mine, exclusive of dead work, is fifty-two cents a ton. The testimony is that very little coal is shipped to the lakes from this mine, the output being mainly sold to railroads and to mills at Youngstown and in the Mahoning Valley in the vicinity of Youngstown. The sales at Youngstown are mostly of nut coal and slack.

In the three principal shipping months of August, September and October, 1887, only nineteen car loads were shipped from this mine to the lakes, and none were shipped in the corresponding months of 1886 or 1888. The shipments from the complainants' mines for the same period were 828 cars in 1887 and 1044 cars in 1888. The shipments from the Whitsett mine to miscellaneous points beyond Youngstown by the defendant roads were twenty-five cars in 1887, and none in 1888. The shipments of complainants to the like points during the same months were thirty-one cars in 1887 and 300 in 1888. The shipments to Youngstown and local points on the Pittsburgh & Lake Erie road from the Whitsett mine by that road were 287 cars in 1887 and 360 in 1888. The corresponding shipments from the complainants' mines were 1,142 cars in 1887 and 1,101 in 1888. The complainants' shipments in these statements are only given from the two mines on the Montour Railroad.

The extent of the competition in transportation of coal from the district to the lake ports and points within a forty mile radius of Pittsburgh by lines of road other than the defendants' is shown by the shipments of the months

of August, September and October, 1888, which were as follows: by the Baltimore & Ohio Railroad to lake ports 3,737 cars, and to points within group 1,429 cars; by the Allegheny Valley Railroad, Pennsylvania Railroad, Pittsburgh, Virginia & Charleston Railroad, and Pittsburgh, Cincinnati & St. Louis Railway, and Chartiers Railway, to lake ports 362,244 tons, to points within group 161,842 tons.

Prior to April, 1887, the equality of rates from the mines in the present grouped district was practically the same as since that date, rebates having been allowed for that purpose. Group rates for the Pittsburgh district, and applying to considerable portions of it where like business is done, are also made by the Pittsburgh & Lake Erie Road, and the other roads that serve the district, on iron ore, limestone, pig iron, stone, and heavy traffic generally, such as iron manufactures. They also prevail extensively over the Western and Middle States, and apply to class rates as well as to commodity rates. Return freight for the coal cars, consisting principally of iron ore and limestone, is carried by the defendants to Pittsburgh and beyond to the extent of loads for about two thirds of the cars. Cars intended for complainants' mines take their return cargoes to Pittsburgh and then go back to those mines.

The question of the lawfulness of a uniform or group rate on coal for the territory embraced in the Pittsburgh district does not involve the reasonableness of the charge from the complainants' mines for the services performed, nor does it present a conflict between the interests of the carriers and of the shippers. The rate is not claimed to be unreasonable in itself for the mines which are nearest the lake ports. The rate per ton per mile for the complainants' mines, a distance of 135 miles, is 6.66 mills, and from Montour Junction since July 7, 1888, 5.92 mills. From the most remote mines on the lines of the defendants, a distance of 178 miles, the rate per ton per mile is 5.05 mills. If the tonnage should remain the same the carriers would be benefited by increased rates in proportion to distance from the other mines to the common destination. In this view the interests of the carriers would be in harmony with those of the complainants. If, however, increased rates based on distance should materially diminish the tonnage, as might be the case, the carriers would lose revenue unless the complainants and the mines in their immediate vicinity necessarily entitled to the same rate, could fully meet the market demand for the kind of coal they produce. This, however, is not claimed, and is not supported by evidence.

A demand for coal in excess of the output of the locality in which complainants operate would doubtless invite shipments at higher rates from more distant mines, with the probable, if not necessary, effect of increased price in the common markets to the extent of the additional charge. Shipments from mines charged higher rates would be problematical, however, for the reason that the same markets are reached from numerous other large coal districts served by other lines of road. How much of the large coal business done by the defendant roads is due to the group rate may not be easy to determine, but it is highly probable that the rate secures a large if not the greater

proportion of the traffic. The effect upon the carriers of advanced rates to different mines or groups of mines more distant than the complainant's cannot be known with certainty, and must be mostly conjectural. It is not, therefore, so manifestly important as to make the carriers' interests a material element of the question, as in some cases when a carrier must accept a certain rate or lose the business.

The question of the lawfulness or relative reasonableness of the uniform rate, to the extent to which it is applied, is to be determined apart from the interests of the carriers, and with regard to the rights and interests of the coal producers in the territory, in view of the conditions of the business disclosed by the testimony. The carriers are the common servants of all the producers and shippers of the coal, and are bound to serve them all reasonably and without unjust discrimination or undue prejudice; but it is not the duty of carriers to disregard distance or natural disadvantages of location, and equalize access to markets for all engaged in a common business though differently situated. It may, however, be lawful and be supported by just public considerations, for carriers to give equal access to markets to localities of dissimilar distances; and it may involve no material difference in expense to the carrier. No producer or shipper has an exclusive right to supply a market, and the interests of consumers and of the general public may justify carriers in enlarging the field from which the demand for a commodity may be supplied on terms of equality for transportation. That is only a recognition of the principle that the general interests are paramount to individual or local interests.

In other cases it may be unreasonable, and therefore unlawful, to give equal rates to diversely situated localities where a demand does not exist for a larger supply, and where conditions intervene that give an undue preference or advantage to the less favorably situated localities.

In all such cases, therefore, the question whether a favorably situated locality is unjustly discriminated against by a grouped rate, or an undue preference or advantage given to the less favorably situated locality, is principally one of fact and not solely of law.

The English Railway and Canal Traffic Act of 1854 contains substantially the same provision on this subject as our statute. Under the English Act the commissioners and courts, after some hesitation, considered questions of this character as questions of fact, to be determined on the evidence in each case, and held that grouping rates was not unlawful unless as a matter of fact the effect was to afford an undue preference. This rule, which has its foundation in reason, and is in the interest of the public, has been repeatedly recognized by this Commission, and was applied in the case of the milk traffic, where the group covered an extent of territory greatly in excess of the district in question. *Howell v. New York, L. E. & W. R. Co.* 2 Inters. Com. Rep. 162, 2 Inters. Com. Com. Rep. 272.

The new English Railway and Canal Traffic Act, which took effect August 10, 1888, and was framed with extraordinary care, and with all the lights of half a century's experience in

railway regulation, makes specific provision for grouping rates in conformity with the rule that had been acted on by the commissioners and courts. The enactment is as follows:

"29.—(1.) Notwithstanding any provision in any general or special Act, it shall be lawful for any railway company, for the purpose of fixing the rates to be charged for the carriage of merchandise to and from any place on their railway, to group together any number of places in the same district, situated at various distances from any point of destination or departure of merchandise, and to charge a uniform rate or uniform rates of carriage for merchandise to and from all places comprised in the group from and to any point of destination or departure.

"(2.) Provided that the distances shall not be unreasonable, and that the group rates charged and the places grouped together shall not be such as to create an undue preference.

"(3.) Where any group rate exists or is proposed, and in any case where there is a doubt whether any rates charged or proposed to be charged by a railway company may not be a contravention of section two of the Railway and Canal Traffic Act, 1854, and any Acts amending the same, the railway company may, upon giving notice in the prescribed manner, apply to the commissioners, and the commissioners may, after hearing the parties interested and any of the authorities mentioned in section 7 of this Act, determine whether such group rate or any rate charged or proposed to be charged as aforesaid does or does not create an undue preference. Any persons aggrieved, and any of the authorities mentioned in section 7 of this Act, may, at any time after the making of any order under this section, apply to the commissioners to vary or rescind the order, and the commissioners, after hearing all parties who are interested, may make an order accordingly."

These provisions are evidently just, and the exercise of the right to group is well guarded. Grouping had been found to be one of the necessities of railway management for the convenience of the traffic and the benefit of the public; and the statute recognizes its propriety and makes provision for its reasonable regulation. The railways of the United States have very often applied the grouping method, especially in the Eastern, Middle and Western States; and if the limitations prescribed by the English Act are observed the method is not unlawful.

In central and eastern Pennsylvania, where anthracite coal is produced, the rates to eastern and western markets are grouped for the different districts from which the coal is taken, although differences in the cost of production from different mines in the same district exist. Large coal districts in Illinois and other western States are also grouped. The entire Hocking Valley district in Ohio is grouped. Rates on grain, flour and other products are also extensively grouped. In the Delaware peninsula, comprising parts of Maryland and Virginia, rates on grain are grouped, but not on fruits, vegetables and other things. In that territory all the lines of railroad are subject to one con-

trol, and the regulation of rates is a much simpler matter than where, as in most other places, there are several competing roads and no one road has power to control the business conditions, but a common understanding upon which all can act becomes an apparent necessity of the situation.

In this case the grouped district comprises a radius of forty miles around Pittsburgh. It is probably one of the largest in the United States. The reasons assigned for the common rate are that the district embraces contiguous beds of coal of substantially the same character though differing somewhat in quality, some being better for gas and some for steam purposes and some a little softer than others, that the cost of production is about the same throughout the district, the difference in thickness of veins being equalized by the larger expenditure required for working the shaft mines in the thicker veins in the southeastern and eastern portions of the district, than for the drift mines containing the thinner veins west of Pittsburgh, and by the higher cost per acre of the coal lands containing the thicker veins; and that all the coal goes to a common market at the lake, and is, therefore, competitive. It is further urged that besides being competitive with each other, the mines of this district are all in competition with Hocking Valley coal and coal from other districts, and that a uniform rate bearing just relation to the Hocking Valley rate is necessary to meet this competition. The competition of the various railroad lines engaged in the transportation of the coal is set forth as another and important reason.

On the other hand, while it is conceded that two or more groups of smaller dimensions founded on the size of the coal veins would be reasonable, it is claimed by the complainants, and on behalf of mines similarly situated, that the present group is unreasonable on account of its extent, and the difference in thickness of the coal veins west and east of Pittsburgh, and that for these reasons an undue preference is given to the more distant mines southeast and east of Pittsburgh. The injurious consequences are said to be stimulated production in the distant mines, largely increased shipments, with ability to sell at lower prices on account of less cost of mining, diminution of production and sales by the nearer mines, depression of prices and actual suspension of operations in some mines.

These results are attributed to the uniform rate as the principal, if not the sole cause; and if it were clear that such consequences are produced, the rate would contravene the limitations under which a grouping system can be sustained.

It is not necessary to consider in detail the various reasons urged for and against the group rate for this district. A few general considerations will be sufficient for the purposes of the case. It is to be observed that a singular and, perhaps, anomalous condition exists in respect to the production, transportation and sale of coal from this district. The cost in each of these instances is fixed by combinations, and individual freedom of action by the producers, each dealing independently and making the best terms he can for himself, is subject to other controlling influences. The laborers in the mines fix their own compensation, and the

operators are obliged, or, at least, deem it for their interests, to comply, to escape the risks and loss of suspension of work.

The selling price at the lake ports and other principal points is fixed by agreement among the producers, presumably for their own protection and to avoid ruinous competition. The rate is fixed by arrangements among the various competing railroad lines engaged in the traffic from this and other districts, ostensibly in the interests of the numerous competing producers, but also with a prudent regard to their own interests. All these circumstances have a more or less important bearing upon the value of mining investments. The profits of the business are dependent on the cost of mining, the cost of transportation, and the selling price. The amount of production, which is a material element in the value of the investment, if a profit is realized at all, is also affected by the same circumstances. If sales are governed by a combination, some apportionment of quantities is necessarily involved.

The rate, though a factor of material importance, is only one of the factors entering into the remunerative value of the mining investments. It is the only one, however, of which the Commission has cognizance. Over the others, the Commission has no jurisdiction, but whatever responsibility may belong to them cannot be imputed to rates.

In making rates the cost of the service is an element, but not the only one or the most important. In this case the rate per ton per mile of $6\frac{3}{4}$ mills, is not, of itself, an unreasonable one for the carriers to charge, nor for the complainants to pay. It presumably affords a fair margin of profit for the carriers. The rate from the most distant mine on the defendants' system of $5\frac{1}{2}$ mills per ton per mile, is less remunerative to the carriers and more favorable to the shippers, but is not claimed to entail any loss on the carriers. It probably leaves some profit and is therefore not a burden but a help to the transportation from the nearer mines. If these carriers had no coal transportation except from the mines west of Pittsburgh, it is probable that the volume of traffic would be so much reduced that a higher rate might be necessary. And if the carriers were not able to obtain return loads of ore from the lake ports, it is doubtful whether the service could be performed at existing rates.

The value of the service is generally regarded as the most important factor in fixing rates. It furnishes theoretically, at least, a foundation for an equitable apportionment that takes into account all interests, those of the carriers, the owners of the property carried, and the public, as well as the dissimilarities of merchandise. But unless a liberal sense is given to value of service, a group rate covering an extended district is affected by other considerations that materially modify the principle. The value of the service to a shipper in a general sense is the ability to reach a market and make his commodity a subject of commerce. In this sense the service is more valuable to a man who transports a thousand miles than to a man who transports a hundred miles, so that distance is an element of the value of service. In a more definite and accurate sense it consists in reaching a market at a profit, being in effect what

the traffic will bear to be remunerative to the producer or dealer. If the charge for service leaves no profit to the shipper the traffic is worthless and necessarily ceases. In this case the intrinsic value of the service to a miner forty or fifty miles farther from the common market is greater in proportion to its distance than to the nearer mine, but relatively on account of cost of production, or a somewhat inferior quality, it may be no greater. If the remote mine cannot sell at more profit the service has the same value for it, and the traffic will bear no more.

The case demands therefore a consideration of the principal grounds upon which the group rate is claimed to be unreasonable. One is the difference in the thickness of the coal veins. The difference is a conceded fact. The veins in the mines west of Pittsburgh are from one foot to three feet thinner than in the mines south and east of Pittsburgh. This is claimed to increase largely the cost of mining by reason of less coal to an acre, less space for miners to pursue their work, and more expense for removing rock to make necessary room. At first view there seems much force in these suggestions.

The testimony, however, largely disproves the claims based on thickness of coal veins. All the mines that have the thinner veins are drift mines, and those that have the thicker veins are shaft mines, which are shown to require many additional items of expense not necessary in the drift mines. The price of mine labor is practically the same. The price of coal lands is considerably higher where more coal is found to the acre.

No difference is shown in the royalties paid where mines are leased, except that being paid by the ton, the amount per acre is greater for thick coal. The cost of production is therefore practically equal in both kinds of mines. The only material exception is the Whitsett mines where the cost is fifty-two cents per ton against seventy-four cents per ton in summer and seventy-nine cents per ton in winter in the others. If it appeared by the evidence that this mine is a material competitor of the complainants at the lake and in the usual markets, the group rate would give it an undue preference and could not be sustained on just principles. But the facts in evidence show that the competition of this mine is slight and comparatively nominal. Its coal, on account of inferior quality, sells for ten or more cents less per ton. Its total out-put and capacity were not shown. It made no sales at the lake in the months of August, September and October, 1886, nor in 1888, and only nineteen car loads in the same months in 1887. The shipments to miscellaneous points beyond Youngstown during the same months in 1887 were twenty-five car loads and none in 1888. The shipments to Youngstown and local points on defendants' line during the same months in 1887 were 287 car loads, and in 1888, 360 cars. In comparison with the shipments from complainant's mines and the general out-put of the mines that reach the same markets, these shipments are only fractional in quantity. The aggregate sales from the district at the lake in 1888 are stated at 1,000,000 tons. They are not given at Youngstown and other local points.

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The general competition, however, from different mines is very great. The product of the Hocking Valley mines in 1886, according to the latest statistics at hand, was nearly 3,000,000 tons, and about 630,000 tons went to the lake in 1888 from those mines. The total product of the State of Ohio in 1888 was 11,950,000 tons. The out-put of bituminous coal from the Pennsylvania mines in 1888 was \$2,500,000 tons, going west as far as the State of Illinois and south through the Mississippi Valley as far as New Orleans. The ascertained deposits of bituminous coal in the United States cover 200,000 square miles of territory, and the total out-put for the year 1888 was about 94,000,000 net tons. These large quantities found markets and many competing lines of road were engaged in the transportation and are still so engaged. New mines are from time to time opened, and the general competition largely increases. The futility of attempting to regulate competition so diversified, upon the basis of thickness of coal veins by graduating charges on a single line of road is entirely apparent. The attempt might injure the particular carrier and might exclude a few mines from participation in the traffic, but it could have no appreciable effect on the general competitive business.

Another principal ground upon which the reasonableness of the group rate is assailed is geographical location. The complainants are about forty miles nearer the lake and the intervening local markets than the Rainbow mine, the most distant one served by the same carrier, and insist that their natural advantage of location entitles them to a better rate, which if denied constitutes an undue prejudice. This raises the question of mileage rates, upon which the Commission has had other occasions to express its views. The Commission has said that it was not the intention of the Act to Regulate Commerce to establish equal mileage rates; that they are not compulsory, nor always politic; that one effect of such rates would be to put an end to competition as a factor in making rates, and that it would work a revolution in the business of the country, which though it might be beneficial in some instances would be destructive in others.* 1 Ann. Rep. 40.

While it must be conceded that there is an apparent justice in the claim that rates should be apportioned to distance, it is not an absolute and unconditional right from which a departure may not be justified by other considerations. The public benefits, the greater volume of business to carriers warranting lower rates to all, and the forces of competition by other lines may furnish reasons that outweigh a claim of right founded only on geographical location.

So long as rates are not increased to nearer producers, or kept unreasonably high to put more distant producers on an equal footing, they are not necessarily unjust. But, if the effect of disregarding distance is to impose burdens for the benefit of others on those who have the natural advantage of location, it is unjust and cannot be sanctioned.

It is not manifest on the facts of this case that such a result is produced. Evidently, any injury sustained by the complainants is of a com-

* See 1 Inter. Com. Rep. p. 673, right column, second paragraph under *Competition*.

inal character. The rate of the complainants is not unreasonable nor so high as to indicate that it is maintained to afford a lower mileage proportion for the longer distances. The rate for the longer distance probably leaves a profit to the carrier, in connection with return loads for the cars. The competition of the one mine that has the benefit of the same rate for more mileage and with less cost of production, is, as has been seen, comparatively unimportant. The other three mines that are said to be worked at less cost are on the Baltimore & Ohio Road which has a mileage of 211 miles to the lake from those mines. That road is not a party to this proceeding, and can not be included in an order in this case.

The case as presented by the complaint assigns only the rate to the lake and not to Youngstown or other intermediate points. The defendants were therefore not called upon to justify the reasonableness of the group rate to those points. Under the complaint the competition of the lake is alone material in ascertaining the prejudice suffered by the complainants and the improbability of any substantial prejudice from the one cheaper mine competing over defendants' lines, on account of its limited lake shipments, has been shown.

The location of the complainants being near the center of the district, they have about forty miles greater distance to the lake than mines near the western limit of the radius. If, therefore, mileage or geographical location alone were to govern the rate, it would be lower from the mines nearer the lake than from the complainants'; and whatever advantage might be gained in the one instance by a higher rate might be lost in the other by a lower rate.

One of the general conditions of the situation is the fact that coal is a natural product requiring no change of character, but is complete for use in its original state, and is not a commodity created by enterprise and skill. It becomes an article of commerce and of public utility simply by the operation of mining. It has no particular claim to favor arising from invention, expenditure to bring it into existence, process of manufacture, or even locality of deposit.

Coal is, besides, one of the principal necessities of life, indispensable for domestic and numberless business and public uses; and cheap fuel is of no less universal importance than cheap food. It is not in the public interest, therefore, to enhance the cost to consumers generally by preserving special advantages for a few; and it requires a clear and strong case of individual or local right to compel a higher rate upon the general competitive product than upon the out-put from a more favorable geographical locality in order that larger profits may accrue to a very small part of the general supply.

Upon all the facts of the case, any presumption arising from geographical location is so far met as to leave no sufficient ground for finding that the complainants are subjected to undue or unreasonable prejudice.

The strong language of the English Court in *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* 3 Ry. & C. T. C. 444, is founded solely on distance, and the presumption of pref-

erence arising from a disregard of it, and takes no account of other considerations. One Judge says:

"I think that where you find two collieries are so placed that one is at a much larger distance than the other, and where the question is what is to be the rate of payment from each of them to the same point, the mere fact of the same charge being made to both to the same point, one being from a larger distance than the other, is *prima facie* evidence of an undue prejudice. It is bringing the colliery, which is naturally at a greater distance, practically as a money matter, at the same distance as the other; whereas, under ordinary circumstances, the one which is nearer to the given point, which is the market, would be able to carry its goods to that market at a cheaper rate, and therefore be enabled, according to the ordinary rule of trade, to sell at a lower price and so get a preference. By bringing the other, which is naturally at a larger distance in point of money, to the same distance you do give that which is at the larger distance a money preference over the other and a market preference over the other; and you take that natural preference from the one which had a natural preference, and so prejudice it."

The application of such a rule is fatal to any group rate whatever, which as has been seen is sanctioned by the last English Statute.

The fact, common to all the mines, that they are not worked to their full capacity is explained by another reason that appeared in the testimony, and is a matter of general knowledge. The use of natural gas for manufacturing and domestic purposes at Pittsburgh, Youngstown and other places, for the last three or four years, has almost entirely displaced the use of coal; and the large supplies of coal previously sold in those places, being no longer required, must find other markets or not be produced. Causes of such a character affecting production and market prices are subject to no regulation, and no redress can be provided by law. It is said that the fact that natural gas has taken the place of coal to so large an extent is one of the reasons for the group rate to the lake, that the mines generally might reach a market. As shipments are not made to the lake during the winter months, when navigation is closed, the suspension of production in part during that period is a consequence of natural laws for which no carrier can be responsible.

The enormous and perhaps over production of bituminous coal which is incalculably abundant over an immense extent of territory, not only in Pennsylvania, but in many other States, has so greatly increased competition that a diminished and less profitable production in mines that formerly had a substantial monopoly of the trade is an inevitable result, though the superior quality of the Pennsylvania coal maintains a preference for it in most markets. This growing production has led producers to compete with anthracite coal in territory where the latter was formerly exclusively sold; and the bituminous coal by reason of its cheapness has to a considerable extent superseded anthracite coal for steam purposes in New England and other eastern

localities. The anthracite producers probably are injured by this competition, but it benefits the country at large.

The competition of the different rail lines engaged in carrying the coal to the lake is a factor entitled to a fair degree of consideration in dealing with the rates. The defendant roads form only one line. There are two other large systems that are competitors in the traffic from this district, and also other roads that carry considerable coal. The rates both from the Pittsburgh district and from the Hocking Valley are fixed by agreement among all the roads that participate in the business, in view of competitive rail and coal conditions. They are claimed to be adjusted upon a basis of relative equity. The arrangement is not perfect, but as stated by one of the witnesses is not essentially unjust, and probably produces a maximum of good and a minimum of evil results.

Upon all the facts and circumstances of the case the conclusion of the Commission is that it does not satisfactorily appear that undue or unreasonable preference or advantage is given by the defendants to mines in competition with the complainants at the lake, nor that the complainants are subjected to undue or unreasonable prejudice or disadvantages.

The question somewhat referred to in the case, of a higher charge for a shorter than for a longer haul over the same line, and in the same direction, founded upon the larger proportions received by the two roads for the haul from Montour Junction, than from points south of Pittsburgh, does not present a case of violation of the 4th section of the Act. In cases like this, the rate as an entirety, and not the divisions of it, must be relied on to make out a violation of the Law, and that is not greater for the shorter than for the longer distance.

The complaint is therefore not sustained.

Cooley, Chairman:

The controversy in this case though nominally between producers of coal and carriers, is in fact a controversy between the producers themselves. Within a radius of forty miles about Pittsburgh are situated a considerable number of mines producing coal not very dissimilar in quality, which is marketed at the same points and is subject to the same competition, coming principally from the Hocking Valley region. To enable them to meet this competition it is stated in one of the answers that in establishing rates for transportation "Their only practicable method was found to be, to fix a uniform rate from the Pittsburgh region, so that not only as between themselves but as competing with the Hocking Valley region, the coal shippers from the Pittsburgh region might have an equal and fair chance to reach the market. By this means the largest number of shippers are benefited and are enabled to compete in the open market with other shippers upon fair and equitable terms. Any attempt to introduce differences in rates between shippers of the same commodity from practically the same locality to the same place of destination, and for the same market would have resulted in injury to the majority if not of all the shippers of coal" in the region.

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If complainants have any ground for complaint it must be either that the rates charged to them are unreasonably high, or else that the rates charged to competitors in the same region are so much lower relatively as to make out a case of unreasonable and unjust discrimination. It is scarcely claimed that the rates charged to the complainants are, when considered by themselves, unreasonably high. They are in fact not high, and upon that branch of the case the complaint is clearly not sustained.

The question then remains whether there is unjust discrimination in giving to the miners who are at a somewhat greater distance from the common market equal rates with complainants. Upon this it is to be said that it is now practically conceded on all hands that rates measured strictly by distance cannot at all times be made without serious detriment to business interests in many sections, perhaps in all. It is not possible to establish equal mileage rates without great curtailment of competition, nor without ruining some carriers and many business interests. A great many considerations have weight in the making of rates, and while relative distance is important, it is not always controlling. This is recognized in the Act to Regulate Commerce, and in rate sheets everywhere.

It is further to be said that there is no reason to believe the carriers intended to discriminate unjustly between the operators by giving equal rates to all concerned. On the contrary, the purpose was to put them all, as nearly as possible, on an equal footing in the common market. If the respective distances from the common market were so different that the doing of this would deprive some of them of advantages fairly belonging to them, and which they must be supposed to have paid for in purchasing or improving their plants, there might be ground for saying that the equal rates for all were unjust to some. But nothing of the kind appears, and on the contrary the rates, if not as just to all as they could possibly be made, are at least not so plainly wrong as to make out a case of unjust discrimination.

The order prayed for should not, therefore, be made.

Morrison, Commissioner, concurs in this.

Re PASSENGER TARIFFS.

(No. 182.)

1. **Methods generally adopted by carriers in the preparation and publication of rate sheets,** if in substantial compliance with the Law and sufficient for purposes of public information, while not necessarily to be accepted by the Commission as a standard, may be acquiesced in until a better mode can be substituted.
2. **When there is no joint rate in effect from a station on the line of one carrier to a station on another carrier's line to which a ticket is applied for,** it is competent to name a **through rate made up of the sums of rates prevailing on the several roads or parts of**

roads made use of in the journey; using for such a through rate **local rates** where there are no joint rates in effect, and joint rates in combination with locals where they are in effect for any part of the distance. When no joint rates are announced it is understood that the local rates are employed in arriving at the through rate.

3. **New individual or joint passenger tariffs must be posted** at stations to which they apply, and tickets can legally be sold on combinations of initial or terminal locals therewith.
4. **Milage, excursion, or commutation passenger tickets, must be offered impartially to all** who accept the conditions on which they are issued, and the rates at which they are sold must be published. The general requirements of the Act to Regulate Commerce as amended are as applicable to these classes of tickets as to any others.
5. **Party rates and passenger car load rates**, lower than contemporaneous rates for single passengers, constitute discrimination between persons entitled to transportation at equal rates, and are therefore **illegal**.

(Filed March 27, 1889.)

MEMORANDUM.

By the Commission:

On the 18th day of March, 1889, the Commission received from George H. Daniels, Vice Chairman of the Central Traffic Association, Passenger Department, a communication from which the following extract is made:

"I beg to respectfully request an audience before your Commission for the representatives of the various Railway Passenger Associations in the United States, at your office on Thursday, March 21, if possible, in order that we may submit our present forms of joint rate sheets, and ascertain from your honorable body what, if any, changes will be necessary in the present methods of printing our joint passenger fares.

"We understand, of course, that the matter of posting them has materially changed, but we desire to explain to you just how we have been printing these fares in various parts of the country, and to obtain your suggestions in regard to changes that you may wish us to make.

"I have taken the liberty of inviting representatives from the Trunk Line, New England, Southern Passenger, Western States Passenger, Transcontinental and International Associations, and will be present myself, with possibly some other representatives of the Central Traffic Association."

Complying with this request the Commission named the 21st day of March, 1889, at its office in Washington, as a suitable time and place for a conference, at which time it was attended by a large number of general passenger agents from different sections of the country, and by the officers of several traffic associations. These agents and officers produced specimens of the

passenger rate sheets they are accustomed to issue and an extended discussion was had in regard to their form and in regard also to various other questions pertaining to the passenger traffic.

The rate sheets exhibited are not made up according to any agreed form, or even on any general system; but where they undertake to give rates to points off the lines of the carriers making them, they seem very generally to be united in by several carriers, and sometimes by all of those which serve a particular section of the country; and they then give rates not only to points in that section, but also to those elsewhere. For illustration the case may be taken of a pamphlet of eighty-one pages entitled "Joint Tariff from New York and Basing Tariff for use of Agents in New England," in which seven railroad companies operating what are known as the Trunk Lines unite. This pamphlet gives the rates from New York to some 3000 other points in different sections of the country, from the Atlantic Seaboard to the Gulf of Mexico and the Pacific, and also contains directions whereby through rates to the same points are made from railroad stations in New England. Considerable other information of value to the traveling public is also given; and it may be assumed that this method of giving the public the information the Act to Regulate Commerce intends they shall find in the schedule of rates as published is the result of considerable study and experience, and is supposed to be the best that up to this time has been devised. Many publications made up in the same general way issued by carriers in other sections were laid before the Commission.

It is suggested that the Commission express a general approval of this method unless some legal objection appears. We do not, however, deem it important to do so at the present time. The whole subject of the preparation and publication of rate sheets is a difficult one, and the Commission is inclined to deal cautiously with existing methods which have evidently been adopted in good faith, neither accepting them as a standard when further experience may perhaps suggest a better way, nor disapproving that for which nothing more suitable can at once be substituted. It is well known in railroad circles that the Commission is now in consultation with the traffic managers in the West regarding the preparation and publication of freight rates, and that a good deal of attention has been and is hereafter likely to be given to that subject. It may perhaps after a time be thought needful to give special and extended attention to passenger tariffs in the same way; but meantime we shall not deem it important to interfere with the general methods now prevailing, but shall of course call attention to any particular schedule of rates that shall obviously for any reason appear to be defective.

A number of specific questions were presented while the conference was in progress, and such of them as have not been otherwise disposed of will now be noticed. One general passenger agent inquired:

"What may be done to accommodate individuals in the way of supplying through tickets at through rates from stations at which such through tickets are not usually on sale, and at which the small business does not warrant

keeping a stock of tickets, and at which the joint through rates are not quoted?"

This question does not seem to the Commission to present a point of difficulty. Every carrier has its regular local rates to and from every point on its line, and it is supplied with the rate sheets of connecting lines. If from any one of the stations it unites in no joint rate to a station on another line to which a ticket is applied for, it is always competent to give a rate made up of the sums of rates prevailing on the several roads or parts of roads which must be made use of in the journey—the local rates where there are no joint rates, and the joint rates where joint rates less than the sum of the locals are established for any part of the distance. Thus if the ticket were desired from an insignificant station on the Michigan Central to another equally insignificant in Texas, the through rate might be made up perhaps of the local rate to Chicago, a joint rate from Chicago to Memphis or New Orleans or Galveston, and a local from thence to the point of destination. There would be nothing illegal in making a through rate in that way for any individual traveler, or in giving a ticket or checking baggage for the whole journey with the consent of the several lines; on the contrary it would subserve the public convenience. It has been customary for the carriers to do this in the past, and we have no idea the Act to Regulate Commerce was intended to preclude its being done hereafter.

In this view the Commission has announced that it would be understood, when no other joint rates are announced, that the local rates are employed in arriving at the through rate. No requirement of posting existing joint tariffs has as yet been made. The requirement is that when changes are made, the advance or reduction shall be notified to the Commission, and made public as required by the Law. A new individual or joint passenger tariff must be posted at the stations to which it applies, and tickets can be sold on combination of initial or terminal locals therewith, in the same manner as heretofore.

Another general passenger agent inquires: "Shall round trip tourist rates be published and posted in the same manner as one way through rates?"

The Act to Regulate Commerce as originally adopted provided in the 22d section "That nothing in this Act shall apply to . . . the issuance of mileage, excursion or commutation passenger tickets." As amended it now reads, "That nothing in this Act shall prevent . . . the issuance of mileage, excursion or commutation passenger tickets." This is a very important change, and must be assumed to have been made for some purpose. One purpose may very well have been to remove any possible doubt whether under the Law as it existed before, the general rules of equality, impartiality, and publicity prescribed for other cases were applicable to these classes of tickets to which in terms it was said nothing in the Act should apply. Those words of exclusion are no longer in the Statute, and the general requirements it makes are as applicable to these classes of tickets as to any others. They must therefore be offered impartially to all who accept the

conditions on which they are issued, and the rates must be published as is required in the case of other tickets.

The same officer also inquires:

"Are so called party rates legal?"

This question brings up a practice which has long prevailed, of giving to theatrical troupes and other similar bodies of persons lower rates when they go in a body than are given to the public generally. Some carriers, however, have gone beyond this, and have advertised party rates for ten or more persons which are considerably below the rates for single passengers. Any ten or more persons it is understood may accept the offer of lower rates by associating together for the purposes of the particular journey, though they may not otherwise be a party, or even be known to each other. This of course affords an opportunity to ticket brokers, who by procuring the requisite number of tickets are enabled to peddle them out at some reduction on the regular rates to single passengers until the number is made up, and at the same time make a satisfactory profit to themselves. Between important cities like Pittsburg and Philadelphia or St. Louis and Chicago, no reason is apparent why under this system the business of supplying tickets to individual passengers should not fall for the most part into the hands of the brokers. The practice is vicious in conception and demoralizing in its effects; it necessarily works a discrimination against the single passenger who purchases his ticket at the regular office and in favor of the customer of the broker. Why any carrier should desire to continue it is not obvious. If only one carrier or a few should practice it some advantage might be gained thereby over others; but if all practice it, even this excuse would be wanting. What defense there can be for the practice, in law, nobody on the conference undertook to point out.

A practice equally vicious and closely associated with that of party rates, is the making of passenger car load rates. Some carriers it is understood make rates considerably below the individual fares when a car is engaged for the carriage of forty or more persons. If therefore a number of persons—say twenty—desire transportation between points where a regular rate is in existence, they may perhaps be able to reduce this rate a very large percentage by engaging the car, purchasing the necessary tickets to comply with the regulation, and then selling to others who may have occasion to make the same journey the tickets not required by their own number. This of course affords another opportunity for the ticket broker; he may engage the car himself and fill it with those to whom he sells the forty tickets at a reduction from the regular rate, or he may be employed to fill up the car load by a party less than a full load who have engaged it. No single party is likely to profit so much from such a practice as the party who has no legitimate place whatever in railroad service—the ticket broker; every person to whom he sells a ticket procures it at less than the regular rate, and every person who buys a ticket for the same journey at the carrier's regular office is discriminated against.

If there is any reason upon which such a

practice can be defended from the standpoint of the interest of the carrier, it must be that the giving of party and car rates will have some tendency to increase travel, and thereby add to the revenues of the roads. But the tendency in that direction is very slight; it is not likely that the additional revenue derived as a consequence equals what is lost to the roads in the discount of regular rates. In fact the whole revenue derived from irregular or exceptional methods of dealing with passenger tickets is a very small percentage of the whole pecuniary results of passenger business, and fails altogether to compensate for the demoralization consequent upon such methods. The principal results of the party rates are, that discriminations are made between persons entitled to transportation at equal rates, and that the drain on the revenues of the carriers which the brokers secure in various ways is increased and perpetuated. The remark is legitimate, that when carriers by their methods voluntarily invite such a drain upon what should be their legitimate resources, they furnish strong evidence that their regular rates are higher than they ought to be.

Some other questions were raised in the conference which are or will be taken up and disposed of in other ways.

Frank L. HURLBURT

v.

LAKE SHORE & M. S. R. CO.

(No. 134.)

ABSTRACT of Supplemental Complaint.
Filed March 25, 1889

See *ante*, 15, 31 and 81.

The plaintiff alleges the former complaint, answer, and decision; and that the fair interpretation of said opinion and decision is that hub blocks should be classed with lumber and other kindred articles; that said defendant has refused and still refuses to obey the order of said Commission, and that ever since the issuance of said order has classed said plaintiff's hub blocks in class 5; whereas, lumber and other kindred articles are classed in class 6.

The plaintiff therefore prays an *alias* order, requiring said defendant to receive hub blocks from said plaintiff in carload lots and transport them at the same rates charged for the transportation of lumber, under similar conditions; and that an interpretation of said former order may be made, and for such other relief as he may be entitled to.

Frank L. Hurlburt,
per his Attorney,
Elbert L. Lamson.

ABSTRACT of answer in No 161 (RAWSON v. NEWPORT NEWS ETC. Co.), Complaint, *ante*, 311.

Defendant admits its organization and object as alleged, and that at and prior to the taking effect of the Interstate Commerce Act, so called, as well as subsequently thereto until the 27th day of October, 1887, it was the lessee

of and operating the Chesapeake & Ohio Railway in the States of Virginia and West Virginia, but not since that date;

Denies that the Interstate Commerce Commission has jurisdiction of the claim of said Rawson;

Submits that if and so far as said Rawson by his said complaint claims the amount of, or compensation for, or repayment of, the value of the lumber referred to in the said petition, the said Interstate Commerce Commission is without jurisdiction of said complaint;

Also submits that the Baltimore & Ohio Railroad Company is a necessary and material party to such complaint;

Also submits that in respect of charge made for lighterage in the Port of New York referred to, the said Baltimore & Ohio Railroad Co. or Messrs. L. Boyers Sons, who, as the defendants are informed, are or were the lighterage agents of said Baltimore & Ohio Railroad Co. in the Port of New York, or both thereof are necessary and material parties hereto.

It admits that previous to the taking effect of the Interstate Commerce Act, and for a short time thereafter, as it believes, there existed an arrangement between the Chesapeake & Ohio Railway Co. and the Pennsylvania Railroad Co. by which lumber could be shipped from Covington, Va., to the City of New York at a rate of 24 cents per hundred pounds, routing being by Richmond, Fredericksburgh & Potomac Railroad from its junction with the Chesapeake & Ohio Railway, which included delivery lighterage free to any point within the lighterage limits of New York Harbor; and it admits, upon information and belief, that the said Rawson had shipped a number of cars of lumber to New York City according to such routing and rate; but it avers that the major part of the transportation involved in such carriage of merchandise was not upon lines owned, or in anywise controlled, by the Chesapeake & Ohio Railway Co. or the Newport News & Mississippi Valley Co., but upon lines owned or controlled by, or in the interest of the Pennsylvania Railroad Co.; practically, in respect to the carriage of merchandise by rail from Covington, Va., and similar points, to the City of New York, the Chesapeake & Ohio Railway Co. is, and the Newport News and Mississippi Valley Co., while operating the Chesapeake & Ohio Railway, was, dependent upon either the Pennsylvania Railroad Co. or the Baltimore & Ohio Railroad Co. or lines controlled by them respectively.

The rate above referred to was made by authority of the Pennsylvania Railroad Co., and the free lighterage conferred thereby was a privilege granted by the Pennsylvania Railroad Co. and in respect to the granting or withholding of which the Chesapeake & Ohio Railway Co. and the Newport News & Mississippi Valley Co. had no control whatsoever. Shortly after the Interstate Commerce Act went into effect, the Pennsylvania Railroad Co. declined further to continue the transportation above referred to at the rates and in the manner above prescribed, and the most favorable arrangement which the Chesapeake & Ohio Railway Co. or the Newport News & Mississippi Valley Co. as lessee of the Chesapeake & Ohio Railway could secure, was an arrangement with the Baltimore

& Ohio Railroad Co. and the lines controlled by it, through and by means of which arrangement the Newport News & Mississippi Valley Co. secured to shippers of five cars for same consignee and same point of deliver free lighterage within the lighterage limits of the Harbor of New York; but the Newport News & Mississippi Valley Co. was unable to secure the privilege of free lighterage for any less amount. It in no wise controlled or could control the question of whether free lighterage should be granted in any cases, or in what cases such lighterage should or should not be granted. It was wholly subject to the direction and control, in that regard, of the railroad companies controlling the ultimate line and the lighterage in the Harbor of New York. The Newport News & Mississippi Valley Co. was wholly dependent on such other companies in respect of the lighterage and the rates therefor, and the most favorable terms to shippers which it could secure were those by the Baltimore & Ohio Line, which involved free lighterage for five cars, but a charge for lighterage for a smaller amount.

In accordance with the arrangement so made in regard to shipments by its line to New York the said Newport News & Mississippi Valley Co., under date of July 2, 1887, and on or about that date, issued to its agents along its line instructions as to manifesting and routing property to eastern points, in and by which it was prescribed that property forwarded by all rail to New York should be forwarded via Staunton, Va., and the Baltimore & Ohio line, and by which it expressly prescribed that freight so forwarded, except live stock, would be subject to the following lighterage regulations:

"If in lots of five carloads for the same consignee and the same point of delivery it will be lightered free to any point within the lighterage limits of New York Harbor; if not in compliance with above, extra lighterage charges will be made and collected. Agents must not sign bills of lading guaranteeing lighterage free except in accordance with the above, and in that case must note on each way bill that it covers part of the lot of five cars giving on each the initials and numbers of the other four."

And by such circular the lighterage limits in New York Harbor are expressly prescribed.

Such arrangements were made for routing property to New York and such instructions issued to the agents of this company at points along the line of the Chesapeake & Ohio Railway because the same were the best arrangements in the interest of shippers which this company could effect for such routing and carriage of merchandise.

It denies that it ever undertook or agreed or became in any wise bound or liable to carry the merchandise referred to in the petition herein, either by the Pennsylvania route or at a rate of 24 cents per hundred or that it ever undertook, or agreed, or became bound, to afford the shipper free lighterage in the Harbor of New York, or ever undertook to control or direct in respect to the lighterage thereof except in accordance with the circular of July 2, 1887, hereinbefore mentioned.

For reasons hereinafter stated it is unable to

admit or deny the particular statements in said complaint in respect to the circumstances connected with the shipment of, and issue of bills of lading for, the lumber referred to in the complaint; and it leaves the complainant to offer such evidence in respect thereto as he may be advised; but denies absolutely as to itself, and upon information and belief as to its agents or servants, that any bill of lading for carriage of such merchandise by the Pennsylvania line, or involving free lighterage delivery thereof, or any lower rate than 24 cents per hundred pounds and lighterage in addition, was ever accepted, approved, or assented to by it or on its behalf. Instructions were issued to its several agents on or about July 2, 1887, as above stated, expressly prescribing the mode and manner in which, and the terms upon which, such transportation could be conducted; and it avers, upon the best of its knowledge, information, and belief, that such instructions were followed and obeyed, and that no one on its behalf ever undertook, in respect to the merchandise complained of, transportation in any other way or upon any other terms than as embodied in such instructions.

It denies upon information and belief that the Baltimore & Ohio Railroad Company ever received payment for performance of any instructions of Stockdale or any one else as to delivery of the said lumber from Communipaw; but avers that the compensation paid said Railroad Company in respect thereto only covered the charge for carriage thereof to Communipaw.

Upon information and belief, it denies that General Wickham ever stated to the petitioner that in his opinion, or in the opinion of Mr. Henry T. Wickham, the action of the company was in violation of the Interstate Commerce Law. It is unable to state whether General Wickham ever received any such letter as Exhibit "E," as no such letter has been found or returned in connection with this matter.

It is unable to answer with greater particularity in respect to the particular facts connected with shipment as the organization of the defendant, so far as the Chesapeake & Ohio Railway is concerned, is entirely broken up, its agents who were concerned in conducting its business on said railway being in other employment and no longer in the employment of this defendant, and General Wickham being dead.

It denies that it was ever under any obligation to post or conspicuously display the terms and arrangements which it was from time to time able to make with other lines for transportation of merchandise to the City of New York. Nevertheless, it avers that it took every pains to communicate the facts in relation thereto to persons concerned in such shipments, and never in any wise concealed or declined to disclose the same, and the same were entirely open to all interested therein and to the public.

It denies that its instructions to its agents above referred to were in violation of the third or sixth section or any section of the Interstate Commerce Act, or that in respect to any of the matters referred to in said petition it has in any wise violated or disregarded the provisions or requirements of said Act.

Wherefore, it prays that the petition may be dismissed.

Signed

Newport News & Mississippi Valley Co.

By I. E. Gates, V. P.

Charles H. Tweed, Counsel.

No. 181.

IN THE MATTER OF EXPORT RATES BY
SOUTHERN AND SOUTHWESTERN RAILWAY
CARRIERS.

At a general session of the Interstate Commerce Commission, held at its office in Washington on the eighteenth day of March, A. D. 1889:

Present: Hon. THOMAS M. COOLEY, *Chairman*,
Hon. WILLIAM R. MORRISON,
Hon. AUGUSTUS SCHOONMAKER,
Hon. WALTER L. BRAGG,
Commissioners.

IT IS ORDERED: That a notification be sent to each of the railway carriers named below to appear before the Interstate Commerce Commission in the City of Washington on Tuesday, April 2, 1889, at 10 o'clock A. M. of said day, for the purpose of fully and particularly setting forth and showing what their export rates are, and how these export rates are made by each of them, and also for the purpose of giving each of said carriers an opportunity to be heard concerning the manner of making and publishing said rates in order to comply with the provisions of An Act to Regulate Commerce, approved February 4, 1887, as amended by An Act to amend said Act, approved March 2, 1889.

Louisville & Nashville Railroad Company.
Cincinnati, New Orleans & Texas Pacific Railroad Company.

Alabama Great Southern Railway Company.
New Orleans & Northeastern Railroad Company.

Vicksburg & Meridian Railroad Company.
Vicksburg, Shreveport & Pacific Railroad Company.

Western & Atlantic Railroad Company.
Central Railroad & Banking Company of Georgia.

Western Railway of Alabama.
Atlanta & West Point Railroad Company.
Georgia Railroad Company.

East Tennessee, Virginia & Georgia Railway Company.
Chattanooga, Rome & Columbus Railroad Company.

Atlantic & North Carolina Railroad Company.
Norfolk & Western Railroad Company.

Atlantic Coast Line.
Seaboard & Roanoke Railroad Company.
Richmond & Danville Railroad Company.

Mobile & Ohio Railroad Company.
Illinois Central Railroad Company.
Newport News & Mississippi Valley Company.

Chesapeake, Ohio & Southwestern Railway Company.
Louisville, New Orleans & Texas Railway Company.

Cape Fear & Yadkin Valley Railway Company.

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Savannah, Florida & Western Railway Company.

Florida Railway & Navigation Company.

South Carolina Railway Company.

Chesapeake & Ohio Railway Company.

Southern Pacific Company.

Texas & Pacific Railway Company.

Gulf, Colorado & Santa Fé Railway Company.

Mexican National Railroad Company.

International & Great Northern Railroad Company.

Kansas City, Memphis & Birmingham Railroad Company.

Kansas City, Fort Scott & Memphis Railroad Company.

Missouri Pacific Railway Company.

St. Louis, Iron Mountain & Southern Railway Company.

Brunswick & Western Railroad Company.

A true copy.

Secretary.

No. 163.

SEPARATE answer of the PENNSYLVANIA R. CO. (INDEPENDENT REFINERS ASSO. V. PA. R. Co.), Complaint, *ante*, 317, filed Feb. 28, 1889.

The Pennsylvania Railroad Company, one of the defendants, for answer to the said petition, or so much thereof as it is advised is necessary to make answer unto, says:

First. This respondent denies that the petitioners are validly or legally existing parties competent to make complaint, and asks that they be held to proof of their corporate or authorized existence and competency as parties, and to a disclosure of the purpose of their confederation. Moreover, respondent avers that it is not advised, excepting as recited in the first paragraph of said petition, whether the confederated petitioners are or are not acting in competition with a certain other confederation called the Standard Oil Trust, engaged in the same business.

Second. This respondent admits that it is a carrier of petroleum, substantially as stated in the said petition, and that some portion is shipped in tank cars in bulk, and some portion in wooden barrels loaded on other classes of cars. It also admits that it has an arrangement with the National Transit Company substantially the same as stated in the seventh paragraph of the petition. It denies, however, that the said arrangement was intended "to secure large profits and maintain an advantage for the Standard Oil Company and its affiliated industries, now controlled by the Standard Oil Trust aforesaid, over all competitors," but avers that the sole purpose was to secure and maintain a reasonable and compensatory rate to itself for the service to be rendered; that the rates now charged are only reasonable and just and that it would be impossible to carry said traffic at a lower rate without entailing unreasonable loss upon this respondent.

Third. This respondent cannot be advised as to, or admit any of, the following subject matters stated in said petition, viz.: whether the petitioners ship principally in wooden barrels, and shippers affiliated with the Standard Oil

Trust principally in bulk cars, not being advised as to the extent or components of either of said trusts or confederations; nor as to the ownership of the National Transit Company by the Standard Oil Trust; nor whether, as a result thereof, the so called trust has increased and become remunerative; nor to what extent the petitioners have thriven in their business because of the advantages incident to their refining in the oil regions of Pennsylvania; nor that there is about 40 per cent of the product of refining petroleum that cannot be readily sold in the United States and must be shipped to foreign markets; nor whether the petitioners were unsuccessful competitors with the Standard Oil Trust in the manufacture and shipment of refined oil, by reason of the lower rate at which the latter trust was enabled to transport its oil through the pipe lines owned by it, as alleged, and submits that none of the said subject matters can affect this respondent.

Fourth. This respondent admits that prior to the 13th of September, 1888, it had been its custom not to charge for the weight of the barrel package containing oil, where oil was thus shipped; and that on and after said 13th of September it did charge and has charged for the weight of the barrel package containing oil. This change of practice was induced by the fact that in a contested case decided shortly before that date a principle was announced which would apparently make the failure to charge for the package a discrimination as against the shipper of oil in tank cars. The attention of the officers of this respondent was called by the Commission, subsequently to the fact that the principles stated in the adjudicated case above referred to were not intended to have application to the Pennsylvania Railroad Company, but only to the case of another railroad company which was then before the Commission. Notwithstanding this, the propriety of charging for the weight of the barrel having been a question about which a contrariety of opinion had obtained among railroad officers and shippers, the subject was carefully considered, and the conclusion arrived at that the practice of charging for the weight of the barrel should continue until the question was made and the matter considered on its merits as applicable to the lines of railroad operated by this respondent. And this respondent avers that the charges are not unjust and excessive nor in contravention of the Act entitled "An Act to Regulate Commerce."

Whereupon, this respondent prays that the said petition be dismissed.

The Pennsylvania Railroad Company,
By Frank Thomson, 1st Vice Prest.
James A. Logan,
Asst. Gen. Solicitor.

ABSTRACT of separate answer of the Western New York & Pennsylvania Railroad Company, in No. 163. (INDEPENDENT REFINERS ASSO. v. P. A. R. Co.)

Complaintante, 317, filed Feb. 18, 1889,

"To the first paragraph of said complaint, the said respondent saith that it hath no knowledge whether the statements therein contained are or
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are not true, but for the purpose of this answer denies, and, so far as they are material, asks that the complainants may be compelled to prove them."

The second paragraph is admitted.

The third paragraph is admitted so far as it alleges that petroleum is shipped both in tank cars and in wooden barrels, and the rest denied for want of knowledge.

The fourth paragraph is denied for want of knowledge.

To the fifth paragraph it admits that a large refining business has grown up in the oil regions of Pennsylvania, and denies that the ability of the refiners in the oil region, whether independent or otherwise, to maintain and increase their business, has been subjected to any disadvantages by reason of the charges for transportation to tide water, and alleges want of knowledge of the rest.

The sixth paragraph is denied for want of knowledge.

The seventh paragraph is denied for want of knowledge.

"To the eighth paragraph the respondent admits that for several years prior to September, 1888, the rates charged upon refined oil by respondent and other lines from the oil regions to New York Bay were 52 cents per barrel, irrespective of the fact whether said oil was shipped in bulk by tank cars, or in wooden barrels or packages," and denies the rest for want of knowledge.

The ninth paragraph is denied.

"To the tenth paragraph of the petition the respondent answers, that on or about the 13th day of September last, a radical change was made in the basis of charging rates upon refined oil; that prior to that date, rates were charged upon oil by the barrel regardless of the weight, and as the barrels frequently differ in size to the extent of from five to ten gallons as between different barrels, such rate sometimes led to injustice as between different shippers; that for a number of years it has been the general practice to charge upon commodities contained in packages rates of freight estimated upon the weight of said commodities including the packages, and such practice has been approved by the highest authorities, both in law and among those engaged in transportation. On the said 13th day of September, the rates were fixed upon refined oil by weight, by all the railway transportation companies in the United States, and the rates so fixed were 14½ cents per 100 pounds to New York Bay, including the package or barrel; and as the average weight of a barrel of oil including the package is 400 pounds, the effect of such change was to increase the average rate upon oil in barrels from 52 to 66 cents per barrel, as stated in said paragraph, while the rate upon oil shipped in bulk in tank cars remained as before, at 52 cents a barrel when estimated by measure while it was actually the same by weight as oil in packages, to wit: 14½ cents per 100 pounds; that such change in the method of computing rates was in accordance with the most approved principles relating to transportation, and that the rates so charged are just and reasonable to all parties engaged in refining and exporting oil, and that if any injury has occurred to the petitioners by reason of such change,

such injury is the result of economic laws which respondent cannot control, and to which it is the duty of the petitioners to adapt their business; that in making such change this respondent acted in accordance not only with such economic laws, but also in accordance with what it supposed to be the decision of the highest legal authorities in the country upon the subject of transportation; and that in making such change it had in view no purpose to prevent the petitioners or those affiliated therewith from competing with the Standard Oil Trust or its parties and allies."

The eleventh paragraph is denied.

"The respondent further saith that it with other railroad companies has been made by the same petitioners a party respondent to a petition relating to the transportation of refined oil between the oil regions in Pennsylvania and New England points, and also with the Lehigh Valley Railroad Company and the New York, Lake Erie & Western Railroad Company, has been made by the same petitioners a party respondent to a petition relating to the transportation of refined oil, from the oil regions of Pennsylvania to the City of New York, thus, including this case, making it a respondent in three different cases to petitions relating to the transportation of refined oil; and that the questions and facts involved in each case, so far as this respondent is concerned, are almost precisely the same. Your respondent therefore submits to your honorable Commission that the said three cases should be tried at the same time, and that the evidence taken in one may be used by this respondent in each of the other cases, so far as it is applicable thereto; and that in order that this respondent may be saved a large expense to which it would otherwise be subject, it prays that you may make an order requiring said cases to be tried, and permitting the evidence to be used as aforesaid.

"And this respondent further prays your honorable Commission to dismiss said complaint at the cost of the complainants."

Verified by E. T. Johnson, G. F. Agt.

Counsel for respondent,

Jas. D. Hancock,

84 Exchange St., Buffalo, N. Y.

MERCHANTS' UNION OF SPOKANE FALLS

v.

NORTHERN PACIFIC R. CO.

(No. 189.)

A BSTRACT of complaint filed April 2, 1889.

Your petitioners respectfully show that they are an association of the merchants of the City of Spokane Falls, in Washington Territory, organized for the purpose of endeavoring to secure equal and reasonable rates for the transportation of persons and property over the Northern Pacific Railroad and its connection to and from the City of Spokane Falls.

Petitioners further show that among other things the defendant is a corporation organized under and by virtue of the laws of the

United States, and owning and operating a line of railway for the transportation of freight and passengers from Duluth, Minnesota, on Lake Superior, to Tacoma, Washington Territory, on Puget Sound, and thence to Portland in the State of Oregon. The said defendant is also engaged in operating certain branch lines or feeders along its main line, and among them a line called the Spokane & Palouse Railroad, extending from Spokane Falls in a southerly direction 110 miles to a town called Genesee in Washington Territory; also a line called the Spokane Falls & Idaho Railroad, extending from Houser Junction, a station on the line of the Northern Pacific Railroad about twenty miles east of Spokane Falls, to Lake Cœur d'Alene in Idaho, and thence by water and rail to Wardner and other points in the Cœur d'Alene mining region; also a line called the Washington Central Railroad, extending from Cheney, a station on the line of the Northern Pacific Railroad about eighteen miles west of Spokane Falls, in a northwesterly direction to Davenport, in Lincoln County, about forty miles from said Town of Cheney.

That Spokane Falls is a city of more than 15,000 inhabitants; that it is the natural distributing point for merchandise of every description for a great distance in every direction.

That defendant is operating said Spokane & Palouse Railroad. That there is also an independent line of railway connecting said country with the City of Portland, Oregon, distant about 400 miles, and by reason of the unjust discrimination in favor of said City of Portland by the defendant, said city is enabled to almost wholly supply said Palouse country with such merchandise as the latter purchases, to the exclusion of Spokane Falls. Upon the line of railway of the defendant both east and west of Spokane Falls, for a distance of 150 miles, are villages and towns surrounded by farming communities, all of which are naturally tributary to Spokane Falls, and would do their jobbing there, but are prevented by the unjust discrimination hereinafter complained of.

That the defendant, the Northern Pacific Railroad Company, has adopted a classification of freights and a schedule of rates for transporting freights according to classification over its road from its eastern terminus to its western terminus and to all intermediate stations; that the said defendant has entered into an association with certain railroad companies, including all the transcontinental roads in the United States, and the Canadian Pacific Railroad Company, called the "Transcontinental Association," and that through the instrumentality of said association said railroad companies have fixed a schedule of freight rates to be charged by each of them respectively to Pacific coast terminal points upon commodities named in said schedule, thus dispensing with the classification upon through freights further than said schedule may constitute such classification. Said schedule contains more than 95 per cent of all the articles shipped to said terminal points or to intermediate points over any of said railroads; that by means of the classification and local freight rate adopted by the defendant aforesaid, and the commodity freight rate to Pacific coast terminal points, to which the

defendant is a party as a member of said "Transcontinental Association" and which it is enforcing, the said defendant is violating the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, to the prejudice of the City of Spokane Falls, its merchants and citizens, in the following particulars:

First. It is requiring consignees receiving goods at Spokane Falls from points in the East, to pay an excessive and unreasonable rate for the transportation of the same.

Second. It is giving other cities and towns on the line of its road and connections, competitors of Spokane Falls, relatively better freight rates than it gives to Spokane Falls, without any reason in the conditions and circumstances surrounding its traffic for so doing, and is thus unlawfully discriminating against Spokane Falls.

Third. It is charging and receiving greater compensation for the transportation of like kinds of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included in the longer.

After exhibiting certain classification of freight rates between certain points in support of the several grounds of complaint last made, it alleges the following facts:

That Portland is west and distant from Spokane Falls via the Northern Pacific Railroad 553 miles; that Tacoma is west and distant from Spokane Falls 406 miles; that Ellensburg is west and distant from Spokane Falls 272 miles; that Genesee is distant from Spokane Falls in a southerly direction on the Spokane & Palouse Railroad 110 miles, and that Missoula is distant to the eastward on the line of the defendant's road 257 miles; that all of the aforesaid places as shown by table mentioned enjoy better rates upon freights shipped to them than the City of Spokane Falls; that all of them are competitors with Spokane Falls for some part of its trade, and that the rates are so disproportionate according to the service rendered as to enable them to undersell Spokane Falls' merchants in the territory immediately surrounding it and tributary to it, and to thus destroy its trade and to build up their own trade at its expense; and charge that the making of such rates constitutes an injurious and unlawful discrimination against the City of Spokane Falls.

That the line of the Northern Pacific Railroad Company constitutes one of the shortest, most expeditious and most cheaply conducted of all the transcontinental lines of railway running into or having connections with Portland; that it possesses the only transcontinental line running into or having connection by rail with Tacoma; that it has no competition by water for the freights shipped from the Atlantic seaboard, or from the interior of the United States to the Northern Pacific terminal points; that the competition which it has in the Canadian Pacific Railroad to Pacific coast terminal points in the United States is by a long and circuitous route, requiring transshipment by boat at Vancouver in British Columbia, and is not to be seriously feared; that the said Canadian Pacific Railroad is a member of the transcontinental

association hereinbefore described, and by the terms of the agreement made between it and the defendant and the other roads members of said association, does not compete with the defendant and the other roads for freight shipped to the Pacific coast from Missouri River common points, or from Mississippi River common points, except St. Paul and Minneapolis; that a great proportion of the freights shipped to Spokane Falls over the road of the defendant are freights originating at the Missouri River common points and the Mississippi River common points; that upon all classes of freights shipped over the line of the defendant's road, as well from points where the railroad has no competition with the Canadian Pacific Railroad as from points where it has such competition, the rates are so fixed by the said defendant that its local tariff to Spokane Falls from its eastern terminals are always in excess of the rates upon through business to its Pacific coast terminals from one third to one half, and in some instances more.

Wherefore, your petitioners pray:

First. That the defendant be required and compelled to reduce its tariff of freight rates from its eastern terminals to Spokane Falls so that the same will be reasonable.

Second. That the defendant be required to so adjust its freight rates, as between the several competing points herein named and Spokane Falls, that the said points will not have an undue advantage over said Spokane Falls in competing for the trade of the tributary country.

Third. That the defendant be required and compelled to so adjust its tariff of freight rates that a greater sum shall not be charged for the transportation of freight to Spokane Falls than for the transportation of like freight to Portland, Tacoma and Ellensburg, or if it be the opinion of the Commission that such an order cannot be made as to all kinds of freight, that it be made as to all freights shipped from points in the East where the said defendant has no competition from the said Canadian Pacific Railroad Company.

Signed—

The Merchants' Union of Spokane Falls,
by Turner, Foster & Turner, its Attorneys,
Spokane Falls, Wash. Ter.

JOINT TARIFFS—AMENDED ACT.

Advances and reductions—Publication of—Criminal offense to receive more or less than published rate—Notice to be given of advance or reduction.

March 23, 1889.

CIRCULAR [*Superseding one of March 7, 1889.*]

The attention of carriers is called to the Act of Congress approved March 2, 1889, entitled "An Act to Amend 'An Act to Regulate Commerce.'" The Interstate Commerce Commission has caused the Interstate Commerce Law as thus amended to be printed for general distribution, and will furnish copies on application by mail or otherwise.

Section 6 of the Act as it now stands contains the following provisions in respect to joint tariffs:

"No advance shall be made in joint rates, fares and charges shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares or charges will go into effect. No reduction shall be made in joint rates, fares and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs."¹

It will be observed that an advance in rates shown upon joint tariffs is forbidden "except after ten days' notice to the Commission," and a reduction in such rates is also forbidden "except after three days' notice to be given to the Commission." The time in each case is to be computed from the day when the notice of advance or reduction reaches the office of the Commission in Washington.

All joint tariffs now filed in the office of the Commission will be understood as remaining in force until due notice of any change is given. When no other tariff is filed the rates on traffic carried over or upon more than one line will be the sum of the local rates of the individual roads, or of local and joint rates, as the case may be.

The Commission has made order that—

"All advances and reductions in joint rates, fares and charges shown upon joint tariff established by common carriers subject to the provisions of the Act to Regulate Commerce shall be made public.

"Every such advance or reduction shall be so published by plainly printing the same in large type, two copies of which shall be posted for the use of the public in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation under such schedules, in such form that they shall be accessible to the public and can be conveniently inspected. Such schedules shall be posted ten days prior to the taking effect of any such advance and three days prior to the taking effect of any such reduction in joint rates, fares and charges."²

The Amendment to the Act further provides as follows:

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."³

It is therefore now a criminal offense for any carrier, party to a joint tariff, to participate in the reception of compensation above or below the established rate.

Another provision of the Act as amended requires the Commission to execute and enforce the provisions of the Act, and makes it the duty of any District Attorney of the United States, upon the request of the Commission, to institute and prosecute all necessary proceedings for that purpose.

The rule heretofore existing, which requires ten days' public notice of any advance in the rates established by individual carriers, is enlarged by adding the following provision:

"Reductions in such published rates, fares or charges shall only be made after three days' previous public notice, to be given in the same manner that notice of an advance in rates must be given."

It will be seen that joint tariffs and individual tariffs are now under substantially the same rules. Neither can be reduced without three days' public notice, or advanced without ten days' public notice; and the Commission must also be notified of all contemplated changes; individual and joint tariffs alike must be observed in their integrity.

In reference to the application of these provisions of the Law to export traffic, the Commission understands that tariffs now on file in its office, established by carriers accepting merchandise billed or intended for export by sea, are made in compliance with its order of the date of March 8, 1888, and whether they be individual or joint tariffs the requirement of notice of any change therein is the same as in the case of other tariffs. Imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights.

By order of the Commission:

Edw. A. Moseley,
Secretary.

THROUGH ROUTES AND THROUGH RATES.

LITTLE ROCK & MEMPHIS R. CO.

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO., and St. Louis, Iron Mountain and Southern R. Co.

(No. 146.)

1. **English legislation and the procedure thereunder**, in respect to applications by carriers admitted to through routes and to participate in through rates, stated; and principles then applied explained.
2. **The Act to Regulate Commerce was probably intended to effect similar results**; but in its present form and in the absence of the necessary machinery, it is not adequate to afford the relief prayed in the petition.
3. Recommendations of Second Annual Report for amendment of sec. 3, renewed.* *Kentucky and Indiana Bridge Co. v. Louisville & Nashville R. R. Co.* (ante, 102), referred to, and explained.

*See ante, 288.

1. See *infra*, App. II, page xlii.

2. See *infra*, App. III, page xlviii.

3. See *infra*, App. II, page xlii, § 6.

(Heard December 11, 1888.—Filing of Briefs Completed January 14, 1889.—Decided March 25, 1889.)

PROCEEDING on complaint alleging violations of section 3 of the Act to Regulate Commerce, in refusing equal facilities for interchange of traffic, etc. *Amendment of Act recommended.*

Messrs. U. M. & G. B. Rose for complainant.

Mr. William M. Baxter for East Tennessee, Virginia & Georgia Railway Co.

Mr. John S. Blair for St. Louis, Iron Mountain & Southern Railway Co.

REPORT AND OPINION* OF THE COMMISSIONER.

Walker, Commissioner:

The Little Rock & Memphis Railroad Company is a common carrier operating a railroad connecting the City of Little Rock, in the State of Arkansas, with the City of Memphis, in the State of Tennessee. Its cars cross the Mississippi River by ferry, and passengers' are drawn to and from the passenger station of the East Tennessee, Virginia & Georgia Road over tracks running through the City of Memphis. Until recently this road formed part of a through line for the transportation of passengers between points east of the Mississippi River and points west and southwest of Little Rock, which traffic formed a considerable part of its business, amounting to about 3,000 passengers per year in both directions. At Little Rock through passengers were transferred to or received from the trains of the St. Louis, Iron Mountain & Southern Railway Company, reaching a great variety of points in Arkansas, Texas, etc.

In May, 1888, the St. Louis, Iron Mountain & Southern opened a branch line extending from Bald Knob, a point on its main line 57 miles northeast of Little Rock, to Memphis. Cars over this line are also ferried across the Mississippi River and enter the City of Memphis. The interchange of passengers with the East Tennessee, Virginia & Georgia is usually by stage transfer, although track connections exist which it would be possible to use.

The length of the Little Rock & Memphis road is 135 miles. The distance from Little Rock to Memphis over the new line of the St. Louis, Iron Mountain & Southern, via Bald Knob, is 15 miles greater. The time made by the two routes is substantially the same.

After the opening of said new line the St. Louis, Iron Mountain & Southern Railroad Company notified the East Tennessee, Virginia & Georgia that it would accept no through tickets from passengers coming over the line of the Little Rock & Memphis. Thereupon the East Tennessee, Virginia & Georgia discontinued the sale of such tickets, and all tickets which it now sells to the territory in question are over the new line of the St. Louis, Iron Mountain & Southern, via Bald Knob to Little Rock. The answer of the East Tennessee, Virginia & Georgia states its position as follows:

"In accordance with a custom of twenty 'years' standing, any railroad company so

"changing its relations towards another as
"the St. Louis, Iron Mountain & Southern has
"changed its relation to respondent, has been
"conceded the right to acquire immediate con-
"nections to take off through tickets to points
"on its line reading over intermediate lines,
"and put on tickets reading entirely over its
"own line for all points reached by its line.
"In accordance with this custom of long stand-
"ing and conceded right, respondent admits
"that it did take off that form of through tickets
"formerly reading over the Little Rock &
"Memphis Railroad to points on the St. Louis,
"Iron Mountain & Southern Railway and
"points reached thereby."

The answer of the St. Louis, Iron Mountain & Southern Railway Company admits that since the opening of its Bald Knob Branch it notified the East Tennessee, Virginia & Georgia Railroad to discontinue sales of tickets to points on its line via the Little Rock & Memphis Road; it admits that it continues to permit sales of such tickets by that company over its Bald Knob Branch in connection with its main line; it claims the right to discontinue its relations with the former through route, and to insist upon the establishment of a new through route west from Memphis over its own rails exclusively.

The complaint asserts that this proceeding is in contravention of the third section of the Act to Regulate Commerce, and prays for an order requiring the East Tennessee, Virginia & Georgia, if it sells tickets over said Bald Knob Branch to points south and west of Little Rock, to sell them also over the line of the complainant when requested; and requiring the St. Louis, Iron Mountain & Southern Railway Company to honor tickets reading over the complainant's line and to refrain from further efforts to induce other railroad companies to withhold from sale tickets over the road of the complainant.

The course of business under which this traffic is conducted is substantially as follows:

The line on which the traffic originates prints tickets with coupons reading over the lines of connecting roads, and distributes them for sale at its ticket offices. When such tickets are sold the station agents make return thereof, and the accounting officer reports to connecting lines monthly the amount so received for such lines. The balance found due, after comparison of statements, is paid upon presentation of a draft therefor. These reports are made and the money is accounted for without regard to the performance of the service. The coupons, when taken up, are retained by the company which collects them, for the purpose of checking off the reports received. The method of accounting upon interchange of joint freight traffic is radically different, but need not be stated here.

Through rates over the through route formerly operated via the Little Rock & Memphis, or as now existing via Bald Knob, are in many instances considerably lower than the local rates which would be collected from a traveler who should buy a ticket from point to point as he passed from one road to another. The rates from Decatur, Chattanooga and other important eastern junction points to Texas

*See complaint, ante, 130; answers, ante, 191.

cities are to some extent controlled by the rates made by lines via Shreveport or New Orleans. This results in the existence of two rates. For example, upon traffic passing from Memphis to Texarkana the sum of the locals gave the Little Rock & Memphis \$5.00, while upon a through ticket from points influenced by competition it received only \$4.44; the fare paid in the first instance was \$9.35, and in the second, \$7.30. In each case an arbitrary sum was allowed the Little Rock & Memphis for the ferry transfer, and the residue was divided as had been previously agreed. In the first case both roads received the standard rate of three cents per mile; in the second case the proportion of the Little Rock & Memphis was somewhat greater per mile than that of the St. Louis, Iron Mountain & Southern.

The Little Rock & Memphis road passes through a very poor country which affords little local traffic; the diversion of the through business which it formerly exchanged at Little Rock with the St. Louis, Iron Mountain & Southern is a very serious loss to its revenue—so serious that in the opinion of its officers it may result in the suspension of its operations. The St. Louis, Iron Mountain & Southern, without conceding that such a result is probable, do not admit that the fact that the other road may be seriously crippled is one which should at all influence their management of their property, and assert their right to go further in the same direction.

The case is tersely stated by the counsel for the St. Louis, Iron Mountain & Southern road as follows:

His company, "rightfully or wrongfully, "has notified the East Tennessee, Virginia & Georgia Railroad Company that it shall not "act as agent for the sale of certain specified "tickets; and if it continues to do so such "tickets will not be honored."

The case does not present the question, which has been somewhat argued, of the right of one carrier to refuse to accept tickets sold by another upon grounds of questioned solvency or for other reasons; on the contrary, the St. Louis, Iron Mountain & Southern honors through tickets sold by the East Tennessee, Virginia & Georgia without question, and desires their sale to continue; whatever right it might have under other circumstances to decline to treat the East Tennessee, Virginia & Georgia as its agent in the sale of passenger tickets, that company is its agent for that purpose at the present time.

Nor does this case present the question whether it is the duty of the East Tennessee, Virginia & Georgia to sell through tickets over connecting roads, or whether the Act to Regulate Commerce is efficient to require the establishment of through routes by connecting roads. That company is now engaged in the sale of such tickets and is operating such a through route. The claim made is that so long as the East Tennessee, Virginia & Georgia sells through tickets to Texas points via Bald Knob it cannot legally refuse to sell them via the Little Rock & Memphis road also.

This case is not controlled, as counsel claim, by the decision of the Commission in the case of the *Chicago & Alton Railroad Company v. Pennsylvania Railroad Company*, 1 Inters.

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Com. Rep. 357 (1 I. C. C. R. 86). In that case the defendant offered to sell tickets over complainant's line upon terms which had been accepted by other lines whose tickets were on sale, but which terms were not acceptable to complainant. Upon that state of facts one Commissioner was of opinion that the condition was not properly required and that a preference was wrought; while the other Commissioners believed that the offer of equal terms to all satisfied the requirement of the statute. In the present case there is simply a refusal to deal with the Little Rock & Memphis Company upon any terms whatever. If equal terms to those given the Bald Knob route were offered the evidence leaves no room for doubt that they would be cheerfully accepted.

A sentence extracted from the opinion of the Commission in the *Chicago & Alton* case does not bear the interpretation placed upon it by counsel, who treat it as deciding that the Act does not undertake to coerce connecting carriers to do business together. The sentence is as follows:

"If companies can agree upon their tariffs, "the form of their tickets and how they should "be sold, they have the right to do so and by "such agreement become interstate carriers; "but if they cannot agree the Act does not undertake to coerce them to do business together "upon terms that may be justly objectionable "or injurious."*

The last qualifying phrase must not be overlooked. The construction of the Act in respect of requiring the establishment of joint traffic arrangements, upon fair and just terms, remains as yet an open question so far as the decisions of the Commission have extended, and the question thus stated is not reached in the present case even, which stands, as above shown, upon the ground of prejudice or preference in favor of one existing through route against another which claims the right to participate in the business upon an equal footing.

The English Statute of 1854 contained the following language:

"Every railway company, canal company, and railway and canal company shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles; * * * and every railway company, canal company, and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal, or a railway and canal communication, or which have the terminus, station or wharf of the one near the terminus, station or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding of the traffic arriving by one of such railways or canals by the other without any unreasonable delay and without any such preference or advantage, or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodations may be means of the railways

*1 Inters. Com Rep. 360.

and canals of the several companies be at all times afforded to the public in that behalf.*"

It should first be noted that the words omitted in the above quotation form the substantial part of the first paragraph of section three of the Act to Regulate Commerce; they are as follows:

"And no such company shall make or give any undue or unreasonable preference or advantage to or in favor of any particular person or company or any particular description of traffic in any respect whatsoever; nor shall any such company subject any particular person or company or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

This language has been dissected from the section in which it originally appeared, and placed as the leading paragraph of section three of our Act.

The Railway and Canal Traffic Act of 1854 was committed for enforcement to the Court of Common Pleas in England. When a Railway Commission was established by the Regulation of Railways Act of 1873, said court had been called upon to construe the above section in several instances, and the language found in the Act of 1873 was chosen in the light of the decisions of the courts upon the language of the original statute. Under a sub-heading, "Explanation and Amendment of Law," the English Parliament in section eleven of the Act of 1873 recited section two of the Railway and Canal Traffic Act of 1854 above quoted, and proceeded as follows:

"Whereas, it is expedient to explain and amend the said enactment, Be it therefore enacted, That except as hereinbefore mentioned said facilities to be so afforded are hereby declared to and shall include the due and reasonable receiving, forwarding and delivering by every railway company and canal company, and railway and canal company, at the request of any other such company, of through traffic to and from the railway or canal of any other such company, at through rates, tolls, or fares (in this Act referred to as 'through rates'); Provided, as follows:†"

Nine enumerated provisos follow, establishing a system for the enforcement of said enactment, in substance, that the carriers must first endeavor to agree among themselves; failing such agreement the matter may be referred to the Commissioners for their decision, when "the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly." Other provisions regulate the apportionment of the through rate by the Commissioners, when a through route is established.

These various provisions obviously are designed to enable a railroad to get itself made part of a through route when facilities for the interchange of traffic are refused by connecting lines, and it has been repeatedly interpreted as having such scope. Applications under it for the establishment of through rates are made by

railroad companies solely, and not by or on behalf of the public.

Great Western R. Co. v. The Severn & Wye and Severn Bridge R. Co. and the Midland R. Co. 5 R. & C. Traffic Cases, 174-189.

Intermediate railroad companies and bridge companies under this statute have repeatedly applied for through rates; and through routes with through rates have been established from time to time by the English Commission. This has been done in instances when the working of the new route would divert traffic from lines operated by existing companies, which were nevertheless compelled to become party to a new through route involving through rates and divisions thereof. The factor which is chiefly looked to, as determining the question of the establishment of a new proposed through route, is the interest of the public therein. The question presented in the statute is met as a question of fact, whether "the granting of the rate is a due and reasonable facility in the interest of the public, and whether, having regard to the circumstances, the route proposed is a reasonable route." The reasonableness of the route is also an important element to be considered, depending upon distance, expense of working and other like considerations. (See case cited above, decided January 27, 1887.)

The Act to Regulate Commerce does not contain the provisions of detail found in the English Act of 1873, and re-enacted with some further modifications in the English Railway and Canal Traffic Act of 1888. The language of our statute, which very greatly condenses the corresponding section of the English Law, is as follows:

"Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.*"

It is to be observed that while the English Statute requires "reasonable facilities," our statute demands "reasonable, proper and equal facilities;" the words "proper" and "equal" being added. Our Act also adds the phrase "and shall not discriminate in their rates and charges between such connecting lines." This phrase, together with the word "equal," were added in Congress to the bill as originally prepared and introduced by the Select Committee on Interstate Commerce.

The rules of construction and application established in the provisos to the English Statute are manifestly just, and this Commission in its Second Annual Report† (page 70) has recommended the amendment of our third section by adding a provision which would substantially incorporate the same rules into our law in terms. Nevertheless the Commission does not find in the section as it now stands an intention to go beyond those principles which have been established by the English legislation and decisions as above summarized. In other words,

*See 1 Inters. Com. Rep. 844.

†1 Inters. Com. Rep. 848.

*1 Inters. Com. Rep. p. 4, § 3.

†Ante, 238.

it is conceived that facilities conceded to a through route only become reasonable and proper when they are demanded in the interest of the public and when the route of itself is fairly reasonable. As is stated in the decision above referred to, "It is sufficient that it should "be such a route as we might fairly expect, "other things being equal, a substantial portion of the traffic to go by, neither unnecessarily long nor unreasonably complicated, "nor having any other decided disqualification; "but certainly it need not be the best route." And in the same opinion the question of public interest is said to turn upon the consideration that "It is the interest of the public that "there should be at least two routes open between any two given places, provided that "those routes are practically independent of "one another, fairly alternative, and reasonably calculated to keep one another in check. "Mere paper competition would not be for the "public interest; nor would such competition "be for the interest of the public if it could "only be maintained on terms ruinous to one "or both companies. Healthy competition "such as I have described would be generally "in the public interest."

In the light of these considerations there can be little doubt that the line here in question is one that under the English Law would be regarded as a reasonable route, and one the retention of which would be considered to be in the interest of the public; in fact it is fifteen miles shorter than the route now in use between Memphis and Little Rock, and it is a route of long standing, only recently discontinued. A new line has been established by a powerful competitor which is physically competent to handle the traffic; the interest of the public, however, fairly seems to require that the old line should be kept open as part of a through route, from Memphis and points east thereof, to Little Rock and points west and south thereof. The East Tennessee, Virginia & Georgia Railway, in selling its tickets to points beyond Little Rock, discriminates against the Memphis & Little Rock Railroad, by refusing to sell tickets reading over this line; this results in exacting higher rates from passengers seeking this route than for through tickets sold via Bald Knob. Such passengers are compelled to buy tickets from point to point at local rates, and they are deprived of the facilities which through tickets and through checking of baggage afford.

Giving to the words of the third section the interpretation received by the present English Statute, and applying that interpretation to the facts of the present case, it would require the two defendant roads to afford complainant equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers to and from their several lines; facilities "equal" to those afforded any other line, provided only that the proposed route is a reasonable route and one the opening or the maintaining of which is fairly in the interest of the public. Our law also adds the prohibition against discrimination in rates and charges between connecting lines—a prohibition which easily fits the present case, in view of the fact that travel seeks the cheapest route, and that

the through rates in force over the Bald Knob route are in many cases considerably lower than the local rates which are alone available to passengers choosing complainant's line.

The contention would still remain open to the defendants, however, that a carrier has a right to discriminate in its own favor; that it is not intended to be restrained by the law from taking to itself all possible traffic that its own line can advantageously handle; and that it is not to be compelled to divide business with a competitor by affording equal facilities therefor between points where its own road is parallel.

In this aspect the defense of the East Tennessee, Virginia & Georgia is, that the St. Louis, Iron Mountain & Southern Company, controlling the various routes beyond Little Rock, requires it to sell tickets via Bald Knob exclusively, for the purpose of throwing all the through travel between Memphis & Little Rock upon the new line of the Iron Mountain Company; and it says that it would not be justified in selling tickets to passengers via the Little Rock & Memphis Road, knowing in advance that such tickets would not be accepted when offered for transportation beyond Little Rock. This position is admitted by the St. Louis, Iron Mountain & Southern Railway Company to be correct; and it justifies its action by saying, in substance, that it refuses to accept through tickets from the East Tennessee, Virginia & Georgia over the Little Rock & Memphis Road when tendered by passengers coming upon its cars at Little Rock, in the exercise of a right to do so, which it claims upon the theory that while discrimination between connecting lines is forbidden, the law does not forbid it to discriminate in favor of a section of its own line as against a competing line.

This claim presents an aspect of apparent justice, which has a tendency to conceal from view the public considerations which may be conceived to have been present in the framing of a law designed to promote and facilitate the unrestricted ebb and flow of the internal commerce of the United States; an Act which contains a provision apparently designed to insure to the people every facility of equal choice which franchises granted in the public interest can by any combination of reasonable routes afford. The section contains no proviso excluding lines owned by the discriminating carrier; the terms of the law are general; the language used in this respect cannot fairly be given any different interpretation from that which the English Statute of 1854 should receive; and there has been no hesitation whatever in the affirmation that the English Law applies as well to cases where business is sought to be divided with the carrier controlling the rate, as to cases where the rights of other carriers only were involved.

The case of the *Swindon, Marlborough & Andover Railway Company v. The Great Western Railway Company and the London and South-Western Railway Company*, 4 Railway and Canal Traffic Cases, 349, decided by the English Railway Commissioners in July, 1884, is directly in point. This was an application under the procedure prescribed in the English Act of 1873, for participation in certain traffic from which the complainant company had

been theretofore excluded. The proposed route was 21 miles shorter than the route in use, between points 120 miles apart by the existing route. The defendant companies contended, however, that—

“The difference of distance, notwithstanding the proposed route and rates, would be of no benefit to the public, * * * and that it would be hard upon them that a third company should be admitted to participate in the receipts from its business.”

The Commission say,—

“But we doubt if the Act of 1854 would allow us to give weight to this consideration of the hardship. The disadvantage to the Great Western of the new route is that the junction at which the traffic turns off from their lines is at a less distance from Gloucester than Basingstoke, and that, receipts from through traffic being divided by mileage, their proportion would be materially less on traffic sent by this route than on traffic carried by Basingstoke. They would carry in the one case 86 miles out of a total distance of 120 miles, and in the other only 36 miles out of a total of 100. But these interests of the Company would not entitle them, as to traffic of the same description going between the same places, to treat it so unequally on their own line as to work it at through rates if passing off their line at one point, but if at another to refuse it that facility. That would be to give an undue preference to one portion of it. * * * Rates then that exclude traffic from the shorter of these two through routes, and confine it to the longer, cannot but be at the expense of public policy; and though the quantity of the traffic may be insignificant, and equal rates may not have much effect in developing through traffic by Andover, we think it a principle of importance to the public that a route between places affording the best opportunities for railway carriage, as far as distance is concerned, should not be placed at a disadvantage merely because portions of the route belong to railway companies which have an alternative route and make lower charges in favor of the latter.”

The proposed through rates were allowed by the Commission, and the case is an unqualified affirmation that under the English Act of 1854 an illegal preference may be wrought by a discrimination in favor of a line worked by the very carrier which refuses to unite in the through rate desired.

The same case proceeds to consider other proposed rates, upon coal, in respect to which it finds that the proposed route is ten miles longer than the existing route; that it has a greater length of single track; that it has a steep rising gradient; that the tendency of these circumstances is to give a slower service; that it is not important in this case to have a second railway route to secure the benefit of a free competition, for the traffic can be and is carried by sea from Cardiff and other ports, and the freights which are charged not only regulate the charges of other modes of conveyance, but are almost below remunerative rates for land conveyance. As far, therefore, as competition is a motive to get facilities for railway transit, and operates to insure good

“management for the traffic, the Severn Bridge route has this stimulus already.”

The conclusion reached was that the granting of the latter rates was not a facility in the interest of the public, and that they ought consequently to be refused.

This case in its two branches very clearly illustrates the method pursued by the English tribunals in dealing with the question under consideration. There can be no doubt but that the principles there adopted would be held sufficient to entitle the Little Rock & Memphis Company to the establishment of the through route desired; its line unquestionably affords a reasonable route for the traffic in question, and the preservation of a competing route is in the public interest. The distance is a trifle shorter than the distance over the line now worked; and the fact that the maintenance of the through route desired would operate to divide the traffic with the St. Louis, Iron Mountain & Southern Road is no reason for refusing the extension of equal facilities.

The Commission believes that it was the intention of Congress in the third section to substantially re-enact the requirements of the English Statute. This is not the only instance in which the Act to Regulate Commerce has embodied in condensed language the substantial ideas of English legislation concerning railroads. Serious difficulties however are met in attempting to apply such a construction of the law to the present case. Section fifteen of the Act to Regulate Commerce makes it the duty of the Commission, in case of a violation of the law, to issue notice to the offending carrier to cease and desist from such violation within a reasonable time to be specified. A notice to cease and desist from further violation of the law, without more, would not cover all that is here required in order to effect any useful result, and in fact would not be operative unless supplemented by something further, which the Commission has no present power to give. The restoration of the through tickets and through rates necessarily involves a division of the rates, which must either be ascertained as a necessary preliminary, or some method of determining the share which each carrier is to receive must be known to exist. In case the ferry transfer arbitrary, and the proportionate divisions of the various rates, can be agreed upon by the parties it would be possible for the business to go forward at once. But if the parties fail or refuse to agree there is no method apparent in which a binding apportionment can be made. This fact clearly shows a case of omission in the law, of the precise nature of the omission in the English Statute of 1854, which was remedied by the subsequent Act passed in 1873. Interchange of freight would also involve other questions. In its Second Annual Report* (page 70) this Commission stated that in its opinion the interest of the public would be subserved by amending the third section of the Act to Regulate Commerce by adding thereto a provision substantially extracted from the English Act of 1873, as further amended by Parliament in 1888, as follows:

“The facilities to be so afforded shall include the due and reasonable receiving, forwarding and delivering by every such common carrier,

**Ante*, 288.

at the request of any other such common carrier of through traffic at through rates or fares. If any one of such common carriers shall desire to form a through route for interstate traffic or any class thereof over its own line or any part thereof, in connection with the line, or any part of the line of one or more other common carriers, it shall address a request in writing to the other common carrier or carriers, describing therein the proposed route specifically, and naming proposed through rates or fares and divisions thereof for such traffic, and shall deliver such request to such other carrier or carriers and also transmit a copy thereof to the Commission hereinafter named. If the other common carrier or carriers shall not, within ten days after receiving such request, make and serve and file with the Commission written objections either to the proposed route or to the proposed rates, fares, or divisions, the same so far as not objected to shall be deemed agreed to; but if either the route, the rates, or fares, or the divisions, are objected to, the objections shall be stated in writing and transmitted to the Commission; and the Commission shall then have power to determine whether, having regard to all the circumstances, the route proposed is demanded in the public interest and is a reasonable route for the traffic; and if the Commission shall so find, and the rate or divisions are not assented to, the Commission shall have the further power to prescribe the same; but the Commission in any case, in apportioning the through rate, shall take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance or working of the route, or any part thereof, as well as any special charges which any such common carrier may have been entitled to make in respect thereof; and it shall not be lawful for the Commission in any case to compel any company to accept lower mileage rates than the mileage rates which such company may for the time being legally be charging for like traffic carried by a like mode of transit, on any other line of communication between the same points, being the points of departure and arrival of the through route."

The facts in the present case clearly develop the importance of such an amendment, or of some amendment which shall provide a mode of procedure for carrying into effect the establishment of through routes and through rates, and the equitable apportionment of the rates established, in cases where the refusal of such routes and rates works an unlawful preference. As the statute now stands there is no way apparent in which practical relief can be afforded to the complainant without authority to provide for the necessary divisions being conferred either upon the Commission, the courts, or some other tribunal.

It is proper to add that the foregoing opinion was written before seeing the opinion of the United States Circuit Court in the case of the *Kentucky & Indiana Bridge Company v. The Louisville & Nashville Railroad Company*, recently rendered in the Sixth Judicial Circuit (Jackson, *J. ante*, 351). In passing upon the original complaint of the *Kentucky & Indiana Bridge Company*, this Commission, *ante*, 102-125 (2 I. C. C. R. 162), expressly stated that no 2 INTER S.

case was before it involving the question of through rates. The case as made up for the decision of the circuit court was a very different case from that which had been previously passed upon by this Commission. The convenience of the junction point in question for the interchange of traffic was conceded by the defendant before the Commission, but afterwards litigated before the court. The case was moreover so presented that the court was called upon to decide the precise point in respect to through rates, which the Commission had explicitly refrained from passing upon. In respect to this question the Interstate Commerce Commission in the present case has for the first time been required to express its views on the construction of the law; and it believes that while it was apparently the intention of Congress to require the establishment and maintenance of a through route with through rates, in cases like the one now under consideration, nevertheless the Act in its present form, and in the absence of the necessary machinery, is inadequate to satisfactorily accomplish the result without the co-operation of carriers in arranging for the division of rates and other necessary agreements.

The recommendations concerning amendments to the Third Section of the Act which were made in the Second Annual Report [*ante*, 208] are therefore again renewed.

Morrison, Commissioner:

I concur in the opinion that the East Tennessee, Virginia & Georgia Railroad should issue tickets over the complainant's road on the same terms it issues them over the St. Louis, Iron Mountain & Southern Railway Co. for reasons expressed in my dissenting opinion in the case of the *Chicago & Alton R. Co. v. Pennsylvania R. Co.* 1 Inters. Com. Rep. 357 (1 I. S. C. C. R. 86).

Schoonmaker, Commissioner, concurs in result.

NEW ORLEANS COTTON EXCHANGE v.

ILLINOIS CENTRAL R. CO.

(No. 180.)

ABSTRACT of complaint filed March 18, 1889.

Complainant alleges that it is a corporation, composed of merchants, brokers, factors and buyers, dealing in cotton in New Orleans, La.; that defendant and its connections, running through many States, is subject to the Act to Regulate Commerce; that it habitually makes unjust and unreasonable charges for hauling cotton from points along its line to New Orleans, especially from Parsons and Aberdeen, Miss., and intervening stations to New Orleans, in violation of the last clause of section 1 of said Act; that continually since said Act went into effect it has charged and received a less compensation for hauling cotton North and East, than it has charged, demanded, and received, for hauling cotton from Aberdeen and Parsons and intervening stations South to New Orleans and like distances, under substantially similar circumstances, thereby violating section 2 of

said Act; that ever since said Act went into effect it has also violated section 3 of same, by giving undue and unreasonable preferences and advantage to the localities of Lowell and Boston, Mass., and New York City and other eastern points, subjecting New Orleans to an undue and unreasonable disadvantage in the transportation of cotton; that defendant has for a long time been transporting cotton from Memphis, Tenn., to New Orleans, La., a distance of about 455 miles, at 1½ cents per ton per mile, as against about 3.19 cents per ton per mile from Aberdeen, charged by it on cotton from Aberdeen and intervening points to New Orleans; that such unjust and unreasonable discriminating charges are driving cotton trade away from New Orleans.

Published rates of defendant on uncompressed cotton to New Orleans from September 10, 1888, are made a part of the complaint.

Complainant prays notice, hearing, and for an order that the defendant modify its rate schedules for rates on cotton from Wickliffe, Ky., and intermediate stations, and from Aberdeen and Parsons, Miss., and intermediate stations, to not greater than \$1.50 per bale for uncompressed cotton, and for general relief.

Signed, B. R. Forman,

Att'y for N. O. Cotton Exchange.

NEW ORLEANS COTTON EXCHANGE v.

LOUISVILLE, NEW ORLEANS & TEXAS R. CO.

(No. 183.)

ABSTRACT of complaint filed March 26, 1889.

The formal parts of the complaint are similar to the preceding.

It further alleged that the defendant gives an undue and unreasonable advantage to exporters of cotton, in Memphis, Tenn., over exporters of the same in New Orleans, La., and has been guilty of an undue discrimination against the merchants of New Orleans in violation of the Interstate Commerce Act; that it gives Memphis merchants through rates to Liverpool via New Orleans, at less than its local rates to New Orleans combined with the current sea-going rate from New Orleans to Liverpool make.

Complainant gives instances of such discrimination, and prays that the defendant answer, and be ordered to desist from such discrimination and commanded to carry cotton from Memphis to New Orleans at 45 cents per bale, the amount by it charged and received from Memphis exporters, and to adjust its rates so that the through rate from Memphis and other points on its line to Liverpool shall not be less than the sum of the local rate and sea-going rate at the time; and that said company be ordered to publish and make public in New Orleans all its through and local rates in its New Orleans stations as well as in the New Orleans Cotton Exchange, and in the New Orleans Board of Trade, and for general relief; and especially that the Commission instruct the U. S. District Attorney of the proper district to institute proper proceedings against the defendant,
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its officers and agents participating in said violation of the law.

Signed, B. R. Forman,

Att'y for N. O. Cotton Exchange.

TARIFFS AND CLASSIFICATIONS IN THE SOUTHERN STATES.

Re ATLANTA & WEST POINT R. CO. et al.

(No. 151.)

- 1. Investigation by the Commission, on its own motion,** concerning course pursued by certain carriers in respect to compliance with the provisions of the Act to Regulate Commerce.
- 2. Results as ascertained stated,** and recommendations made for further advances in the direction of conformity to the Law.
- 3. Short-haul clause.** Principles giving application of, as heretofore announced by Commission, and again affirmed, and applied.
- 4. Form of tariffs and classifications in use criticised** and requirements of Statute stated in respect thereto.

(Hearing December 18, 19 and 20, 1888.—Opinion Filed March 30, 1889.)

PROCEEDING upon an order of the Commission for a hearing in relation to apparent violations of the Act to Regulate Commerce, disclosed by tariffs as filed. *Order that carriers named shall comply with the Act.*

For order directing the hearing, see *ante*, p. 199.

Representatives appeared as follows:

Messrs. Cecil Gabbett, General Manager, and *Charles H. Cromwell*, General Freight and Passenger Agent, for Atlanta & West Point Railroad Co., and Western Railway Company of Alabama.

Messrs. E. P. Alexander, President, *W. F. Shellman*, Traffic Manager, *G. A. Whitehead*, General Freight Agent, and *E. T. Charlton*, General Passenger Agent, for Central Railroad and Banking Co. of Georgia, Mobile & Girard Railroad Co., Montgomery & Eufaula Railroad Co., Port Royal & Augusta Railroad Co., and Savannah, Griffin & North Alabama Railroad Co.

Mr. William J. Craig, Acting General Freight and Passenger Agent, for Port Royal & Augusta Railway Co.

Mr. C. D. Owens, Traffic Manager, for Savannah, Florida & Western Railway Co., and Charleston & Savannah Railway Co.

Mr. William P. Hardee, General Freight and Passenger Agent, for Savannah, Florida & Western Railway Co.

Mr. E. P. McSwiney, General Freight and Passenger Agent, for Charleston & Savannah Railway Co.

Messrs. James T. Worthington, General Counsel, *Linden Kent*, Assistant General

Counsel, *T. M. R. Talcott*, First Vice President, *Sol. Haas*, Traffic Manager, *James H. Drake*, General Freight Agent, *J. S. Potts*, Division Freight and Passenger agent, *W. H. Fitzgerald*, Agent, and *Reuben Foster*, for Richmond & Danville Railroad Co., Charlotte, Columbia & Augusta Railroad Co., and Columbia & Greenville Railroad Co.

Mr. Sol. Haas, Traffic Manager, also for Associated Railways of Virginia and Carolinas, including the Atlantic Coast Line and the Seaboard Air Line.

Mr. G. S. Barnum, General Freight and Passenger Agent, for Georgia Pacific R. Co.

Messrs. John C. Gault, General Manager, and *Robert X. Ryan*, General Freight Agent, for Cincinnati, New Orleans & Texas Pacific Railway Co., Vicksburg & Meridian Railroad Co. and other roads of the "Queen and Crescent" line.

Messrs. William M. Baxter, General Solicitor, and *Edwin Fitzgerald*, Traffic Manager, for East Tennessee, Virginia & Georgia Railway Co. and Memphis & Charleston Railroad Co.

Messrs. John W. Green, General Manager, and *E. R. Dorsey*, General Freight and Passenger Agent, for Georgia Railroad and Banking Co.

Messrs. Edward Baxter, Attorney, *Milton H. Smith*, Vice-President, *E. B. Stahlman*, Third Vice-President, *Stuart R. Knott*, Traffic Manager, and *Basil W. Duke*, for Louisville & Nashville Railroad Co., including the Mobile & Montgomery Railroad Co. and South & North Alabama Railroad Co.

Mr. J. W. Thomas, President and General Manager, for Nashville, Chattanooga & St. Louis Railway Co.

Messrs. Charles G. Eddy, Vice-President, *Augustus Pope*, General Freight Agent, and *W. B. Bevell*, General Passenger Agent, for Norfolk & Western Railroad Co.

Mr. F. W. Clark, General Freight and Passenger Agent, for Seaboard & Roanoke Railroad Co.

Mr. Joseph M. Brown, General Freight and Passenger Agent, for Western & Atlantic Railroad Co.

Messrs. H. Walters, Vice-President, and *T. M. Emerson*, General Freight & Passenger Agent, for Atlantic Coast Line, including the Wilmington & Weldon Railroad Co. and Wilmington, Columbia & Augusta Railroad Co.

Mr. William H. Halsey, Chief Rate Clerk, for Southern Railway & Steamship Association.

REPORT AND OPINION OF THE COMMISSION.

Walker, Commissioner:

On the 22d of October, 1888, an order of notice was made by the Commission in the above entitled matter as follows:

"It appearing to the Commission upon an inspection of the tariffs and classifications published and filed by the carriers hereinafter named, which are associated for certain purposes under the name of the Southern Railway and Steamship Association, as well as by information and complaints received from time to time, that such carriers in many cases make a greater charge for the transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction upon interstate traffic; and that the disparity between the charges made at different points over the same line is in some instances apparently very great as related to distance; and that there is reason to believe that the requirements of section 6 of the Act to Regulate Commerce are not complied with in the filing and publishing of many of said tariffs, in this, among other things: that the rates actually charged to shippers are not the rates given upon said schedules, but so called combination rates are made, different from the rates specified in the tariffs as published and filed, upon both local and joint interstate traffic; and that the classifications in use are complicated and involved, containing many exceptions and variations, different classifications being at times used upon the road of the same carrier for the shipment of the same commodities to neighboring points, and at times two or more classifications being employed upon the same shipment in fixing a so called combination rate upon the line of a single carrier, or of two or more connecting carriers; and that the tariffs as filed, and without explanation, are apparently not in form sufficient for the information of the public in the transaction of business; and that special tariffs are issued upon single shipments, and are limited in time; and that said tariffs and classifications in other respects do not appear to conform to the provisions and requirements of the Act to Regulate Commerce; and that an investigation and inquiry should be had in respect to said matters;

"It is thereupon ordered that the following named carriers, to wit:

Atlanta & West Point Railroad Company,
Central Railroad & Banking Company of Georgia,
Charleston & Savannah Railway Company,
Charlotte, Columbia & Augusta Railroad Company,
Cincinnati, New Orleans & Texas Pacific Railway Company,
Columbia & Greenville Railroad Company,
East Tennessee, Virginia & Georgia Railway Company,
Georgia Railroad & Banking Company,
Louisville & Nashville Railroad Company,
Memphis & Charleston Railroad Company,
Mobile & Girard Railroad Company,
Mobile & Montgomery Railroad Company,
Montgomery & Eufaula Railroad Company,
Nashville, Chattanooga & St. Louis Railway Company,
Norfolk & Western Railroad Company,
Port Royal & Augusta Railway Company,
Richmond & Danville Railroad Company,
Rome Railroad Company,
Savannah, Florida & Western Railway Company,
Savannah, Griffin & North Alabama Railroad Company,
Seaboard & Roanoke Railroad Company,
South Carolina Railway Company,
South & North Alabama Railroad Company,
Vicksburg & Meridian Railroad Company,
Western & Atlantic Railroad Company,
Western Railway Company of Alabama,

Wilmington & Weldon Railroad Company, Wilmington, Columbia & Augusta Railroad Company, and such other carriers as may hereafter be named, operating in the same territory with those above enumerated, or connecting with them, appear before this Commission at Washington, D. C., on December 18th, 1888, at 11 o'clock A. M., for the purpose of a general examination and investigation of their tariffs and classifications as on file in the office of the Commission, and as in use upon their lines, respectively; to the end that an opportunity may be then and there given to said common carriers to be heard concerning the same, and in respect to the method of constructing interstate rates therefrom as practiced upon said lines, respectively, or in connection with other lines; and that any changes may be made which shall be found necessary and proper in order to bring said tariffs and classifications, and the manner of transacting business thereunder, into more complete conformity with the provisions of the Act to Regulate Commerce."

Pursuant to the notice so given, representatives of the various carriers named appeared before the Commission on December 18, 19 and 20, 1888, and an examination was made in respect to the matters recited in the order. Reference has also been had to testimony previously given on various occasions, as well as to tariffs, classifications and other documents on file. Section fourteen of the Act to Regulate Commerce requires the Commission to make a report in writing, which shall include the findings of fact upon which its conclusions are based, together with its recommendations thereon.

It will be observed that the roads named in the order embrace the principal lines operating in the territory south of the James and Ohio Rivers, in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama and Tennessee, being the territory within which rates have heretofore been to a large extent controlled by the rail and water lines comprised in the Southern Railway and Steamship Association. Rates within that territory, however, are affected to such an extent by conditions existing upon other lines in its vicinity that it has been found necessary to somewhat extend the field of investigation.

The status of the carriers engaged in the transportation of passengers and property to, from and among the States above named is so different from that of carriers in the Eastern, Middle and Western States, and the methods employed are so variant from those of carriers in most other sections of the country, that a careful statement of facts is necessary, for the purpose of clearly exhibiting the principles applicable to the conditions which prevail in the Southern States, and of emphasizing the fact that conclusions reached in respect to this territory are not controlling everywhere. The chief differences will be found in the fact that the territory in question is substantially surrounded by the ocean and the mighty rivers which bound it on the North and West, while it is penetrated to a considerable extent by other navigable streams; and in the further fact that the traffic is relatively small in amount,

the annual gross earnings per mile of road being considerably less than in most of the Eastern, Northern and Western States. In addition to these elements of diversity it is a characteristic of this section that many lines exist over which traffic to or from distant markets may be taken in either direction, with equal facility; and it is also peculiarly true that long established usage has here created a system of so called "trade centers" which control the collection and distribution of commodities throughout the territory in their vicinity; a course of business which has become so firmly grounded that the territory surrounding these local centers is frequently spoken of as naturally tributary to them.

Previous to the passage of the Act to Regulate Commerce it was the universal custom in this section of country to establish rates to certain basing points, subject to fluctuations occasioned by competition and otherwise, while rates to and from all other points were obtained by adding the local charges of the various terminal or initial roads to the rates at the basing points. These points were selected by reason of their situation upon navigable streams, or at the junction of railroad lines, or as determined by other considerations; their number was large. The result of the system was that rates quite reasonable, and in some cases low, were given to and from the basing points; and that goods were thence distributed at high local charges in all directions. For example, the rates from New York or Chicago to Atlanta, plus the rate from Atlanta to local points north, east, south and west therefrom, were the rates charged from New York or Chicago to the latter points direct; and the latter rates were usually very much in excess of rates to distributing points situated at a greater distance over the same line in the same direction. While this method was satisfactory to the centers which it created and maintained, the smaller towns and rural communities protested against a system which worked so obviously to their disadvantage. Since the passage of the Act the number of these favored localities has decreased in the Southern States, and upon many of the lines the disparity in rates as between them and intermediate or local stations has been diminished. So far as passenger traffic is concerned the rates are generally if not universally upon a mileage basis; except upon a few of the weakest roads, they are three cents per mile.

The application to freight traffic in this territory of the fourth section of the Act, which makes it unlawful for the carriers to "charge "or receive any greater compensation in the "aggregate for the transportation of passengers "or of like kind of property, under substantially similar circumstances and conditions, "for a shorter than for a longer distance over the "same line in the same direction, the shorter being included within the longer distance," was carefully considered by the Commission soon after its organization, and the conclusions then reached were set forth in its opinion "In the "Matter of the Petition of the Louisville & "Nashville Railroad Company," 1 Inters. Com. Rep. 278 (1 I. C. C. R. 31). That opinion stated that competition not subject to the regulation of the Act might constitute the circumstances and conditions recognized by the section as ex-

ceptional; the Commission has seen no occasion as yet to vary from the construction of the law then reached, or from the principles then indicated as governing its application. The manner in which interstate rates should be constructed in order to conform to the requirements of the Act, was necessarily left in the first instance where the Law left it, to the judgment of the various carriers. The present inquiry involves the question of how far their conduct hitherto has conformed to the Law as then interpreted, and to the recommendations then made.

The following transportation lines are now members of the Southern Railway and Steamship Association, to wit:

Central Railroad & Banking Company of Georgia,
Ocean Steamship Company of Savannah,
Port Royal & Augusta Railway Company,
Georgia Railroad Company,
East Tennessee, Virginia & Georgia Railroad Company,
Richmond & Danville Railroad Company,
Georgia Pacific Railway Company,
South Carolina Railway Company,
Clyde Steam Lines,
Western & Atlantic Railroad Company,
Old Dominion Steamship Company,
Wilmington & Weldon Railroad Company,
Seaboard & Roanoke Railroad Company,
Merchants & Miners Transportation Company,
Baltimore, Chesapeake & Richmond Steamboat Company,
Atlanta & West Point Railroad Company,
Western Railway Company of Alabama.

This Association publishes a Classification of Freight "for the use of the lines between Eastern "and Western points and Southern points," the last issue of which took effect September 1, 1888. Supplements were issued December 5, 1888, and February 27, 1889, containing changes and additions. The Association also publishes a pamphlet, the issue of which is entitled as follows: "Class and Special Rates of Freight between "Eastern, Western and Coast Cities and Southern Points, in Effect September 30, 1888." This pamphlet bears upon its cover a notation, "For "the use of officers and employees of transportation companies only;" and is furnished to transportation companies at cost, on application to the office of the Commissioner, at Atlanta, Georgia. It is intended for their use in preparing the tariffs which it is customary for each line to publish for itself. For example, the Associated Railways of Virginia and the Carolinas issue monthly a pamphlet entitled "How to Ship," giving rates from New York, Philadelphia, Boston, Providence and Baltimore, to all points in the Southern States reached over the lines named, including points on roads as far distant as the Texas Pacific. The stations upon each line are named in their natural order, including competitive points and locals, and a general index is also given. A similar publication of the Savannah Freight Line, operating over the roads of the Central Railroad & Banking Company of Georgia, is entitled "The Best Way to Ship." These publications are quite generally distributed among shippers, and are readily obtainable; they comprise nearly one hundred

closely printed pages each, and are constructed from the rates issued by the Southern Railway and Steamship Association, by the use of methods which will be more particularly hereinafter described.

An examination of the Association pamphlet shows that it purports to contain "all authorized class and special rates between the points "named, except rates on cotton and pig iron, "which will be found in special circulars." The class rates given are between various Eastern, Western and Coast cities, and what are called "Association Points." It becomes important at the outset to know what are these "Association points," and why they are selected in naming rates. From Boston, New York, Philadelphia and Baltimore the following points are given:

Anniston, Birmingham, Eufaula, Montgomery, Opelika and Selma, Alabama, Albany, Athens, Atlanta, Augusta, Cedartown, Columbus, Dalton, Elberton, Macon, Milledgeville, Rome and Washington, Georgia, Chattanooga, Tennessee.

In naming rates from St. Louis, Cincinnati, Chicago, Louisville and other Ohio River points, the following are given:

Anniston, Birmingham, Eufaula, Montgomery, Opelika and Selma, Alabama; Albany, Athens, Atlanta, Augusta, Brunswick, Cedartown, Columbus, Dalton, Elberton, Fort Gaines, Macon, Milledgeville, Rome, Savannah and Washington, Georgia; Chattanooga, Tennessee; Charleston and Port Royal, South Carolina; Fernandina and Jacksonville, Florida.

An examination of the map shows that the points named are some of them situated upon the ocean, some of them upon navigable rivers, and others are railroad junction points. Athens and Elberton are at the end of the spurs running south from the Richmond and Danville main line; Athens is also reached by a branch of the Georgia Railroad; Cedartown is a comparatively unimportant junction point north west of Atlanta; Albany is the junction point of lines from the north and west with the Savannah, Florida, and Western Railroad; Dalton, forty miles south of Chattanooga, is the crossing point of the East Tennessee, Virginia & Georgia with the Western and Atlantic; Columbus, Eufaula and Fort Gaines are on the Chattahoochee River, and Opelika is a railroad crossing point twenty-nine miles northwest from Columbus; Montgomery and Selma are on the Alabama River, with a regular steamboat line to and from Mobile; Augusta, Georgia, is on the Savannah River, about 130 miles from Savannah by rail; Washington is the termination of a branch of the Georgia Railroad; Milledgeville and Rome are junction points. The location of the other points named is sufficiently well understood. The list does not by any means include all of the junction points in the territory referred to. Most of the places named, however, are reached by more than one line of road, although some of them, like Elberton, Washington and Fort Gaines, are simply terminals.

Rates between Boston and the various "Association Points" are the same as between New York and the same points. The Philadelphia rates are likewise the same, except to Chat-

nooga, Birmingham, Montgomery and Selma, where they are less than New York by the amount of the Trunk Line differentials customarily applied between Philadelphia and Western cities. Baltimore rates are a little lower than Philadelphia rates.

Taking the New York rate as a representative of rates from the eastern cities to Association Points, it appears that the framers of the association pamphlet have recognized the existence of a combination of forces which they deem it essential to regard in the establishment of the tariffs under consideration. Of these the most important one consists in the existence of several steam ocean lines, long established and well known, which ply with regularity from the various Eastern cities to various southern ports, including Norfolk, Wilmington, Charleston, Port Royal, Savannah, and Brunswick. These steamship lines are operated in connection with railroad lines running from said ports into the interior, and form combined rail and water routes, competing with the all-rail lines over the East Tennessee, Virginia and Georgia and the Richmond and Danville from the Eastern cities into the same territory.

The rates made by these rail and water lines are quite steadily maintained; several of the steamship lines, as above shown, are members of the Southern Railway and Steamship Association and operate under the association tariffs in transportation to interior points. Rates to coast points however are not published by the water lines. There are also other water lines which are not members of the association, and there is considerable interchange of traffic by schooners and other sailing vessels.

Taking the rate to Atlanta as an illustration, it will be seen that the tariff from New York to Atlanta, first class, is \$1.14. The statement is made that the rate from New York is as high as the ocean rate to southeastern ports, plus the inland rates from those ports to Atlanta will permit. The rate of 69 cents, first class, is named in the pamphlet as in force between Atlanta and Charleston, Port Royal, Savannah and Brunswick. This rate has been agreed upon by the various lines between Atlanta and the southeastern ports.

The rail lines from Savannah to Atlanta and from Brunswick to Atlanta are wholly within the State of Georgia. That State has a railway commission which for several years has exercised quite extensive powers in the regulation of transportation charges. The rate above stated as established from the seacoast to Atlanta has received the approval of the Georgia state commission, although by all the lines charges are higher from the coast to intermediate points than to Atlanta; and the same is true of rates in the reverse direction. The state commission has established a classification which is in force upon all railroads in the State of Georgia, containing twenty-two classes, six designated by numbers and the remainder by letters from A to R. The lower classes however are substantially commodity lists embracing only one or two articles each, and the general basis of the classification does not largely differ from the classification of the Southern Railway and Steamship Association, which has been adapted to what the state com-

missioners understand to be the local requirements of the State of Georgia. In applying this classification the commissioners have established what is termed a "Standard Freight Tariff," giving rates for each class for distances of 5, 10, 15 and 20 miles, etc., up to 450 miles. This "Standard Tariff" is subject to special rules in respect to each road, varying according to their several local or financial conditions, and resulting in authority to make rates usually considerably larger than the standard rates. For example: The Central Railroad and Banking Company of Georgia, Savannah to Macon (192 miles) and the East Tennessee Virginia and Georgia Railway, Brunswick to Macon (192 miles) are authorized on Classes 1 2 3 4 5 6 A E G and H, to add to the standard tariff as follows:

Between nothing and forty miles, 50 per cent.

Between 40 and 70 miles, 40 per cent.

Between 70 and 100 miles, 30 per cent.

Over 100 miles 20 per cent., etc.

Said Commission also issues rules governing the transportation of freight which provide, among other things, as follows:

"For distances under 20 or over 250 miles a reduction of rates may be made without making a change at all stations short of 250 miles; provided, however, that when any railroad shall make a reduction of rates for distances over 250 miles the same shall apply to similar distances on all the roads controlled by the same company, and in no case shall more be charged for a less than a greater distance."

"* * * But when from any point in this State there are competing lines, one or more not subject to the jurisdiction of the Commission, then any line or lines which are so subject may at such competing point, or other points injuriously affected by such competition, make rates below the standard tariff to meet such competition without making a corresponding reduction along the line of the road; provided that before taking effect the proposed change in rates shall be submitted to and approved by the Commission, and published as required by law."

Under this system rates upon roads wholly within the State of Georgia have been established from Savannah and Brunswick on the seacoast, to Atlanta, Macon, Augusta and other interior points, which are less than the rates charged by the same roads to intermediate points. In constructing tariffs from New York City and other eastern cities via Savannah and Brunswick, to interior points in Georgia, the authorized state rates are customarily added to the agreed ocean rates. In this way rates are established which all-rail routes from the eastern cities to the same points must accept if traffic is taken.

A relation also appears between the rates from eastern cities to Atlanta and those from western cities to the same great center of distribution, and other points similarly situated. The pamphlet of the Southern Railway and Steamship Association names rates from Cincinnati and other Ohio River points, to Atlanta, first class, \$1.07; St. Louis to Atlanta, \$1.35; Memphis, Huntingdon, Vicksburg and New

Orleans, to Atlanta, \$1.03; Chicago to Atlanta, \$1.47. Special commodity rates are given from the western cities on many important articles.

Returning to the New York City rate of \$1.14, first class, to Atlanta, it appears that the same rate is also in force to Athens, Columbus, Dalton, Elberton, Rome and Washington, Georgia; Anniston, Birmingham, Eufaula, Montgomery, Opelika and Selma, Alabama; and to Chattanooga, Tennessee. The rate to Augusta, Georgia, is 96 cents; to Macon and Milledgeville, \$1.09; and to Albany, Georgia, \$1.27.

The Augusta rate of 96 cents is claimed to be made by adding the Georgia State rate of 41 cents, Savannah to Augusta, to the ocean rate of 55 cents, New York to Savannah. It is observed however that in making additions from ocean points to interior points the ocean proportion of the through rate is variable; for example:

| | Railroad. | Ocean. | Total. |
|-----------------|-----------|--------|--------|
| New York to— | | | |
| Atlanta..... | 69 | 45 | 114 |
| Augusta..... | 41 | 55 | 96 |
| Birmingham..... | 74 | 40 | 114 |
| Albany..... | 91 | 36 | 127 |

Taking Louisville as a sample of the Ohio River and western points, the Southern Railway and Steamship Association pamphlet gives lower rates to southeastern coast points than to any, even the competitive, interior points. The first class rate to Savannah, Port Royal, Charleston and Brunswick is 95 cents. The rate on Class D (corn, etc.) to the same points, in December, 1888, was 20 cents. From Louisville to Anniston, Athens, Atlanta, Augusta, Cedartown, Columbus, Eufaula, Macon, Opelika and Rome, first class, \$1.07; Class D, 27 cents; in some cases 29 cents.

Louisville to—

| | | | | |
|----------------|------------|------|----------|-----|
| Montgomery, | | | | |
| Birmingham, | | | | |
| Selma, | 1st Class, | .98; | Class D, | .20 |
| Albany, | " " | 1.62 | " " | .31 |
| Elberton, | " " | 1.21 | " " | .33 |
| Fort Gains, | " " | 1.17 | " " | .33 |
| Milledgeville, | " " | 1.15 | " " | .31 |
| Washington, | " " | 1.21 | " " | .33 |

When making rates into this territory from Chicago, St. Louis and other points northwest of the Ohio River, differentials are added representing the proportions of the lines beyond the Ohio.

In explanation of the low rates from the Northwest to the southeastern ports the statement is made that they are as high as the rates through the eastern cities and thence by ocean to the same ports will permit; rates have been made on grain, Chicago to Baltimore via Savannah, one cent per hundred pounds higher than the established trunk line rate Chicago to Baltimore, which is usually 22 cents.

The general plan of the construction of the rates named in said pamphlet from eastern cities and from the Northwest to association points, so called, having been thus explained, it is next necessary to consider the manner in which rates between the same cities and intermediate points upon the lines of the various southern roads are made. As above stated,

they were usually built upon the through rates to the nearest association point by the addition of the local tariffs of the various roads. This statement, however, is subject to considerable modification at the present time in respect to many of the lines; in fact, there is no common system now in force; one or two of the lines still retain and apply the old system of adding locals, under local classifications, to the established association point rates; other lines have modified this system by conforming in greater or less degree to the principle of the fourth section of the Act to Regulate Commerce. The application of the short-haul rule has been made upon so many lines and to such an extent of territory that inferences can now properly be drawn in respect to the effect of the rule upon localities, traffic and revenue. The only way in which this subject can be intelligently studied is by a careful examination of the methods of each road.

The first line south of the Potomac largely engaged in long distance competitive business at low rates is the Chesapeake and Ohio. This company was not a party to the order of notice above mentioned, but its tariffs are on file. It is engaged in traffic between the Western States and the Atlantic seaboard, in competition with what are known as the Trunk Lines; and in view of the longer route traversed it makes a differential rate in such competition lower than the current trunk-line rates on business between Chicago and New York, the differential being 3 cents on the first four classes and 2 cents upon the 5th and 6th classes. The Baltimore rates via Newport News are the same as the Baltimore rates by other lines all-rail; and the same rates are made over the Chesapeake and Ohio to Newport News, Norfolk, Richmond, Petersburg, Lynchburg and other Virginia points, the rate from Chicago being 72 cents first class and 22 cents 6th class.

The through traffic of the Chesapeake and Ohio is handled by the Kanawha Despatch Fast Freight Line, an organization made up of the several companies over which it operates. The Chesapeake & Ohio proper extends from Huntington, West Virginia, easterly through Charlottesville to Richmond and Newport News; this company also controls the operations of the Richmond and Alleghany, branching from its main line at Clifton Forge, and running thence through Lynchburg to Richmond.

The Kanawha Despatch Fast Freight Line works over the Cincinnati, Indianapolis, St. Louis & Chicago from St. Louis and Chicago; also over various lines from Toledo and its vicinity; also from Memphis, Nashville and other southwestern points. In all this business between the Atlantic seaboard and the Western and Southwestern States, handled in competition with the trunk lines (of which in fact the Chesapeake & Ohio may be called one), the principle of obedience to the requirements of the fourth section of the Act to Regulate Commerce is preserved; in other words, in making rates over this line between the Western and Southwestern States and local points in Virginia situated upon the Chesapeake & Ohio and Richmond & Alleghany roads, the tariffs do not show that rates are higher to intermediate points than to more distant points over

the same line. The Official Classification is used. All local points in Virginia, for example between Charlottesville and Richmond, and between Richmond and Newport News are grouped under the same tariff in respect to through business east-bound and west-bound; and the Chesapeake & Ohio road asserts that it is not a party to rates on interstate business to or from their intermediate points which are in excess of through rates over the same tracks to or from points beyond. In this respect the competition of this line with the other trunk lines is conducted upon the general principle adopted by the Grand Trunk and Central Vermont or National Despatch Line in the same competition since the decision of the Commission in the case of the Boston & Albany Railroad Company against the Boston & Lowell Railroad Company and others, 1 Inters. Com. Rep. 571 (1 I. C. C. R. 158).

Proceeding south, the next important line is the Norfolk & Western. This road extends from Bristol on the boundary line between Virginia and Tennessee, easterly through Lynchburg and Petersburg to Norfolk. Its connection at Bristol is the East Tennessee, Virginia & Georgia, over which it reaches all parts of the Southwest. It also handles freight to and from the Western States via Bristol, and thence through Knoxville and Jellico or Knoxville and Chattanooga.

The interstate traffic of the Norfolk & Western is considerable in both directions. In many respects it is conducted in conformity to the principles of the short-haul clause of the Act.

This is true in respect to traffic between stations on the line of the Norfolk & Western road and the Atlantic cities in connection with steamboat lines via Norfolk. The tariffs on file give rates subject to the Norfolk & Western Local Classification (which is the Official Classification, so called), from Baltimore, Philadelphia, New York, Providence and Boston to all stations on its line, and from those stations to said cities. These rates to and from points east of Petersburg are no higher than to and from Petersburg; to and from points east of Lynchburg are no higher than to and from Lynchburg; and the same is true of intermediate points east of Roanoke and of Bristol, respectively. In making this adjustment the stations are quite widely grouped; for example, the first class rate between New York City and Shawsville is \$1.05; and the same rate applies to and from all stations between Shawsville and Bristol, a distance of 127 miles. A very large proportion of the interstate traffic of this road is handled under these tariffs in connection with water lines for Norfolk to the cities named.

A Fast Freight Line known as "The Great Southern Despatch" works over this road from New York and Pennsylvania points via Harrisburg, Hagerstown and the Shenandoah Valley, striking the Norfolk & Western road at Roanoke and leaving it at Bristol. Rates over this line to local stations on the Norfolk & Western road are made in conformity with the fourth section of the Act to Regulate Commerce, being no greater to local points easterly from Roanoke than to Lynchburg, and to local points westerly from Roanoke than to Bristol. Other tariffs

of the Great Southern Despatch Line will be considered in connection with the road upon which the various points reached are located.

Rates from western cities to points on the Norfolk & Western road are treated in a different manner. Tariffs to Norfolk, Petersburg and Lynchburg are issued from time to time by initial railways, and by the Virginia, Tennessee and Georgia Air Line, so called, from various Western and Southwestern points; these tariffs also include rates via Norfolk to Baltimore, Philadelphia, New York, Providence and Boston. The first class rate from Chicago to Lynchburg, Petersburg and Norfolk is 72 cents; and the same rate is made via this line to Baltimore, Philadelphia and New York. Rates to local points on the Norfolk & Western are constructed by adding to the Norfolk, Petersburg and Lynchburg tariffs, under the Official Classification, certain arbitraries specified in a sheet furnished to the initial railways for that purpose. These arbitraries are not the local charges on the Norfolk & Western Road from the basing points to intermediate stations, but are considerably less. On the main line they run from 15 cents on the first class to 6 cents on grain; the local freight tariff is a distance tariff, the rate to Farmville, for example, being, first class, 30 cents from Lynchburg and 32 cents from Petersburg, while the arbitrary addition as above is 15 cents only. The division of these rates is also peculiar, in this: that while the usual custom in respect to roads charging local rates from junction points provides for a *pro rata* division of the through rate to the junction point and allows the terminal road the entire local rate, the Norfolk & Western divides the entire rate on Norfolk, Petersburg & Lynchburg percentages, receiving an arbitrary only on stations situated on its branches, and in that case only the amount attributable to the service on the branch line. Under this system the amount charged local points on the main line is divided proportionately among all the roads between the points of origin and of delivery of the freight, so that the additional sum received by the Norfolk & Western upon the greater charge made for the shorter haul is comparatively very small.

An explanation of the grounds on which this company justifies the charging of a higher rate to intermediate points from the rates charged to Lynchburg, Petersburg & Norfolk, is stated by its representative as follows:

"We are compelled, as we believe, by the "controlling force of circumstances (desiring "to participate in the business and to obtain "for ourselves a share thereof) to accept the "rates as made by other lines to the important "competing points on our road."

"Looking at it from our revenue standpoint, "if we made the rates to Norfolk from western "territory as high as we did to intermediate "stations between Norfolk and Petersburg it "would put our rates higher than our competitors, and therefore we could not do the Norfolk business."

The meaning of this statement undoubtedly is that the line desires to participate in traffic from the West to the important points of Norfolk, Petersburg, Richmond and Lynchburg, which are reached from the same territory by the Chesapeake & Ohio, Baltimore & Ohio, and

other routes having shorter lines than the line of the Norfolk & Western via Chattanooga or Knoxville. This cannot be done unless the rates made are the same or lower than those of the more direct lines. Rates are accordingly made upon this competitive traffic which the company is unwilling to accept upon traffic to its local stations. It is claimed that this system contains an element of compensation to the intermediate points which is stated as follows:

"A consignee at a local station understands that he is not unduly discriminated against in favor of the competing points on the line, because the rates made to his station on this traffic are always less under the basis employed in the traffic referred to than they would be if the business came by a competing line to the competing point on our road and then local rates to the stations were added thereto."

Nevertheless, under the system above detailed, the division of the through rate to local stations which the Norfolk & Western itself receives does not yield to this company a revenue very largely in excess of the revenue which it receives upon business taken to the competitive points.

The infraction of the short-haul rule in this instance appears to be simply for the purpose of meeting railroad competition and enabling this route to participate on favorable terms, by a roundabout line, in business to and from certain competitive points. It is stated that the Western connections are allowed to participate in the division of the increased rate at intermediate points, as an inducement to them to co-operate more freely in routing competitive business.

This situation presents a case which has not as yet been passed upon by the Commission, except so far as the same is discussed in *Boston & Albany Railroad Co. against Boston & Lowell Railroad Co.* and others, 1 Inters. Com. Rep. 500, 571 (1 I. C. R. 158), in which case it was said that the necessity there alleged is one "which exists wherever long and short lines compete; the long line must accept the rates made by the short line and perhaps make concessions from them. In this respect there is nothing peculiar in the position of these defendants; there are roads in every part of the country which can make the same claim they do with the same justice. It is a claim that could be advanced wherever a route, however circuitous, could be formed for long-haul traffic. * * * The greater departure from the direct line, the greater would commonly be the necessity for low rates on through traffic; and the greater the liability to have the charges on the local traffic increased to make the carriage of through traffic possible."

The case now in question does not appear to develop any substantial ground upon which the departure from the rule of the statute can be justified.

Rates in the reverse direction from local points to distant western and southwestern points are generally made observing the short-haul principle of the law, so far as the point of shipment is concerned; that is, no more is charged from intermediate points upon the Norfolk & Western road than from other

points more distant over the same line. In making shipments to the South and Southwest where the Southern Railway and Steamship Classification is employed, that classification is necessarily used and the shipments are billed according to its provisions. It appears that many roads in the Southern States upon which freight of this character may be delivered, have established exceptions to the standard classification of the Southern Railway and Steamship Association; in such cases bills of lading issued by initial roads are framed so that, in case the classification of the delivering road so requires, a change in the bill of lading may be made, as well as in the freight charges. Freight destined to points in the southern and western territory last referred to of course is subject to the exceptions to the short-haul rule which prevail at the various points of delivery; and each road furnishes others with the rates to its several stations.

So far, however, as the stations upon the Norfolk & Western Railroad are concerned, interstate traffic to and from them is carried substantially in accordance with the rule of the fourth section of the Act to Regulate Commerce, excepting freight from the West and Southwest to its local points.

The earnings of this road, both gross and net, have been very considerably increased during the period since the Act to Regulate Commerce took effect.

The Richmond and Danville Railroad may next be considered. The main line of this company extends from Richmond through Danville to Atlanta, running along the foot of the mountains across the States of North and South Carolina into Georgia; from which circumstance the route is known as "The Piedmont Air Line." It reaches tidewater at West Point on the York River 38 miles east from Richmond, where steamboat communication is made with Baltimore and other Eastern cities. From Danville a branch extends northerly via Lynchburg to Washington, called the Virginia Midland Division. The Richmond & Danville has several spurs or branches, the more important being a line from Charlotte, North Carolina, running southerly through Columbia, South Carolina to Augusta, Georgia; another from Salisbury, North Carolina, westerly to Paint Rock on the Tennessee boundary, where connection is made with a branch of the East Tennessee, Virginia & Georgia; and an extension westerly from Atlanta, called the Georgia Pacific running through Birmingham, Alabama, and projected to the Mississippi River.

The greater part of the south-bound interstate traffic of this company is between New York and other Eastern cities and points on and beyond its line in the Southern and Southwestern States. The tariff upon this traffic is contained in the monthly publication entitled "How to Ship" above referred to, which gives rates between Boston, Providence, New York, Philadelphia and Baltimore and all said Southern points, in both directions the same. The Richmond and Danville routes named are the Paint Rock Line and the Piedmont Air Line; the former reaching the territory in question via Knoxville and Chattanooga, and the latter

via Charlotte and Atlanta. The classification employed is that of the Southern Railway and Steamship Association with an "Exception Sheet B," which is printed in the pamphlet, together with the Classification. This "Exception Sheet" affects from 100 to 125 articles, many of them leading commodities in the traffic. When shipments are wholly within the States of Georgia and South Carolina respectively the Classification established by the state commissions of those States is employed. On traffic from a Georgia point to the East the Georgia Classification would be used to Atlanta and that of the Southern Railway and Steamship Association for the rest of the route; the rate upon the same article is therefore at times subject to be computed under two different classifications for parts of a single journey.

The method employed by the Richmond & Danville in respect to interstate business to and from its local points, taking the New York City first class rate as an illustration, is as follows:—

On the main line the rate, New York to Richmond, is 35 cents; going south the tariff gradually increases as follows:

Burkeville, 60 cents; Danville, 88; Reidsville, 99; Greensboro', \$1.05, 189 miles from Richmond. From this point through Salisbury to Charlotte, 93 miles, the same rate is preserved. Beyond Charlotte the rate again increases to Spartanburg, 257 miles from Richmond, where the rate is \$1.24. This rate is maintained for a distance of 99 miles through Greenville and Seneca to Toccoa; the rate is reduced to \$1.14 at Gainesville and remains the same for a distance of 53 miles to Atlanta, 549 miles from Richmond. The Atlanta rate is the same by all routes, and the principles said to control its establishment have been above stated. The stations between Gainesville and Atlanta are grouped under the Atlanta rate of \$1.14 upon what is considered a concession to that locality, the traffic being light and the loss of revenue inconsiderable.

From the above it appears that the rate from New York to Atlanta by this route is a gradually increasing rate, with the exception of a distance of about 100 miles where a grouped rate of \$1.24 is maintained as against the Atlanta rate of \$1.14. The rates on the other classes vary proportionately less, the difference between Spartanburg and Atlanta being 5 cents on classes 4 and 5, 3 cents on class 6, and the rates being the same on class D. In reaching their present adjustment the rates from Spartanburg to Toccoa, including those points, were reduced; the rate, New York to Spartanburg, now \$1.24, being formerly \$1.35.

Upon the Western North Carolina Division, leaving the main line at Salisbury where the rate is \$1.05, a rate of \$1.08 is reached at Catawba, distant 39 miles from Salisbury and 278 miles from Richmond, which rate is preserved through Asheville to Paint Rock, and beyond on the line of the East Tennessee, Virginia & Georgia to Knoxville without higher charge at any intermediate point.

On the Charlotte, Columbia & Augusta Division the rate at the time of the hearing was \$1.24 uniformly, except at Columbia and Augusta, where it was 96 cents, and at Rock Hill, \$1.14. No reason is stated why two minor points between Charlotte and Rock Hill were

given a higher rate than the latter place. The low rates to Columbia and Augusta were claimed to be justified by water competition. Since the hearing the rates from New York to the intermediate points upon this division have been quite materially reduced—Columbia and Augusta being the only exceptions to the short-haul rule, and the disparity in relation to those points being diminished. Upon the branch roads running from Columbia to Greenville, from Spartanburg south to Union and Alston, also at Laurens, Anderson, Abbeville and other points in Western South Carolina, the Spartanburg rate of \$1.24, first class, is preserved. The rates on the Cheraw & Chester have been reduced from \$1.24 and are now grouped at \$1.05. The rates on the Chester & Lenoir have also been reduced and aligned.

Other junction points at southern terminals of this system are Athens and Goldsboro, the rate to Athens being \$1.14, or 10 cents lower than certain intermediate points; and to Goldsboro \$1.05, all the stations on the branch from Greensborough to Goldsboro being grouped at this rate. On the minor branches of the Richmond & Danville additions to the rates from the branching points are made, which however are not heavy. Diagrams have been produced by this company showing the rates as they existed prior to the Act to Regulate Commerce and as they now exist, a comparison of which shows material reductions at many intermediate points and a general bringing of the tariffs into conformity with the fourth section of the Act, with only the exceptions above stated. Through rates from the West to points on the above lines are made by adding stated rates from junction points, which are lower for the long haul only in the cases of Columbia, Athens and Gainesville.

North-bound rates on business originating at points on this line are not higher to intermediate points than to Richmond, Lynchburg and Washington. In some cases, but not generally, such business originating at remote points has higher rates to intermediate stations than to the terminals; an example of this is found in the case of molasses and some other commodities, shipped from New Orleans to Richmond over this line at 40 cents for the purpose of dividing the traffic with water routes, whose tariff is 37 cents, the rate meanwhile to local stations from Charlotte to Danville remaining at 50 cents. This is claimed to be justified on the ground of actual existing water competition; the forty cent rate is not accepted to Lynchburg where no water competition is found, although other rail lines make that rate from New Orleans.

It is seen therefore that the chief variations from the short-haul clause made upon that part of the Richmond and Danville system east of Atlanta are found in the territory from Spartanburg to Toccoa, where the first class rate is 10 cents higher than the Atlanta rate, at points between Charlotte and Columbia, and between Columbia and Augusta. In all this territory the grouping of rates is widely extended, and nothing exists in the nature of adding local rates from junction points, either forward or in the reverse direction, as found upon some other lines. The rates in question are largely affected by rates made from the seaboard to Au-

gusta, Macon and Atlanta under the authorization of the Georgia State Railroad Commission; no recommendation respecting them is now made, other than the general suggestions below.

Proceeding upon the extension of the Richmond & Danville line west from Atlanta, known as the Georgia Pacific, it appeared from the testimony that the first-class rate increased from Atlanta, \$1.14, to Bremen and Waco, \$1.52, then decreased to \$1.14 at Anniston and Oxanna; it increased to \$1.51 at Seddon and returned to \$1.14 at Birmingham; it increased again to \$1.54 at various stations from Day's Gap to Hudson, and decreased to \$1.20 at Columbus, Mississippi. The Anniston, Birmingham & Columbus rates are made lower in conformity to the established rates of other lines at those points. The February, 1889, edition of "How to Ship," however, shows important reductions from the above figures at all intermediate points; the highest rate between Atlanta and Anniston is now \$1.31; between Anniston and Birmingham, \$1.31; between Birmingham and Columbus, \$1.37.

Traffic passing over the Richmond & Danville road to the lines of its various connections is charged to destination upon the principles adopted by the several connecting lines where the freight is delivered.

The publication "How to Ship" also contains the tariffs of two groups of railroads known as the Atlantic Coast Line and the Seaboard Air Line, operating in the vicinity of the Coast in Eastern Virginia and North and South Carolina. The situation of these lines is quite peculiar, as rates to and from the Eastern cities by ocean are largely available at coast points—Wilmington, for example, having by long usage received the same rates as Charleston; Fayetteville, in the interior, being reached by water lines on the Cape Fear River, and Wadesboro by the line of the Carolina Central from Wilmington; Tarborough and other points may be mentioned as affected by ocean rates. No minute scrutiny has been made of the rates upon these lines; it is stated that many changes have been made since the passage of the Act in order to bring the rates within the principles of the law. The violations of the fourth section are not many. Nor does the disparity between the points affected by ocean rates and interior points appear to be extreme, so far as the rates have been examined by the Commission.

Another very important system is that of the East Tennessee, Virginia & Georgia Railroad Company. Its principal lines are the following:

One commencing at Bristol on the boundary line between Virginia and Tennessee and running southwesterly through Knoxville, Chattanooga and Decatur to Memphis; another from Chattanooga through Rome, Atlanta and Macon to Brunswick on the Atlantic Ocean; another branching westerly from Rome through Calera and Selma to Meridian, Mississippi. The main line from Bristol reaches Rome by a branch from Cleveland, Tennessee, 29 miles northeast of Chattanooga; there is also a branch from Knoxville northwest to a connection with the Louisville & Nashville at Jellico; and several other minor branches, making a total

of nearly 1500 miles of road, situated in four States and reaching many important points between the Atlantic Ocean and the Mississippi River. It connects at Bristol with the line of the Norfolk & Western from the eastern cities.

The interstate commerce of this system includes traffic which originates at points located on the line of its road and destined to points in other States also on its own line, and joint traffic handled in connection with other lines. The principal originating points of its local traffic are Knoxville, Chattanooga, Memphis, Atlanta, Brunswick, Selma and Meridian. Probably, however, the more considerable part of the interstate business of this line is traffic to and from Virginia and the Eastern States via Bristol, Paint Rock and Brunswick; traffic to and from the Western States via Jellico, Chattanooga and Memphis; and traffic with Mississippi and Louisiana via Meridian. Much of this business is very long-distance traffic; for example, from New Orleans and Memphis to New York City, or from Chicago and St. Louis to Atlanta, Macon and Brunswick.

It is traffic of the latter class which presents the greatest apparent difficulties to the traffic manager who endeavors to comply with the fourth section of the Act to Regulate Commerce in the working of rates through a country where business is light and distances between stations long. There is, for example, proof of the existence of considerable freight traffic from Chicago, St. Louis and other points in the Western States to Charleston, Savannah, Brunswick and other points on and near the Atlantic seaboard, consisting of packing-house products, flour, grain, etc. Taking as an illustration Class D (grain), the rate as established September 30, 1888, by the Southern Railway and Steamship Association over these and other lines from St. Louis to the Atlantic Coast points referred to was 25 cents; to Macon and Augusta, Georgia, the rate was 34 cents; and to Atlanta, Georgia, 32 cents, Macon being 195 miles inland from Savannah. The low rate to the coast points was claimed to be compelled by reason of competitive rates established on rail routes from St. Louis and Chicago to Baltimore and Philadelphia and thence by ocean vessels to the coast points in South Carolina and Georgia.

The various carriers engaged in the all-rail traffic to those points have recently revised these rates, and on February 1, 1889, the rate from St. Louis to the coast points was made 31 cents on Class D, the rate to Macon and Atlanta remaining unchanged. A trial of this revised tariff is now being made and the practical results will soon enable the carriers engaged therein to determine whether they cannot properly make the Macon rate a continuous rate to the coast. Macon and Atlanta, however, have at all times been treated as competitive points and have received rates of the lowest grade.

The intermediate points which seemed to the Commission to have been particularly in view in the framing of the Act, are the smaller places scattered along the lines of the Southern roads; for example, between Brunswick and Macon and between Macon and Atlanta. Owing to the treatment which points of this kind received from the carriers there has been little

opportunity for the exhibition of local enterprise or for the development of local industries. It has been customary to issue tariffs from distant commercial centers to the larger southern points and railway junctions as basing points, from which rates to all surrounding intermediate territory were made by the addition of local charges, usually framed on a progressive mileage basis and increasing rapidly, the hauls being treated as short and independent from the several basing points, and the combination of the through and local rate being regulated only by giving to such points the "benefit," as it is somewhat ironically termed, "of the lowest combination;" by which is meant the adoption of such combination as would produce the lowest rate, whether the basing point was on one side or the other of the destination; in other words, the shipper at these local stations had the legal right to have his goods forwarded to a point beyond his depot and returned at local rates, if less than the combination made from a basing point in the other direction by adding the local rate therefrom to the through rate thereto.

The belief has forced itself upon this Commission with increasing strength during the period in which it has observed the operation of various systems of rate making in the Southern States and elsewhere, that this system of combined joint and local rates to points in the Southern States intermediate to the so called basing points is in a very great degree responsible for the lack of local development in that region, except at favored localities. That there are difficulties in the situation is readily conceded; that there are present and temporary advantages to the carrier in the establishment of thriving cities and jobbing centers distant from each other one hundred miles or more, with stretches of intermediate territory where all distribution and collection of articles of consumption and products of the soil are made at local tariff rates, may also be conceded; nevertheless, it is the belief of the Commission that it was the situation of these local communities and others similarly situated in other parts of the country, mostly agricultural, without important manufactures, mills or other business enterprises, and paying rates for transportation largely in excess of the customary tariffs to competitive centers, that attracted the attention of Congress and led to the incorporation of the short-haul clause, so called, as a leading feature of the Act to Regulate Commerce. Having given a most attentive consideration to this subject it is the further belief of the Commission that the complaint of these minor communities was a just complaint; the expression of the short-haul principle has been clearly made in the Act to Regulate Commerce, and it would be the duty of any tribunal competent to aid in the enforcement of a statute of this nature, to insist upon its execution, subject only to such just exceptions as the language of the Act may reasonably sustain.

When therefore competitive carriers are enabled by harmonious action to so adjust their rate sheets as to bring their charges into conformity with the general rule of the fourth section, and still realize reasonable and fair return for the service performed for the public, it becomes the duty of the Commission to see that

intermediate points receive the benefits of such an adjustment.

By "intermediate points" the Commission does not refer to points like Macon and Atlanta so much as to the minor points along the lines of the various carriers. If the former principle of adding local rates from basing points is pursued, the effect of any advance of rates to terminals will be to advance them at all the local stations by the same amount. This is directly contrary to the intention of the law; it is the duty of the Commission to see to it that such advances, when proper in themselves, are made the occasion for reduction rather than advances at minor intermediate points.

The chief obstacle in the way of a general compliance with the rule of the fourth section is found in the question of revenue. Carriers in the Southern States employ that argument in every case when conformity to the law is suggested. They say that the railroads must live or there can be no commerce by rail; and they insist that any reduction of rates means loss of revenue, which is against the public interest and the carrier's right, unless the rate in question be unreasonable *per se*. But it is not clear that the application of the general rule of the law would involve permanent loss of revenue. The stimulus given to business at intermediate points will increase traffic largely; that proposition has been so often practically demonstrated that no intelligent observer can reject it. Moreover, the adjustment required does not necessarily involve immediate loss of revenue. An advance of a single cent, for example, on the various classes and specials composing the large interstate traffic to and from Atlanta would compensate the carriers for very considerable reductions on the comparatively light interstate traffic which is now carried to local points on the Atlanta combination.

The construction of the tariffs of the East Tennessee, Virginia & Georgia Railway, during the period that has elapsed since the passage of the Act, has been in some respects intelligent, and an effort has been observed to bring them in some degree into conformity with the spirit of the law. The treatment accorded to different parts of its system has not however been uniform, and much room still remains for progress. It is the belief of the Commission that an intelligent study of the tariffs of the system as a whole, from the standpoint of observing desirable changes, rather than of seeking for the perpetuation of old methods, would result in the elimination of much injustice which still remains, without materially affecting the earning capacity of the property. The method by which this may be accomplished is indicated above.

At present the amount shipped to intermediate points is relatively very small; giving such points the rates charged at more distant places, if adopted and maintained as a general principle, would necessarily encourage local industry and enterprise. Such encouragement would not be at the expense of the coast points, but would in its reflex action and by necessary laws ultimately work in their favor also. It is customary for dealers at Baltimore, Philadelphia, New York and Boston to supply interior towns in their vicinity by sales to customers there located, deliveries being made by the

stoppage of cars *en route* for the terminals, at the same rates charged in case they are carried through. The adoption of such a system in the Southern States would not break up the business of distributing points; the methods would be somewhat changed, but the combinations of credit and acquaintance would maintain existing business relations. The operation of this system in the Eastern, Northern, and Western States, by way of developing local communities, has wrought benefits to the country at large which are obvious to the most superficial observer. An example of the results which might follow the abandonment of the old system of constructing tariffs is given in the following extracts from a communication which was addressed to the Traffic Manager of the East Tennessee, Virginia & Georgia Railroad, from a party residing twenty-three miles north of Macon on the line of that road:

"We own at Juliette, Ga., a water mill with a capacity at present of grinding about one carload of corn per day, besides some wheat, stock feed, etc. The mill site is 100 yards from your line of road, on the Ocmulgee River, which, during lowest water, furnishes about five thousand horse power, easily available, enough to run an enormous mill, or several of them. Now, we have undertaken to improve this property, commensurate with its earnings, and propose to put a good deal of money in it if it pays, and there is no telling what proportions it might reach if we can enlist the aid we ask of you, which seems very reasonable to us. Our principal work will be that of grinding corn into meal, by water power.

"Our request is for a through rate to Juliette, Ga. (23 miles shorter haul than Macon), and at the Macon rate. We want this rate from the principal grain markets, viz.: St. Louis, Cincinnati, Chicago, etc. Our purpose is to erect at this place an Elevator and Warehouse, and have Macon merchants ship us corn, and then re-ship it to their orders over your road when it is made into meal, thereby giving you a local rate on all our product, besides the through rate you get for bringing it there.

"We would very much like 'Milling-in-transit' but not hoping for that, we ask for this rate, which we believe you can and will give us, as it contributes, coming and going, to your earnings."

This application was supported by wholesale merchants of Macon, and was obviously not in conflict with the interests of that city, but afforded an opportunity for Macon capitalists to purchase western grain to be milled at Juliette and thence distributed at local rates. The reply of the Company was as follows:

"Your communication, asking for the Macon rate on grain from Western points to Juliette, has had our very careful consideration; but for reasons hereinafter stated we do not see our way clear to grant what you ask. In the first place, the Interstate Commerce Commission would not approve of our making the Macon rate to Juliette and charging higher rates to other local stations north of Juliette, and it would be too much of a sacrifice for the road to make to level the rates

"to all local stations; and, in the second place, we could not give Juliette the Macon rate without pursuing the same policy toward the many mills located on our system of railroad, which we are not prepared to do at this time. I will state that the question as to the validity of the practice of what is known as 'Milling-in-transit' is now before the Interstate Commerce Commission, and pending the decision of that body we do not feel safe in allowing you that privilege. We agree with you that the arrangement you propose would be a good thing for this Company—if it could be confined to Juliette, but as this is an impossibility, it would mean a large loss of revenue to this Company to consummate the arrangement. In conclusion we have to regret that the general good of this Company forces us to make an unfavorable answer to your proposition."

This answer, in substance, announced the policy of the Company to be the preservation of its general principle of charging more to intermediate points than to Macon and other so called competitive points on its line, although at the expense of preventing the establishment of new industries, and of affording practicable rates to "the many mills" situated along its line of road. The writer is correct in stating that the Interstate Commerce Commission would not approve of charging higher rates to local stations north of Juliette than to Juliette; nor has it ever approved of charging higher rates to Juliette than to Macon. The Commission is by no means convinced that the general reconstruction of tariffs referred to in the letter would mean a "large loss of revenue" to the Company, if intelligently arranged and upon the line of the suggestions made in this opinion. Such loss of revenue as might apparently immediately ensue would, in its judgment, presently and at no distant day be much more than compensated for by the increased traffic resulting from the establishment of manufacturing, mills and other industrial enterprises, at points where the railroad rates now prohibit them.

That part of the East Tennessee, Virginia & Georgia system lying between Bristol and Chattanooga has been the subject of changes in interstate rates. Two principal routes are available to commerce between this region and the Eastern cities; one via Bristol, and the other via Paint Rock. The Great Southern Despatch Line reaches this territory through the Shenandoah Valley via Harrisburg, Hagerstown, Roanoke and Bristol. It publishes tariffs from points in Pennsylvania, New York and New England, governed by the Southern Railway and Steamship Association Classification. The rate (first class) to Knoxville, Chattanooga and Dalton is \$1.14; and the same rates are made to all intermediate points along the line and also to points on the branch from Knoxville to Jellico.

This principle is also followed in arranging rates in the same territory via Paint Rock.

The same rate, \$1.14, is in force from New York to competitive points south of Dalton, including Rome, Atlanta, Anniston, Birmingham, Selma, Montgomery, Columbus, Opelika, Macon and Brunswick. The rate to New Orleans, Natchez and Vicksburg is 70 cents; to

Mobile 75; Baton Rouge 87; Memphis \$1.00. The through rates to these Mississippi River points are seen to be low; nevertheless there is actual water competition by ocean steamers between the Eastern cities and New Orleans, and by boats upon the Ohio and Mississippi Rivers. While it is not at all improbable that this subject requires adjustment and rearrangement, it is not proposed to enter upon its consideration at the present time. The question of competitive markets is often more embarrassing than that of competitive carriers.

Returning to the tariff of the Great Southern Despatch from Eastern cities, it is observed that the rates named to local points beyond Dalton are in most instances greater than the above schedule fixed for competitive points. The intermediate stations between Rome and Atlanta and between Atlanta and Macon are grouped at first class, \$1.33. Upon other routes of this company the rates to local stations are somewhat higher; but as given in the tariff of the Great Southern Despatch there is an effort apparent, by grouping and otherwise, to prevent the existence of very great disparity.

The portion of this line between Macon and Atlanta presents a question which arises in various forms in the Southern States and which gives rise to a serious difficulty in the adjustment of rates. The Central Railroad of Georgia has a line from Savannah through Macon to Atlanta, which, by its ocean connection, practically controls the tariff from the Eastern States to both points; while the East Tennessee, Virginia & Georgia enters the State of Georgia from the opposite direction and competes both at Atlanta and at Macon for business to and from the same Eastern cities. If the rate by the latter line to Atlanta were lower than the rate to Macon, or if the rate by the former line to Macon were lower than the rate to Atlanta, the result might be a "war" of rates between these two competing lines, which would either compel the Central Railroad of Georgia to withdraw from competition for business to Atlanta, or the East Tennessee, Virginia & Georgia to withdraw from competition for business to Macon. The adjustment of rates to both these points at a reasonable figure is an advantage to shippers at both places by enabling two available routes to be maintained.

The figures, however, which have been agreed upon are claimed to be so low that they would not afford reasonable rates on either line for local deliveries at intermediate points where no competition exists. This claim can hardly be accepted without challenge. Statistics concerning the amount of business over these lines to the Cities of Atlanta and Macon, respectively, as compared with the amount of their business to and from intermediate points, have not been furnished. Those cities are distant from each other about 100 miles, and several villages are found upon each line. Of these, McDonough, on the East Tennessee, Virginia & Georgia, now receives the \$1.14 rate as a junction point, the rate at other intermediate points on that line being \$1.33, as above stated. Its competitor, the Central of Georgia, operating a parallel road on which the movement from Eastern cities is in the opposite direction, has recently reduced its rates in such

manner that the stations from Macon to Griffin are grouped at \$1.14; beyond Griffin a rate of \$1.31 is reached at Jonesborough, falling to \$1.14, as above stated, at Atlanta. It is fair to say that neither of these roads at present adopts the principle of adding local charges to the rates at basing points, but both have modified their tariffs in the direction of conformity to the rule of the law. The requirement of the general rule of the statute, however, is not satisfied so long as any disparity exists; and the question of a general readjustment of the rates does not seem as yet to have seriously engaged the attention of the carriers.

The section between Macon and Atlanta has been dwelt upon simply as illustrative of conditions quite largely prevalent in the Southern States. Water competition as a direct factor is not found at either of these points. The rates at Macon, however, are said to be affected by the ocean rates to Savannah and Brunswick, from which points a rail carriage of about 200 miles reaches the City of Macon. The rate from the ocean to Macon on business from New York is not, however, based upon the principle of relation to increased distance; on the contrary, the Central of Georgia in its rates from New York reaches \$1.31 at Gordon, only to fall again to \$1.14 at Macon. It is obvious, therefore, that the Macon and Atlanta rates are founded upon arbitrary considerations, resulting from past usage and from local demands, and not altogether upon compliance with the competitive pressure of ocean lines. The general reconstruction of the tariffs suggested would require concurrent action on the part of the various carriers which penetrate the section of country under consideration, from different directions, interlacing each other at many points. So far as the Commission is able to perceive, however, this is not an impracticable arrangement; on the contrary, in view of the improvement in construction of tariffs since the passage of the law that has been effected on many lines in a similar way, it is believed to be entirely feasible. It is therefore recommended that action be at once inaugurated in the direction above indicated; in case obstacles are found, either arising from natural causes, or from the position taken by lines interested in the traffic, which tend to make difficult the proposed readjustment, the facts with the questions involved may be brought at any time to the attention of the Commission, when they will be considered and such further recommendations made as the situation appears to demand.

One of the difficulties met by the southern roads in applying the rule of the fourth section to their traffic is exemplified by the situation of the Western and Atlantic road, which runs from Atlanta, Georgia, to Chattanooga, Tennessee, 140 miles. Freight from or to the Eastern cities may reach or leave this road at either end of its line, the rate to Atlanta via the Richmond and Danville being 114, and the rate to Chattanooga via the East Tennessee, Virginia & Georgia being also 114. The latter road moreover announces a rate of 114 to Atlanta, while the former makes a rate of 114 to Chattanooga. Shipments to intermediate points on the line of the Western & Atlantic usually are received via Atlanta rather than via Chattanooga; but when deliverable at local stations

the rates are met somewhere on the line by rates obtainable by the addition of local rates from Chattanooga. Moreover, the competing line of the East Tennessee, Virginia & Georgia from Chattanooga to Atlanta crosses the Western & Atlantic at Dalton, and the latter point also receives the 114 rate. Rates in the pamphlet "How to Ship" to points on the Western & Atlantic are made by the addition of locals to the Atlanta rate until a place called Rogers is reached, where the rate is 144; thence the rates decrease to Dalton; thence they increase again to Chickamauga, 134, and fall to 114 at Chattanooga. And the rates of the Great Southern Despatch via Chattanooga are identically the same to all such local points.

In case the same rates from Eastern cities were made to Chattanooga, Dalton, Atlanta, and also to all local stations on the Western & Atlantic, the question of division of rates might be an embarrassing one. A *pro rata* division on a mileage basis would afford the delivering road but very little revenue; yet the long lines to Atlanta and Chattanooga might object to accepting less on freight to local points on the Western & Atlantic than they get on freights to those cities, especially when those rates are adjusted on a so called competitive basis. Such an adjustment of this matter as would be required in order to make the tariffs conform strictly to the law might be difficult, and would involve mutual concessions. Upon its local tariffs the Western & Atlantic substantially conforms to the rule of the statute, although Dalton receives lower rates from Atlanta than some intermediate points, by reason of the general arrangement existing on the southern roads in favor of junctions, which it is difficult to justify.

The Marietta & North Georgia is a road running northeasterly from Marietta. Rates from the Eastern cities are made by adding its locals to the rate to Marietta. These rates are progressive as far as Murphy, North Carolina, 112 miles from Marietta. The road is under construction beyond Murphy, and when it reaches Knoxville, Tennessee, similar conditions will be presented, to those above described, on the Western & Atlantic, as traffic can then be handled in both directions.

Another example of a similar difficulty is the following:

In the pamphlet "How to Ship," and in the Great Southern Despatch tariff, rates are shown from the Eastern cities to points on the line of the Cincinnati Southern; the first via Paint Rock to Chattanooga; the other via Bristol to Chattanooga, and thence northerly to local points on the Cincinnati Southern in Tennessee and Kentucky. The rate to Chattanooga, as above stated, is 114. The rate to Melville, 17 miles north of Chattanooga, is 129; from thence the rate grows gradually less and less to Moreland, Kentucky, 211 miles north from Chattanooga, where it is 100. This apparent anomaly is explained by the fact that the Cincinnati Southern is part of the Queen and Crescent system, which runs from Cincinnati through Chattanooga to New Orleans. The rates upon this system are progressive from Cincinnati south as far as Chattanooga. The system forms a quite direct line from the Eastern cities via

Cincinnati to its local points. Traffic from New York to the stations between Melville and Moreland might naturally come upon this line at Cincinnati and be taken thence southerly. Such traffic is not refused when it comes on to the line at Chattanooga to be taken thence northerly; but the rates in the latter case instead of increasing with distance diminish with distance, because they are made the same as rates from New York to the same points coming in the normal direction of the movement, that is, by way of Cincinnati.

This situation develops a fact which has been somewhat overlooked by the public in dealing with the general subject. It is a feature of the method of making rates and interchange of traffic pursued in the Southern States—that all routes are equally open to the shipper, and on the same terms. For example, of the rate New York to Melville, 129, the Cincinnati Southern would receive pay for only 17 miles haul from Chattanooga; while if the freight approached Melville from the north it would receive pay for 318 miles haul. In such cases it is obviously very greatly for the interest of the carrier to arrange its tariffs in such a manner that the longest haul and the greatest division possible shall accrue to its own line. The contrary policy is, however, quite generally in force, and equal rates from initial points are given without regard to the direction in which the freight may come. This is a matter of mutual arrangement among carriers in the Southern States, not required by any provision of law, and which apparently has been long in operation. So far as the statute is concerned it would be legitimate for the rates from New York City to points on the Cincinnati Southern via Chattanooga to be made progressively increasing, although such rates would necessarily exclude traffic, except at points where they were less than the rates made via Cincinnati. The method generally employed however has opened up all the lines of the Southern States to the most free interchange of traffic in every direction and by all possible routes; and the losses in some cases are compensated by corresponding advantages in others, so that the general result may not average unfairly.

Returning to the East Tennessee, Virginia & Georgia for the purpose of considering the individual tariffs used by that company, as distinguished from joint tariffs, an example is found in the tariff from Memphis east bound. This is a pamphlet of about 60 pages, containing the rates to places named. The form of its preparation is in some respects excellent; the figures are plainly printed, and the extensions are said to be of actual rates, leaving nothing for computation. In general the Southern Railway and Steamship Classification applies, but the first column against the names of places is headed "For Exceptions to Classification see Note—;" and in the column below references are furnished to notes found at the end of the pamphlet. The classification proper is not printed, but about twenty pages are devoted to lists of so called "Exceptions to Classification." These are numbered Note 1 to 7, inclusive, and Note A to Z, inclusive, thirty-two in all, each headed "Rates named in current printed tariffs to points indicated by letter—opposite

will be governed by the following Exceptions to the Classification." Some of these Exception Sheets contain only ten or twelve articles, others embrace more than one hundred. There is also a list of "Specials to Pensacola, Fla.;" also a note (AA) containing special rates from Memphis to fifty-four competitive and junction points in the Southern States, upon thirty-eight leading articles. It is obvious that so far as classification is concerned the confusion is almost infinite. It was explained to be occasioned by the differences in use upon the roads on which the points named are located; thus Georgia points are said to be subject to the Georgia State Classification, etc. This explanation hardly fits the case, for State classifications do not control interstate business. Certain roads have individual exceptions to the classification, and a few have individual classifications for local business, but they do not necessarily control on shipments from distant points. The absence of simple and uniform classification in the Memphis tariff was not satisfactorily explained, and a change in the methods employed seems to be a necessity.

This subject is now under consideration by a standing committee on Uniform Classification, organized by selection from the railroads and associations in all parts of the United States, which is working in the direction of uniformity throughout the entire country with, as is represented, a reasonable prospect of success. Whatever may be the outcome of this effort, lines now using cumbrous and detailed Exception Sheets may and should at once enter upon the work of reducing them to that direct and simple form which the Commission has so often recommended.

The effect of the classification methods used in the Memphis tariff may be illustrated by an example or two taken at random. Take Frankville, Georgia, 29 miles north-west from Macon; the class rates from Memphis to Frankville and to Macon are as follows:

| Class | 1 | 2 | 3 | 4 | 5 | 6 | A | B | C | D | E | F | H |
|-----------------------------------|-----|-----|----|----|----|----|----|----|----|-----|----|----|----|
| Frankville.... | 127 | 109 | 96 | 81 | 66 | 53 | 35 | 45 | 36 | 31½ | 60 | 69 | 68 |
| Macon | 103 | 88 | 77 | 64 | 52 | 42 | 24 | 34 | 29 | 25 | 46 | 50 | 51 |
| Differences ... | 24 | 21 | 19 | 17 | 14 | 11 | 11 | 11 | 7 | 6½ | 14 | 19 | 17 |
| Georgia distance tariff—29 miles. | 24 | 21 | 19 | 17 | 14 | 11 | 11 | 11 | 6 | 5½ | 14 | 12 | 17 |

The class rates to Frankville are therefore seen to be the rates to Macon plus the local rates back to Frankville, except in Classes C, D and F where they are greater, and apparently excessive even under the system of combination rates.

Now applying these rates to some particular commodity, take for example, molasses, released, found in the Classification under Class 6; this would apparently give a rate to Frankville of 53, to Macon 42; but Note AA gives a special rate to Macon—24 cents. Under Frankville we are referred to Note L; here we find molasses, owner's risk, Class R; but opposite Frankville there is no rate on Class R, or on any class below H. The Georgia State Classification puts molasses under Class R (giving it practically a commodity rate) which for 29 miles is 7 cents; but this is not shown in the tariff and there is apparently no way to treat a 2 INTER S.

shipment of molasses from Memphis to Frankville, except to leave it in Class 6 at 53 cents. The evidence shows that in practice it would be so treated. Nevertheless an intelligent shipper could ship to Macon at 24 and thence back to Frankville at 7, making the rate 31 instead of 53.

Given a 24-cent rate to Macon the question whether even a 31-cent rate to Frankville is justifiable under the law is a very doubtful one. It would be difficult to find a practicable competing water line from Memphis to Macon. The rate of 53 cents shown in the tariff is wholly indefensible. It arises from the confused Classification and Exception sheets employed. It is no answer to say that there is no movement of freight from Memphis to Frankville; there probably is not, but if that is the case the carrier would lose no revenue by having its tariffs correctly constructed, and might possibly in that way attract traffic.

Take another article, "Dried Fruit." In the classification it is found under Class 3, rate Memphis to Frankville 96, to Macon 77; rate to Macon, Note AA, Dried Fruit, Released, is 31, any quantity; to Frankville Note L, Owner's Risk, Carloads, Class 6, 53; to Frankville, not at Owner's Risk, Carloads, Class 4, 81; Georgia Classification, Class 3, rate Macon to Frankville 19. Out of all this we find that less than carload shipments Memphis to Frankville direct would be at the rate of 96 cents; but to Macon and back to Frankville it would cost 31 plus 19, or only 50 cents. The notations in reference to "owner's risk," "released," "carloads," etc., are not related to each other, and the result in this case, as usual, is largely to the disadvantage of the local station. Such illustrations as these could be multiplied indefinitely. A tariff which presents them is not in conformity with the law, and should at once be corrected.

The Memphis freight tariff now under consideration gives rates to about two thousand points in the Southern States, including points on the line of the East Tennessee, Virginia & Georgia, and on the lines of its connections, all arranged in alphabetical order and without regard to location; the line on which the various points are situated is not stated. The method pursued in other similar tariffs, of arranging stations in their order as located upon various connecting lines, has some advantages over the method adopted here.

The tariff properly provides for its application to rates from St. Louis and Cairo by adding fixed differentials.

It further establishes, in some cases, two rates to the same point, designated as follows:

Live Oak, Fla. (For F. R. & N.) 91 etc.

Live Oak, Fla. (Proper) 150 etc.

This is confusing and appears discriminating. The fact seems to be that the first line of rates are divisions of a thorough rate to local points on the road of the Florida Railway and Navigation Company. If this is the case they are not properly stated as a rate to Live Oak, Florida.

This company also issues a tariff from Chattanooga to points in the Southern States, arranged on the same alphabetical plan, which is made applicable also from Knoxville by the addition of a 5 cent differential.

These two are the only general interstate tariffs on file by this company individually.

It would seem to be practicable for tariffs to be constructed upon some suitable plan, from Brunswick, Birmingham, Selma, Atlanta and perhaps other important points, which could be used upon shipments to and from intermediate stations; such tariffs might also be adapted for use at neighboring points by providing in each case the proper addition or subtraction of the necessary sum. No attention apparently has as yet been given to this subject by the managers of the line.

An illustration of the effect and treatment of water competition is found in the Memphis tariff above referred to. Going east from Memphis the rates are lower to Tusculumbia and Florence than to Corinth and other points west of said places. The Company's witness states that those points are located on the Tennessee River, where regular lines of steamers are available to traffic from Mississippi and Ohio River points as far up the Tennessee as Florence. He further states that "We do not attempt to meet all the rates of river lines, but we get the best attainable rate to secure a fair proportion of the business and maintain our interests at those points. We make those rates by experience as to what we find just to the shipper, and our rates do not fluctuate with the changes that the river lines may see fit to make." This is effected by making the first class rate to Corinth 45, to Cherokee 48, to Tusculumbia and Florence 34; and other class rates in proportion. No proof of rates by water has been submitted, nor any facts in respect to the commodities for which water for transportation is available.

Proceeding easterly we find the rates as follows: Courtland 52, Decatur 34. Decatur is the crossing of the Louisville and Nashville Railroad. No water competition is found except locally from Decatur through Chattanooga to Knoxville. Proceeding easterly again,—Stevenson 55, Chattanooga 72, Athens 103, Knoxville 76, Johnson's 110, Bristol 84.

The higher rates charged from Memphis and St. Louis to intermediate points in East Tennessee than to Knoxville and Bristol are not conformable to the uniform rates from Eastern cities to the same territory, nor was any satisfactory explanation given thereof. Attention was called to the fact that Bristol is reached by the Norfolk and Western from tide water on the Atlantic Ocean. How this can be claimed as a reason why the intermediate points should be charged a greater rate from Memphis than Knoxville and Bristol receive was not made clear.

The main line of the Louisville & Nashville Railroad extends from Cincinnati, through Louisville, Nashville, Birmingham, Montgomery and Mobile, to New Orleans. A branch line extends from Memphis Junction in Kentucky to Memphis, Tennessee; another branch line from St. Louis, Missouri, crosses the Ohio River at Evansville, and intersects the Memphis branch at Guthrie, and the main line at Edgefield Junction, near Nashville. Various other branches are operated, including one to Lexington, Kentucky; one to Jellico, forming with the East Tennessee, Virginia & Georgia a line to Knoxville; another to Owensboro,

on the Ohio River; another from a point in Illinois to Shawneetown, on the Ohio River; another to Pensacola, Florida, and thence east 161 miles to River Junction; another to Sheffield, Alabama, etc. Altogether it includes about 2,500 miles of road. This mileage has been reached by the addition, from time to time, successively, of different roads to the general system. About 2,200 miles are now operated directly by the Louisville & Nashville Railroad Company in its own right, and the remainder are under its control as owner of a majority of the capital stock of the companies operating the same.

In certain respects this company has punctually and continually complied with the provisions of the Act to Regulate Commerce, particularly in the matter of placing tariffs on file in the office of the Commission, preparing and filing statistical reports, etc. In so far, however, as the Act to Regulate Commerce attempts to exercise control over the rates charged for the transportation of freight, and the principles upon which such rates are constructed, this company has changed but very slightly the methods which it was accustomed to employ before the passage of the law. This it insists is not in any respect due to a spirit of antagonism to the law, but is justifiable under the construction which it places upon the language and intention of the statute. The views which it entertained respecting the requirements of the second, third and fourth sections of the Act were announced to the Commission immediately upon its organization, and were at that time the subject of careful consideration, the result reached being announced in the opinion above referred to (1 Inters. Com. Rep. 278, 1 I. C. C. R. 31). That opinion defined with care and precision the principles which would govern the Commission in the administration of section four, or the short-haul clause, so called, of the Act to Regulate Commerce. The suggestion was made in its conclusion, "that strict conformity to the general rule is possible in large sections of the country without material injury to either public or private interests; and that in other sections the exceptions can be and ought to be made much less numerous than they have been hitherto, and that when exceptions are admitted the charges should be less disproportionate."

The order for temporary relief which had been made upon the application of the petitioner was allowed to remain in force until the date originally limited for its expiration, to afford time for the revision of tariffs "in order to bring them as nearly as may be reasonably feasible into harmony with the general rule of the Statute, and with the views expressed in this opinion." And it was further added, "That they may be brought much nearer to conformity than they now are, without the sacrifice of any substantial interest, we have very little question; and as business adapts itself to the new principle established by Congress, it will no doubt be found that exceptions can safely and steadily be made less and less numerous."

This opinion was filed June 15, 1887. The tariffs of this company, as they were from time to time received by the Commission, failed to

show any substantial modification in the direction referred to. What were known as competitive rates, meaning rates lower than the rates charged to other points in the vicinity, were taken away from a few comparatively unimportant railroad junction or crossing points; but the general system upon which the rates of this company were constructed remained absolutely without change. On October 22, 1887, the Commission made a general inquiry of all the railroads in the United States in respect to the conformity of their rates with the fourth section of the Act. The reply of the Louisville & Nashville Railroad Company, with arguments of its officers and counsel in support of its position, was received, and appears at page 166 of the First Annual Report of the Interstate Commerce Commission. From time to time this subject, together with the subject of the preparation and publication of tariffs on the part of this company, has been taken up by correspondence and in interviews between the Commission and its officials. The difficulties surrounding the situation have been carefully examined and freely admitted. Suggestions have been tendered in respect to various particulars in which changes in the direction of conformity to the law might be made. The Commission was given to understand more than a year ago that a general re-casting of the company's system of rate-making was in progress, and from time to time these intimations have been renewed. Nevertheless, upon the hearing on December 18, 1888, this corporation continued to plant itself firmly upon the position that its tariffs were in conformity to the requirements of the law, and that no change in any respect could properly be required by the Commission.

In considering the questions now to be discussed the subject necessarily divides itself into two branches: first, the general method employed by this company in constructing its rates and in preparing its tariffs, under the interpretation which its officials have given to the law; and, second, the correctness of the interpretation of the fourth section of the statute which has been applied by this company to its interstate traffic.

First, therefore, we consider the tariffs of the Louisville & Nashville Railroad Company in the light of the requirements of section six of the Act to Regulate Commerce.

Traffic from points on the Ohio River and north thereof, passing to points upon and beyond the line of the Louisville & Nashville Railroad, is controlled by two general tariffs known as the Southeastern and Southwestern Freight Tariffs, respectively. The latter reaches what is called the Southwestern territory, lying between the Mobile & Ohio Railroad and the Mississippi River; the other reaches what is called the Southeastern territory, including all points in the Southern States east of the Mobile & Ohio Railroad. Rates to the Southwestern territory are based upon rates from St. Louis, and are said to be controlled by the Mississippi River transportation. Rail rates from St. Louis to Memphis, Vicksburg, Natchez, Baton Rouge and New Orleans, called Mississippi River points, are fixed with reference to river competition; and the same river competition extends to rates between

Evansville, Louisville and Cincinnati, and the same territory. The latter rates are established with relation to the rates from St. Louis as the basis, being to many of the points in the Southwestern territory the same as from St. Louis; and rates from Chicago, Terre Haute, Indianapolis, etc., are fixed by agreed differentials higher than the St. Louis rate.

To the Southeastern territory rates are made upon an entirely different basis, substantially being the rate from the initial point to the nearest point on the Ohio River, plus the rate from such Ohio River point to destination. The rates fixed by the Southern Railway and Steamship Association from the Ohio River crossings, Cincinnati, Louisville, Evansville, and from Memphis, are taken as the basis to basing points, for example, Nashville, Birmingham, Montgomery, etc.; and from those points freight is transported to local and intermediate points in all directions at local rates, the nearest common or competitive point to the point of destination, or that point from which the addition of the local to destination would give the lowest rate, being used as the basing point.

North-bound rates to points north of the Ohio River from the Southwestern and Southeastern territories respectively are made upon the same general principles.

Rates to local points on the lines of the Louisville & Nashville Railroad are constructed under the same rule, its connections being furnished with its local rates from its common or basing points to its local points, and the company accepting a through rate so made on what is called the "lowest combination." No attempt has yet been made to modify this system of combination rates by any general tariff or system of tariffs applicable to the lines of this company. Tariffs constructed with relation to distance are used in the same manner as before the law—by combination with the rates to the agreed basing points.

The attention of the officers of this company has been called to the fact that the law contemplates the definite establishment of a rate of charges from every point on a line under one management to every other point on the same line, which the ordinary citizen can read for himself and understand without difficulty. The reason given for the failure of this company to remodel its tariffs and fix definite rates between points on its own line is that it has not as yet found it possible to do so. It is claimed that the complications involved are too great to be practically overcome. For example, while the law obviously requires the establishment and publication of rates from Cincinnati, Louisville, etc., to points between Montgomery and Mobile, this company finds it necessary, in making its freight charges upon such traffic, to instruct its agents to build combinations rather than to establish rates which are open to public view. It further appears that the chief reason why this company has not found it possible to establish and publish a series of actual rates upon its individual interstate traffic is the complex system of classification in use. While other lines in all parts of the United States have gotten over the same difficulty by a simplification of the classifications employed, this company has hitherto declined to change its

classification methods, and has used the difficulties occasioned thereby as an excuse for its failure to conform to the provisions of the law. Traffic to its basing points is subject to the Southern Railway and Steamship Classification, while traffic from its basing points to its local stations is subject to its local classification. This fact, it is said, renders impossible the establishment of definite rates from initial points to local stations. The Traffic Manager of the Company states as follows:

"A solution of these difficulties is apparently offered by applying on our local traffic the same classification as applies to through traffic;"

but, he proceeds,

"The fact remains that even in that event the difficulties are not overcome, and the impracticability, if not impossibility, of printing a local tariff always adjusted to competitive rates, under the peculiar circumstances governing the competition at so many of the points reached by this company's lines, is not thereby surmounted."

In further explanation he states that,

"While the Southern Railway and Steamship Association Classification nominally applies from our western and northern termini to all common or basing points upon this company's lines, as a matter of fact such is not the case. To Nashville there are 39 specials, to Birmingham there are 35 articles excepted from the general classification, to Memphis there are 21 specials and 58 additional exceptions to or changes in the general classification, and to New Orleans and Mobile there are 20 articles taking specified rates and the same exceptions as apply to Memphis."

The resulting complication, as he claims, is so great that a steady system of tariffs is impossible to be intelligently constructed. The company therefore made no attempt to comply with the law in this respect.

Other elements of complexity in classification might be added to its statement. The tariff from Cincinnati to Louisville is subject to the Official Classification, and the same classification applies also to other lines of traffic handled by the Louisville & Nashville where the competition is with the Trunk Lines of the Northern States; for example, between Nashville, Lexington, Memphis, etc., and the Eastern cities. Between St. Louis and Shawneetown, Evansville and Henderson the Illinois State Classification is employed. In the Southwestern Freight Tariff above described, which is nominally subject to the Southern Railway and Steamship Association, there appear 33 exception sheets, each of them grouping a large number of articles varying in some respects from the standard classification, and rates on special commodities are made almost without number. The local classification which the Louisville & Nashville Railroad Company employs on all local traffic and in all combinations upon traffic deliverable to or received at local points on its lines, differs to a remarkable degree from other classifications elsewhere in general use. In explaining the difficulties of the situation an official of the company pointed out the fact that there are very few articles in reference to which the enumeration is the same with that of the Southern Railway and Steam-

ship Classification. The Louisville and Nashville local classification is in its result much higher. A computation "of the revenue actually derived during a stated period from the transportation of certain classes of property between certain representative local stations under the classification now in use, and of the revenue that would have been derived from the transportation of the same kind and quantity of freight between the same points had the Southern Railway and Steamship Association Classification been in use," showed that the loss would have been over 10 per cent.

Nevertheless it is claimed that during the past twenty years this company has done much in the way of uniform classification, the present local classification having been substituted for no less than twelve different classifications which were formerly in use.

Since the passage of the Act to Regulate Commerce, however, so far as appears by the results as yet made public, such progress has ceased, and the tendency has been rather in the direction of increasing complexity than of simplification.

It is unnecessary to say that a confusion created or maintained by the carrier for its own purposes cannot be used to justify a disobedience of the law. If changes in classification methods are necessary in order to conform to the requirements of the statute, such changes should be made without hesitation. One of the most valuable results from the provisions of the law which demand the establishment and publication of schedules of rates, fares and charges, has been found to be the fact that in order to do this in conformity with the statute the abandonment of old classification methods became necessary; local classifications almost without number have been surrendered. Throughout the entire country this simplification has gone on, forced by the mandatory provisions for the establishment and publication of tariffs that shall not be varied from, and in respect to which the rates charged shall be neither higher nor lower than the actual sum named; nearly every road in the land now employs on its local traffic the general classification of its section. This was found to be a necessity; the law could not otherwise be obeyed, and the results, so far as can be observed, are satisfactory both to the public and the carriers.

The only attempt at justification of the perpetuation of confusion by any argument other than loss of revenue (which manifestly could be to some extent if not entirely compensated by re-adjustment of rates) is found in the following statement of the Company's officers:

"Should the Louisville and Nashville Railroad Company accept a classification of the 'Trunk' Lines on shipments from New York destined to a point on its line between Cincinnati and Louisville that will make its portion of the rate from Cincinnati either less or more than it would receive on similar shipments forwarded from Cincinnati proper, it would be an unjust discrimination, either for or against Cincinnati. Should the Company accept a classification of the lines north of the Ohio River on shipments from Chicago

"go destined to local points on its line south of Louisville that would make its proportion of the rate from Louisville either more or less than it would at the same time be receiving for the transportation of like kind of property from Louisville proper to the same destination, it would be an unjust discrimination in favor of or against Louisville. The same is true of traffic reaching our lines at Nashville, Montgomery and other junction or terminal points."

And again:

"When this traffic reaches the competitive point, say Louisville, Nashville, Birmingham or Montgomery, it is transported thence by us to the local point for the same rate and under the same classification at which we transport similar traffic that may be forwarded by merchants from those points on our line. This is the only way to prevent an unfair discrimination. It would be an apparent injustice for this Company to haul a carload of meat, or even a box of drygoods, from Nashville for a local station south of Nashville at a lower classification, and consequently lower rate, when from St. Louis or Chicago, than when from Nashville proper."

The general idea of this line of reasoning is, that it is unjust discrimination against Southern distributing points to charge in the aggregate a less sum on business passing through such points to local points beyond, than when like commodities are purchased by merchants at such distributing points and by them reforwarded. This question has several times been before the Commission; and it has repeatedly expressed its belief that such a charge not only would involve no unjust discrimination, but that it is at times a natural result of the application of the principles established by the Act to Regulate Commerce.

Crews v. Richmond & Danville R. Co. 1 Inters. Com. Rep. 703; 1 I. C. C. R. 401 (Danville case); *Martin v. Chicago, Burlington & Quincy R. 2 Inters. Com. Rep. 32*; 2 I. C. C. R. 25 (Omaha case); Second Annual Report of Interstate Commerce Commission, 30 (The Law in its Effect upon Cities) 2 Inters. Com. Rep. 264.

But the point here in question does not go to the extent claimed; on the contrary, the discrimination referred to only exists in case the local shipment is under a higher classification than that employed in the shipment to the distributing point. If the classification is the same there need be no discrimination whatever; the question then becomes one of rates purely. The argument assumes the necessity of keeping on foot a local classification; a necessity which is not established by proof, nor in any way obvious. Assuming, on the other hand, that the local classification was unknown, the rate from Chicago or St. Louis to a local point could still be the same as the rate to the distributing point with the local beyond added, or it could be less should a through rate to local stations be deemed advisable; and in neither case would any unjust discrimination necessarily be effected.

In arranging its local rates this Company proceeded originally upon a distance basis, recognizing the principle that as distance increases the proportionate rate should decrease.

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Upon the taking effect of the Act to Regulate Commerce it filed with the Commission a series of printed tariffs naming rates of freight from the more important points on the line, such as Cincinnati, Louisville, Nashville, Montgomery, Birmingham, Mobile, New Orleans, etc., to all local stations; it also filed a local freight tariff, in the form of a bound book compiled July 1, 1885, and containing the schedules from each local point as furnished to the individual station agents. In this book rates are shown from each point to every other point, by numerical references to a series of fifty division numbers, each of which represents a line of class rates, gradually increasing. It is admitted that the tariff rates between far-distant local points given in this local tariff "can, in a number of cases, be cut by combination of rates to and from competitive points beyond;" and it is not claimed that the agent in such cases "would apply any other rate than that given in his local tariff." But there is said to be little or no business between such local points, and that practically there is little injury caused by the inaccuracy of the tariffs placed in the agent's hands.

The tariffs from the basing points so filed were in force for some time prior to the passage of the law, and in most instances they remain to the present time without change. Tariff No. 5, dated March 1, 1886, may be taken as an example; it shows rates of freight from Cincinnati to all local stations on the Louisville and Nashville Road. Confining our attention to class 1, these rates increase from 5 cents at Newport, Kentucky, to 40 cents at La Grange, 83 miles, and remain the same until the first station north of Louisville is reached. Rates to Louisville, Nashville and other competitive points are not shown; leaving Louisville, the first rate from Cincinnati is 37 cents, and the rates increase to 80 cents at Bowling Green, whence they remain identical to Nashville, a distance of 71 miles; leaving Nashville the rates commence at 72 cents and increase to \$1.06 at points near Decatur; going south from Decatur they increase to \$1.25 at points north of Birmingham; leaving Birmingham they increase to \$1.45 at points between Birmingham and Montgomery; they further increase to \$1.60, which is the rate named to all points within 80 miles of Mobile; and to points beyond Mobile the rate is \$1.65 nearly to New Orleans, and \$1.70 for the last 25 miles.

The rates to the basing points are as follows: Cincinnati to Louisville, 25 cents; Nashville, 53 cents; Decatur, 99 cents; Birmingham, \$1.08; Montgomery, \$1.08; Mobile, 98 cents, New Orleans, 98 cents.

Returning now to the first section, called the Cincinnati Division, between Cincinnati and Louisville, it appears that the rate to Sparta, 45 miles from Cincinnati, is 28 cents, which is greater than the rate to Louisville, and the same is true in respect to all stations between Sparta and Louisville, a distance of 65 miles. For the last twelve miles, covering nine stations between Anchorage and Louisville, a lower rate than the tariff is obtained by adding to the Louisville rate the local charges back from Louisville to the several stations. In reference therefore to those stations the rates of freight named in the tariff are not the

rates that would be actually charged, according to the Company's system of working rates. Although the Act to Regulate Commerce pointedly says that after schedules have been established and published it shall be unlawful to charge a greater or less compensation than is specified in such published schedule, nevertheless this schedule of rates from Cincinnati to the stations named is customarily departed from and a less amount is charged. This arises, it is said, from the fact that any shipper would have the right to ship to Louisville at the Louisville rate and then return his shipment at the local rate to the neighboring point. This is undoubtedly true, and wherever rates are established less for the longer than the shorter haul it becomes necessary to give the combination at points near the more distant terminal or basing point. This fact however would not make it impossible for the published tariff to show the rates to such points correctly instead of incorrectly; under such circumstances tariffs may be so constructed that they show a decreasing rate as they approach the more distant terminal. The real reason why this tariff cannot be so constructed lies in the matter of different classifications above described. The rate from Cincinnati to Louisville is subject to the Official Classification. Very many articles are classified higher in the Louisville and Nashville local classification than in the Official, and in point of fact a shipper to Louisville under the Official Classification and thence back along the line under the local classification would be able to extend the reflex influence of the lower through rate on many and probably most commodities for a considerable distance east of Anchorage; so long as two classifications are used in constructing rates from one point to another no accurate publication of the rate can be made. There is no possible way of escaping from this difficulty except for the diversity of classifications to yield to the demands of the law.

As Tariff No. 5 is further examined similar inaccuracies repeatedly appear. The rates from Cincinnati to both Mobile and New Orleans being 98 cents, as above stated, there is not a single point between those places at which the combination is not less than the published tariff. The schedules therefore from Cincinnati for the entire division between Mobile and New Orleans are untrue, and the difference in classification intensifies their incorrectness.

The same thing exists in reference to the entire series; they are full of misinformation and they fail to conform to the requirements of the law.

While this subject has been treated as though the methods of computing rates by combinations was well known by all the local agents of the Company, as well as by its shippers, there is considerable difficulty in assuming such to be the fact; if so it arises from custom and oral instruction, rather than from any explicit orders shown to have been issued. The tariffs themselves contain no intimation whatever that any reductions from the tariff rates are obtainable through combination or otherwise; such tariffs posted in the stations and placed in the hands of station agents would apparently authorize the collection of the charges

published. Upon the attention of the officials of the Company being called to this point a circular was produced, dated October 2, 1885, instructing agents at Cincinnati, Louisville, Evansville, Owensboro, Henderson and East St. Louis, to make rates to all local stations south of Nashville by taking the rates to Nashville, Decatur, Birmingham, Calera, Montgomery, Mobile or Pensacola, and adding the rates from Nashville, Birmingham, etc., to local stations whenever the total rate so arrived at is less than the tariff rate from initial point to said local station. No circular is produced authorizing agents at any other points to make rates in this manner; and although it is not believed that such rates are customarily made otherwise than in conformity with the method testified to by the Company's officials, nevertheless, in the absence of explicit instructions there is obviously a door open for a great amount of imposition upon the public.

This Company has been at considerable pains to obtain information from its station agents respecting the extent to which its published tariffs are consulted by their patrons. With very few exceptions the agents unite in saying that the posting of the rates is useless; that their patrons are accustomed to call upon them for information respecting each shipment and to accept the figures furnished without question; and that they never observe them examining the posted schedules. The collection of this evidence was entirely unnecessary. In view of the fact that the schedules published for posting confessedly do not give the rates which would actually be charged in a very great number of instances, and in view of the double classification universally employed in shipments to basing points and thence to local points, in both directions, it is not at all surprising that the public fail to consult the tariffs; there would apparently be no use in their doing so, as any information which they might gather from schedules so prepared would be of no practical value.

What the custom of the public might be in case the published schedules conformed to the requirements of the law is not shown by any experience at the stations of this road. It is proper to add, however, that the requirement for publication found in the law is based upon many other considerations besides that of affording information to local shippers. The necessity of establishing and maintaining a steady, uniform, open tariff rate is of paramount importance, in view of the evils which the Act to Regulate Commerce attempts to correct; and obviously the first and most efficient method of regulation is the requirement of constant publicity. That this requirement has proved of no practical value upon the line of the carrier now in question does not arise from the fault of the law, but from the fact that the law has been persistently disobeyed; whether the requirement is, or is not, a proper one, is a subject upon which it would be improper for the Commission to enter; arguments excusing violation of the law upon the theory that its provisions are useless, cannot be entertained. That question is not submitted to the discretion of the Commission, or of carriers. The requirement of the law is obvious and plain; there is no physical impossibility in

constructing classifications and rates which shall conform thereto; the duty of the Commission is clear, and requires it to insist upon such classifications and schedules being put in operation by the Louisville and Nashville Railroad Company.*

Coming, in the second place, to the question of whether the tariffs of the Louisville and Nashville are in conformity with the requirements of section four of the Act to Regulate Commerce, there is no present occasion for a general discussion of the meaning of this section; the views of the Commission have been often expressed; first in the opinion above referred to, and subsequently in repeated instances. No reason for modification of those views has been as yet found, either upon further consideration of the language of the section, or in the light of facts which have from time to time been developed in the practical conduct of interstate commerce. The Louisville and Nashville Railroad Company, as has already appeared, is accustomed on very many parts of its several lines and branches to charge a greater sum for the shorter haul than for the longer. This is done in both directions, and upon a general principle of regulating its charges which had been in force for many years prior to the passage of the Act.

Recognizing as correct what was said in the opinion above cited that "The existence of 'actual competition, which is of controlling 'force in respect to traffic important in amount, 'may make out the dissimilar circumstances, 'and conditions entitling the carrier to charge 'less for the longer than for the shorter haul 'over the same line in the same direction, the 'shorter being included in the longer, in cases,

"first, where the competition is with carriers "by water which are not subject to the provisions of the statute; second, where the competition is with foreign or other railroads "which are not subject to the provisions of "the Statute; third, in rare and peculiar cases "of competition between railroads which are "subject to the Statute, when a strict application of the general rule of the Statute would "be destructive of legitimate competition;" and further recognizing the fact that the rates of this carrier between its Ohio River terminals and points like Memphis, New Orleans, and to some extent Mobile, Selma and Montgomery are affected by competition with carriers by water not subject to the regulation of the Act, it nevertheless is obvious that very many of the violations of the fourth section found in its tariffs cannot be justified under the circumstances and conditions above defined.

That opinion, among other things, affirmed that the exceptional circumstances and conditions did not arise in cases where the lesser charge on the longer haul has for its motive a purpose to build up particular manufacturing establishments or special branches of industry, when the natural effect would be the detriment or discouragement of others; nor where it is designed to favor business or trade centers at the expense of less important points; nor where the lesser charge on the longer haul is merely a continuation of the favorable rates under which trade centers or industrial establishments have been built up.

It is not apparent, in respect to the tariffs now under consideration, that the lesser charge on the longer haul has for its motive the encouragement of manufacturers or other

*Since the above opinion was prepared the following letter has been received from the Louisville and Nashville R. R. Co. The new tariffs referred to were received by the Commission on March 28. So far as there has been opportunity for their examination they appear to substantially meet the criticisms above made, and to conform to the requirements of Section 6 of the Statute:

LOUISVILLE, KY., March 25th, 1889.

C. C. McCAIN, Esq.,

Auditor Interstate Commerce Commission,
Washington, D. C.

DEAR SIR:

I send you by express today a copy of this company's new local freight tariff fixing the rate for transportation of freight between all stations on the lines of the Louisville & Nashville Railroad (owned, leased and operated lines), South & North Alabama Railroad, Birmingham Mineral Railroad, Owensboro & Nashville Railway, Nashville, Florence & Sheffield Railway and Pensacola & Atlantic Railroad.

Several months were spent in the preparation of this new tariff for the purpose of properly adjusting the company's local rates to the classification of the Southern Railway & Steamship Association. It was desired to have the tariff effective on January 1, 1889, and blank forms were printed accordingly with that date. It was found impossible, however, to have the tariffs properly prepared and in the hands of agents and the public so as to be effective on January 1st, and it was therefore made effective between all stations on January 15th, 1889. Since that date, therefore, the local classification of the L. & N. R. Co. Company has been the Southern Railway & Steamship Association Classification with exceptions as noted. Special efforts were made to adopt the S. R. & S. S. A. Classification en-
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tire and the exceptions that have been made, few in number, are of two kinds:

1st. Articles for which the S. R. & S. S. A. Classification provides one class while the local classification provides another as follows:

| Articles. | Class. | |
|---|---------------|---------------|
| | S. R. & S. S. | L. & N. |
| Agricultural implements, C. L. | 5 | L |
| Barrel and box material, C. L. | A | N |
| Boilers, engine, etc., C. L. | 6 | L |
| Cars, logging or mining, C. L. | 6 | L |
| Charcoal in bbls. or casks, C. L. | A | M |
| Dry goods, "cotton piece goods," etc. | 6 | 3 |
| Lumber, dressed N. O. S. and rough, including fence posts, etc., C. L. | 6 | N |
| Lumber, dressed N. O. S. and rough, including fence posts, etc., L. C. L. | 4 | 6 |
| Machinery N. O. S., C. L. | 6 | L |
| Machinery, cotton mill, C. L. | 6 | L |
| Oil, coal or its production, in tank cars. | 6 | Sp'cl tariff. |
| Pipe and tile, drain or roofing, C. L. | A | N |
| Pipe, earthen or concrete, C. L. | A | N |
| Tobacco, unmanufactured, in casks or hhds. | 4 | 6 |
| Vehicles, carriages, buggies, etc., C. L. | 4 | L |
| Vehicles, wagons, carts, C. L. | 5 | L |

2nd. Articles for which the S. R. & S. S. A. classification provides no specific class but governed by

branches of industry, except such as are located at a few favored places; on the contrary, many examples appear in which the precise converse of this is the case, and the rates as constructed operate to discourage manufactures and to interfere with local industries. For example, on the line of the Louisville and Nashville Railroad from 20 to 80 miles south of Nashville, in Tennessee, there are several milling stations from which south-bound shipments are made over the line of this company.

A circular issued January 30, 1889, reads as follows:

"Effective at once, rates on milled products of grain from Franklin, Tenn., West Harpeth, Tenn., Claiborne, Tenn., Dark's Mills, Tenn., Columbia, Tenn., and Pulaski, Tenn., to all points named in Current Southeastern Tariff, and Supplement thereto (except Clarksville, Tenn.), will be five cents per hundred pounds higher than the rates from Nashville, Tenn."

The rates charged on the product of the mills in question have varied somewhat at different times since the passage of the Act; the present basis is shown by the above circular. The effect upon these industries of a higher charge than is charged Nashville mills, or that is charged Nashville merchants who distribute through the territory in question, is obvious.

A similar state of things exists in reference to milling points in Kentucky, of which there are several on this line of road. Another circular, dated January 29, 1889, establishes rates therefrom to points south on mill products, as follows:

"Effective at once, rates on milled products from local stations to all points named in current Southeastern and Southwestern Tariffs, and Supplements thereto (except to Nashville, Tenn., and Clarksville, Tenn.), are as follows:

Below appear the names of a large number

of points from which agents are directed to make through rates by adding to rates from Louisville, or from Evansville, a certain number of cents per hundred pounds, or per barrel of flour, as the case may be; for example, from Bowling Green, Kentucky, 114 miles south of Louisville, the directions are to add to the Louisville rate six cents per hundred on flour in sacks, and sixteen cents per barrel on flour in barrels; from Hopkinsville, Kentucky, 84 miles south of Evansville, add to the Evansville rate four cents per hundred, or twelve cents per barrel. Over thirty milling points are thus treated. These rates are somewhat more favorable than they have been at times; nevertheless their present adjustment affords a vivid illustration of the tendencies of the system in the repression of local industries.

The same state of things exists in reference to other commodities, and probably with greater force; for example, the charge on any article of manufacture at points like Trenton, a hundred miles south of Evansville, to points in the more southern States, would be considerably greater than the charge from Evansville or Henderson; and so in respect to all points in Kentucky and Tennessee south of the terminals or basing points, respectively. And so again the charge on flour from Bagdad, Kentucky, 52 miles east of Louisville, to Newport News, is 27½ cents per 100 lbs., while the rate from Louisville to Newport News is only 18½ cents per 100 lbs. In this case the rate from Louisville and from Lexington to Newport News is the same, while the Louisville & Nashville R. R. Co. charges 9 cents per hundred pounds additional, for the haul of 42 miles from Bagdad to Lexington.

So in respect to rates in the other direction. From Louisville to Birmingham the rate on flour is 40 cents per barrel; to Warrior, 24 miles north of Birmingham, the rate is made by the addition of 22 cents local from Birmingham to Warrior to the Birmingham rate in car loads, and 24 cents if less than car loads; thus

Note 9 of said classification. In order to prevent confusion additional classes to the S. R. & S. S. A. schedule have been made in our local schedule, designated as "L" "M" "N," in which these articles have been included. Also as a matter of convenience this company has indicated articles which in the S. R. & S. S. A. Classification take the special iron rate as class "I." While we have comprised in the list of exceptions printed at the head of the classification our rates on live stock, they are not properly exceptions to the S. R. & S. S. A. Classification, as that classification specially provides that the rates on live stock are to be the locals of each road.

The division numbers referred to in the table of rates from each station will be found in the local tariff in tables "A," "B," "C" and "D" respectively. Table "A" prescribes the division numbers governing the charges between all stations except: (1) between stations on the Louisville, Harrod's Creek & Westport Railroad; (2) between stations on the Pensacola & Selma Railroad and between stations on the Pensacola & Atlantic Railroad; (3) between stations on the St. Louis Division and branches. Table "B" prescribes division numbers governing the charges between all stations on the Louisville, Harrod's Creek & Westport Railroad. Table "C" prescribes division numbers governing charges between all stations on the Pensacola & At-

lantic Railroad and between all stations on the Pensacola & Selma Railroad. Table "D" prescribes division numbers governing the charges between all stations on the St. Louis Division and branches; this table being fixed by the Illinois Railroad and Warehouse Commissioners.

In connection with the tariffs now submitted, I beg to refer you to the communication from Mr. M. H. Smith, Vice-President, to the Interstate Commerce Commission, dated Louisville, March 21, 1887, transmitting the rates then in effect over the lines owned, leased and operated by this company. Also, in further explanation of the adjustment of rates herein made, I beg to refer to the statements submitted by Mr. M. H. Smith, Vice-President, and myself, at a hearing before the Honorable Interstate Commerce Commission at Washington, D. C., on December 18th, 1888.

I regret that there has been some unavoidable delay in compiling these tariffs in their present shape for file with the Interstate Commerce Commission, but I trust that the form in which they are now presented will be found convenient, and enable you to refer readily to any rate effective between any of the more than 750 stations that these tariffs govern.

Yours Truly,

S. R. KNOTT,

Traffic Manager.

making the rate to Warrior more than 50 per cent higher than the rate to Birmingham. The rate on oil to Cullman's, 54 miles north of Birmingham, is made by the addition of 18 cents to the Decatur and the Birmingham rate, the latter being 37½ cents from Cincinnati, while the rate to Cullman's is 55½ cents. The rate on oil from Cincinnati to Montgomery is 37½ cents, and to Mobile 24½; while the rate to Greenville, 44 miles south of Montgomery, is 58½. These figures are taken from the oil tariff of the Louisville and Nashville Railroad Company taking effect January 1, 1889. Illustrations of this character might be extended without limit. They are of the precise nature of the cases which the Commission had in mind when it said, in disposing of the original Louisville and Nashville petition, that "Exceptions can be and ought to be made less numerous than they have been hitherto; and when exceptions are admitted the charges should be less disproportionate."

In advising the reduction of the number of exceptions to the statutory rule, the Commission does not mean that particular articles should be excepted from the customary rates at particular points or upon special considerations, but that the general system of making the rates at points like those which have been referred to, and which are actual cases of complaint received by the Commission, should be reconstructed.

The principal traffic at the intermediate points will be carried on at local rates from the accustomed points of supply in the immediate vicinity; and while some slight detriment may occur to the business of distribution from interior points, nevertheless the intention of the law can clearly be seen to be to give the citizens at local points the option of dealing with far-distant markets upon even terms with citizens situated at points that have been heretofore accustomed to control the trade of large surrounding districts, instead of upon terms which operate to prevent them from doing so. This being the purpose and policy of the law, it is not proper for the Commission, or for the carriers, to stand in its way. In the opinion of the Commission, rates like those mentioned above, to Cullman's and to Warrior, or like the rates from the flouring mills in Tennessee and Kentucky to Southeastern points, unaffected by water competition, are illegal and unjustifiable. No circumstances or conditions are found to exist which justify in such cases the exaction of the greater charge for the shorter haul in the same direction over the same line.

In cases where actual water competition exists, which is of controlling force in respect to traffic important in amount, entitling the carrier, under what the Commission believe to be a liberal though just construction of the statute, to charge less for the longer than for the shorter haul over the same line in the same direction, the question still remains as to the disparity which may properly be allowed between the rates to such competitive points and the rates upon the shorter haul to or from points intermediate. Upon the line of the Louisville and Nashville Railroad Company this disparity is at times very considerable, so considerable as

to be unjust.* If a rate on oil of 24½ cents per hundred pounds from Cincinnati to Mobile is a remunerative rate, a fact which must be assumed from its establishment and maintenance by the carrier, then a rate of 58½ cents to Greenville, Alabama, or 55½ cents to Cullman's, must yield an amount of profit wholly out of proportion to the reasonable requirements of compensation for traffic carried for the public by a common carrier. In the Greenville case 34 cents per hundred pounds remain after paying the amount of 24½ cents which the Mobile rate recognizes as a reasonable compensation for the longer service. It is difficult to ascertain what would be a just measure of disparity in cases where the circumstances and conditions of the case warrant an exception to the rule of the statute. The reduction of the long-distance rates becomes more extreme as the severity of the competition increases and is often found to be the greatest at the terminus of the longest route; nevertheless it is always optional with the carrier to decline to accept traffic that does not afford a remunerative rate; and the establishment of the rail rates in cases of this kind has without doubt at times been occasioned by a determination to absorb the traffic and prevent the maintenance of competition by water

The views above expressed, which have been illustrated by actual facts concerning the traffic of several important roads, are perhaps sufficient to show the opinion entertained by the Commission concerning the matters enumerated in the Order of Notice. Other carriers to whom notice was given attended the hearing and the investigation embraced to some extent their methods. Enough has been already said, however, to fairly represent the condition of the whole, without minute elaboration concerning the remainder.

The Nashville, Chattanooga and St. Louis is closely affiliated with the Louisville and Nashville; it uses the same classification on local business, and pursues the same general methods.

The Central Railroad and Banking Company of Georgia, which operates several very important lines connecting Savannah, Georgia, with Macon, Atlanta, Columbus, Montgomery, Selma and Birmingham, has from time to time somewhat modified its tariffs. It does not publish, with the precision required by the law, interstate tariffs for traffic on its own lines between Alabama and Georgia points. In its interstate traffic to and from the Eastern cities and the interior it was formerly accustomed to universally employ the system of combination rates above described; of late it has modified its custom in that regard by establishing between its basing points a grouped line of rates, reducing the disparity which was formerly created by the addition of locals in every case and which necessarily operated to make some intermediate point higher than others on either side. For example, in an amendment of December

*The new tariffs filed by this Company on March 28, 1889, considerably reduce the disparity which formerly appeared between rates on classified freight to local points, and to more distant competitive points: on some portions of the line the exceptions heretofore made to the strict rule of the fourth section have now disappeared.

15, 1888, to the pamphlet entitled "The Best Way to Ship," which gives rates from Eastern cities on freight shipped by water to Savannah, this line considerably reduced its rates to intermediate points, making the rate of \$1.31 on the first class a maximum, replacing in some cases rates which were as high as \$1.50, \$1.55, and \$1.62; for example, to Cowarts, situated upon a branch of this system running Southwest from Albany, Georgia, the rates on the different classes from New York City were as follows:

| 1 | 2 | 3 | 4 | 5 | 6 | A | B | C | D | E | H |
|-----|-----|-----|-----|----|----|----|----|----|----|----|----|
| 162 | 143 | 130 | 111 | 90 | 68 | 58 | 58 | 42 | 42 | 90 | 96 |

These rates on December 15th last were made as follows:

| 1 | 2 | 3 | 4 | 5 | 6 | A | B | C | D | E | H |
|-----|-----|----|----|----|----|----|----|----|----|----|----|
| 131 | 111 | 98 | 83 | 69 | 56 | 46 | 56 | 42 | 41 | 67 | 78 |

Similar reductions were made at other points on the same branch; also at points between Americus and Eufaula; between Davisboro and Macon; between Sunnyside and East Point; between Macon and Columbus, etc. So far as these changes have extended they have been in the direction of reducing the disparity between competitive points and points intermediate. Some points are still treated as competitive and get exceedingly advantageous rates as related to intermediate points, concerning which it is difficult to see the grounds upon which the discrimination is made.

Upon the five roads operated by the Cincinnati, New Orleans and Texas Pacific Railway Company, called the Queen and Crescent Route, local rates have been established which are progressive in their form and not violating the general rule of the fourth section of the Act except at river points. Traffic over this line from points north and east of the Ohio River is controlled by the same principles, except in the vicinity of certain river and junction points, for example, Chattanooga, Birmingham, Meridian, Jackson, Vicksburg, Shreveport, New Orleans, etc. At some of these cities actual water competition exists. In respect to other basing points shown on this company's through freight tariff, situated on its line and on the lines of its connections, it expresses a willingness to engage in a general readjustment of rates for the purpose of more strict conformity with the rule of the fourth section of the Act. So long as the rates of its competitors at points where the line of this road is crossed, and other points in its vicinity, are made as at present, for this company to change its own tariff would apparently involve the abandonment of traffic. Its officers are quite ready to say that the changes which it has made in the direction of conformity to the law have not been detrimental to its revenue, but on the contrary have benefited the carrier and have produced a feeling of satisfaction along its line, which is of material assistance to the prosperity of the road.

Similar results have been experienced by the Illinois Central and other Southern roads which have entered upon the same policy.

So far therefore as the experience of carriers, during the time since the passage of the Act, has developed results consequent upon the act—

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ual introduction and application of the short-haul rule, it is clear that the evils anticipated were, to a large extent, non-existent and that the relations between the carriers and their patrons have been quite materially improved. It is also clear that the present is not the time to stop the movement in this direction, but that it should be still further pressed in conformity with the suggestions hereinbefore made. The additional changes called for embrace many of the topics enumerated in the Order of Notice under which this proceeding has been had.

The greater charge for the transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction is found to be made at many points where it is, in the opinion of the Commission, unjustifiable; the disparity between the charges made at different points over the same line is in some instances apparently much too great. The form of the tariffs as prepared in many cases does not meet the requirements of the law; and in other cases the tariffs do not show the rates actually charged to shippers. Combination rates are made which are different from the rates specified in the tariffs as published and filed; the classifications in use remain complicated and involved, containing many exceptions and variations; different classifications are at times used upon the road of the same carrier for the shipment of the same commodity to neighboring points; at times two or more classifications are employed upon the same shipment in fixing a so called combination rate upon the line of a single carrier, or of two or more connecting carriers. In these and other respects which have been above described the methods pursued are not in conformity with the requirements of the Act to Regulate Commerce.

The Commission has repeatedly said that the rearrangement of rates and the simplification of classifications are matters which the carriers should undertake and should carry forward for themselves. Many questions of detail are involved with which it would not be easy for the Commission to deal. In order to effect the reforms recommended much labor and care are necessarily required; and a reasonable time for the purpose should be allowed.

The order of the Commission, therefore, is that the carriers named in the Order of Notice comply with the Act to Regulate Commerce in the particulars and respects hereinabove pointed out, without unnecessary delay, and make report to the Commission of their action in the premises. If the action so reported shall seem to the Commission to fall short of what is required by the law, further action will be taken.

John P. SQUIRE *et al.*
v.

MICHIGAN CENTRAL R. Co., New York
Central & Hudson River R. Co., and Boston & Albany R. Co.

(No. 159.)

JOINT answer filed March 1, 1889, to complaint given *ante*, 303, charging unreasonable and unjust preferences.

The said respondents, jointly answering the said complaint,—

First. Admit that the said complainants were and are carrying on business, and that these respondents were and are operating railroads and transporting freight as in that behalf in said complaint alleged; and that the shipments by said complainants from and to the places in said complaint mentioned had for some time prior to the filing of said complaint averaged per week about as in said complaint stated;

Second. Admit that the chief source of supply for the said business in which complainants are engaged is the western markets named, and that complainants are to some extent compelled to compete, in the various markets where their hog products are sold, with various persons, firms and corporations which have slaughter houses in the Western States where the live hogs are purchased; but deny that complainants are, to any appreciable extent, compelled to so compete with the sellers of dressed beef who have slaughter houses in said Western States. And upon information and belief show and aver that the amount of hogs so slaughtered in said Western States and shipped in dressed form to the markets in which complainants sell their hog products is so inconsiderable that it does not materially affect the price of such products in said markets or to any material extent come into competition with the business of said complainants;

Third. Admit that the item of freight on live hogs shipped from the West to the East is in the aggregate of considerable magnitude; but deny that practically "upon this, relatively to the freight on other products" in said complaint in that behalf mentioned, very largely or to any considerable extent depends the ability of said complainants and others similarly engaged to carry on such business. Aver that, as hereinafter and hereinbefore shown the competition in the markets between the hog products of complainants and others engaged in like business, and the said other products is so slight that it is impossible that such competition can materially affect the ability of said complainants and others engaged in said business to carry the same on;

Fourth. Admit that the meat supply of the country consists largely of the products of slaughtered beeves and slaughtered hogs, but show that such meat supply also includes the products of slaughtered sheep and calves and of poultry and game; and deny that to any material extent the relative consumption by the larger portion of the consuming public of slaughtered hogs and slaughtered beeves depends upon the relative price at which these respective articles are sold in the markets, or that whatever enables the dealer to relatively cheapen either materially lessens the demand for the one or increases the sale of the other. On the contrary, they show and aver, upon information and belief, that a change in the price of the one or the other of said commodities is seldom or never so great as to have any appreciable effect upon the amount of the one or the other consumed;

Fifth. Admit the allegations contained in paragraph 7 of said complaint, except the alle-

gation that the supply of slaughtered beeves transported from Chicago to Boston is sold in competition with the hog products produced by said complainants and others similarly engaged in business, which they deny to be true, save to the limited extent hereinbefore and hereinafter stated;

Sixth. Admit that Schedule "A", in said complaint contained, correctly shows the rates, at the several dates therein stated, charged and collected by these respondents for the transportation of the commodities in said schedule named, from the City of Chicago to said City of Boston;

Seventh. Deny that the just relative rate of charges for transportation, between the points in that behalf named in paragraph 10 of said complaint, of live hogs and of slaughtered beef, and the product of slaughtered hogs, or that the just relative rate between live hogs and live cattle, is or should be as in said paragraph alleged. On the contrary, show and aver that the charge for transportation between said points of live hogs should be relatively greater in proportion to the charge for transporting said other commodities in said paragraph named than therein stated;

Eighth. Admit that during the period covered by said Schedule or Exhibit "A", these respondents did charge for the transportation of slaughtered beef, live cattle and slaughtered hog products, as is shown by said Exhibit "A", a rate less in proportion to the rate then charged for transporting live hogs than the relative rate alleged to be just in said paragraph 10; but deny that by so doing these respondents, grossly or otherwise, unjustly discriminated against the said live hog traffic and against complainants;

Ninth. Deny the allegations contained in paragraphs 12, 13 and 14 of said complaint, respectively;

Tenth. Deny the allegations contained in paragraph 15 of said complaint, that the charges made for transporting dressed cattle, dressed beef, and dressed hogs, as shown by said Schedule "A", were an unjust, undue, and unreasonable discrimination against complainants and the live hog traffic; and also deny the allegations in said paragraph contained which purport to state what would be reasonable relative rates for the transportation of live hogs and the other commodities in said paragraph mentioned;

Eleventh. Submit that the allegations contained in paragraphs 15 and 16 of said complaint are a mere repetition in another form of allegations theretofore made in said complaint and hereinbefore answered;

Twelfth. Deny the allegations contained in paragraphs 17 and 18 of said complaint, respectively;

Thirteenth. Show and aver that thirty cents per 100 pounds for the transportation of live hogs from Chicago to Boston yields only a reasonable profit and is in itself wholly reasonable;

Fourteenth. Show that the several reductions of the rates shown by said Schedule "A", to have been made for the transportation of the commodities therein mentioned, between the dates shown by said schedule, were made by respondents after like reductions for the transportation of like commodities had been made by roads competing for such traffic with re-

spondents; that the rates made by said reductions were unreasonably low; but respondents were compelled to make like reductions or abandon the transportation of such commodities; and submit that the making of such reductions by these respondents, under such circumstances, and continuing to compete for and carry on such traffic, affected the said business of said complainants no more injuriously, if at all, than said business would have been affected had these respondents not made such reductions but abandoned such traffic;

Fifteenth. That on the 17th day of December, 1888, the rates for the transportation of said commodities other than live hogs, were made as shown by Exhibit "A", and the rates so made have ever since been maintained by these respondents; and these respondents are unable to make any higher rates for the transportation of said commodities because of the fact that the competitors of these respondents for such traffic still make and maintain rates below the said rates;

Sixteenth. Show, upon information and belief, that, notwithstanding the reduction of the cost of transportation of the commodities named in said Schedule "A", other than live hogs, as shown by said schedule, the retail price of beef and pork, both fresh and salted, remained the same in the markets in which complainants were sending their products, during the entire period covered by said Exhibit "A";

Seventeenth. Show and aver, upon information and belief, that the principal competition which complainants are compelled to meet in their business, is with salted provisions; and also that complainants, and other shippers engaged in like business, have for years urged and demanded that rates for the transportation of live hogs and salted provisions should be made the same, and these respondents have yielded to such demand and during the period covered by said Exhibit "A", said rates were so made and maintained.

| | |
|-------------------|-------------------------------|
| Ashley Pond, | The Michigan Central Railroad |
| Counsel, | Company, |
| Detroit, Mich. | By H. B. Ledyard, |
| | President. |
| Frank Loomis, | The New York Central & |
| Counsel, | Hudson River R. R. Co. |
| 42 St. & 4th Ave. | By H. J. Hayden, |
| New York, N. Y. | Second Vice President. |
| Samuel Hoar, | The Boston & Albany Rail- |
| Counsel, | road Company, |
| B. & A. R. R. Co. | By Arthur Mills, |
| Boston, Mass. | Gen'l Traffic Manager. |

(Verified Feb. 27, 1889, by H. B. Ledyard and H. J. Hayden.)

Re JOINT WATER AND RAIL LINES.

(No. 167.)

The Act to Regulate Commerce does not empower the Commission to compel railroad companies to enter into joint arrangements with carriers by water for through carriage at through rates. The fact that a railroad company makes such joint arrangements for one of its branch roads will

not charge it with unjust discrimination for refusing to make identical arrangements on other parts of its system, when it appears that from such other parts of its system it actually makes through arrangements by a more direct route and at the same rates which are presumptively of equal convenience to shippers.

(Memorandum—Filed March 1, 1889.)

THE complaint in this case is informal, and the facts are stated in a letter of which the following is a copy:

"Columbia, S. C., December 17, 1888.

"Mr. D. Cardwell, Asst. Gen'l. Agt., R. & D. R. Co., Columbia, S. C.

"Dear Sir:

"I have 150 bales of cotton at Winnsboro (S. C.) which I bought from Messrs. Jones, Robertson & Co. I went there on Saturday to ship it, but your agent refused to give me a bill of lading to New York via Columbia and Charleston, claiming that he had no authority to do so. At my solicitation he wired you, but failed to obtain your permission. The Charleston steamers land so much nearer our shores than any other line that it saves us trouble and expense.

"In a personal interview with you this morning I gave you other good reasons why this particular lot should be shipped as I wish, but still met with refusal. What I asked as a favor I must now request as a right—a shipper having the right to designate the route by which his goods shall be shipped."

(Signed by the complainant.)

By the correspondence which accompanies this complaint, it appears that when the cotton was tendered to the agent of the respondent the agent stated that the respondent had no through arrangements or joint rates upon which the shipment by way of Columbia and Charleston could be made from Winnsboro to New York, but that its through arrangements for such shipments were by way of its own road to West Point on York River and thence by steamer. The respondent had through arrangements for shipment from points on the Columbia and Greenville division of its system through Charleston to New York, but the explanation was made that these arrangements had been in existence before that branch was acquired, and had simply been allowed to continue. Like arrangements, it is understood, were not made for the towns on respondent's main line, for the reason that the more direct route by way of West Point would be to a larger extent over respondent's road, and therefore more for its interest. The agent to whom the cotton was tendered offered to receive it and forward it on through bill of lading to New York via West Point, or, on the other hand, to receive and transport it as local freight to Charleston on the regular rates to that city. Both these offers were declined; complainant insisting upon a through bill of lading by way of Charleston to New York at the same through rate that would be charged by way of West Point. And he now insists that the refusal to

give him the through bill by way of Charleston when through bills are given by that route from points on the Columbia and Greenville branch, constitutes unjust discrimination. It should be mentioned that the road from Columbia to Charleston is not a part of the Richmond & Danville system, and is operated independently.

Two questions upon this state of facts seem to be presented: whether a carrier by rail is under any legal obligation to make through arrangements and join in through rates with carriers by water, and if not, then whether the making of the same for a part of the system and a failure to do so for another and distinct part can be held to be unjust discrimination.

It is to be observed that carriers by water are not in terms brought under the regulation of the Act to which carriers by rail are subject except "when both are used under a common control, management, or arrangement for a continuous carriage or shipment," etc. If the carriers by water see fit to operate independently, no authority is conferred upon the Commission to compel them to do otherwise; and the understanding of the Commission is that, by the Act to Regulate Commerce, the carriers by rail are also left at liberty to act independently. They cannot decline to receive from or deliver freight to connecting water lines; but at the same time they are not required by law to make with the water lines joint rates, though they should be expected to do so when they can thereby subserve the interest of the public without detriment to their own interest. The carrier's own interest in the present case is evidently to carry the freights by way of West Point, rather than by way of Charleston, since the transportation will be in larger degree over its own line; and if the business is properly conducted by that route no reason is apparent why the public interest will not be as well subserved.

It is said on behalf of complainant that a shipper is entitled to select the route by which his property shall be forwarded; but we do not see that this right has been denied by respondent. Complainant directed that his cotton should be forwarded via Charleston, and the agent offered to so forward it. But the demand of complainant went further than this; it was a demand that the cotton should be taken to New York via Charleston at the same charge that would be made via West Point. This was denied on the ground that respondent had no rate from Winstonsboro via Charleston to New York, and could therefore give none; it could only take the cotton as local freight to Charleston at local rates. It is thus seen that it is not the route that is in controversy, but the obligation of respondent to make the same through rate in both directions, when, apparently, it is not for its interest to do so. As already stated, we know of no provision of law which imposes such an obligation.

It is to be observed that if the claim made by the complainant is valid as to shipments from Winstonsboro, it must in law be equally good in behalf of a shipper at a point still further north, say at Richmond, for it would be impossible to designate any particular point on the respondent's line that would be a point of division as between those who must ship by West Point

and those who have a right to ship by Charleston. But the reasonableness of such a claim when presented on behalf of a Richmond shipper could scarcely be insisted upon, since it would require long roundabout transportation for the same compensation as was charged for one which would be both short and direct.

Complainant assigns as one reason for desiring to forward his freights by Charleston rather than by West Point, that the landing of the Charleston steamers in New York is more convenient to his warehouse. But this is purely an individual matter, and general rules must be made with a view to the general accommodation of the public; they cannot be made or varied to meet the circumstances of particular individuals.

Complainant also objects to the West Point route because of delays and want of promptitude in handling freight which occurs on that line. That, however, is not an objection to the route itself but to the method of transacting business over it, and would perhaps be quite as likely to occur on the Charleston route if the arrangement he desires were made. Obviously the facts stated do not affect the question which the complainant raises, though they might perhaps give complainant a good cause of action in the courts.

ANSWER in No. 168, *Memphis Ft. B. v. Kansas etc. R. Co.* filed March 19, 1889. See Complaint, *ante*, 400.

Replying to the charges made by the Memphis Freight Bureau, in their petition filed against this company, dated January 22, 1889, wherein complaint is made:

First: That in establishing and publishing its tariff of freight and charges, this company has willfully and unjustly discriminated against certain stations on its road, to wit: The several stations located between Sibley, Ark., and Cabool, Mo., by an unjust and improper gradation of rates. In regard to this complaint we respectfully submit that the rates, as per tariff referred to (copy attached), are in accordance with the 4th section of the Interstate Commerce Law, and are graded fairly and justly with reference to distance, conditions and circumstances, and the transportation situation generally; and that no station on its line has been discriminated against; nor has any such station claimed to have been discriminated against;

Second: It is complained that if rates are correctly adjusted between Memphis and "Spring Hill, Mo.," 457 miles, "It is unjust to exact from Memphis to Big Bay Siding, a distance of 56 miles, the following rates, viz.:

| | | | | | | | | | |
|-----|-----|-----|-----|-----|-----|-----|-----|----|-----|
| 1. | 2. | 3. | 4. | 5. | A. | B. | C. | D. | E. |
| .45 | .39 | .30 | .25 | .20 | .19 | .15 | .12 | .9 | .6" |

It is not claimed that the rates to Spring Hill, Mo. (by which is probably meant Spring Hill, Kan.), are unjust or unreasonable, but that the rates to Big Bay Siding are unjust and unreasonable only by comparison with the rates to Spring Hill. We respectfully submit that the rates from Memphis to Big Bay Siding are just and reasonable in themselves, for the following reasons, viz.: All freight transported between Memphis and Big Bay is subject to an extraordinary expense attending the transfer

across the Mississippi River,—an arbitrary expense incurred alike on all freight regardless of distance or rate of freight. This arbitrary considered, the rates charged for this fifty-six miles are moderate and just. They are also just and reasonable as compared with rates by other lines out of Memphis as shown by the following table of rates, taken from the current tariffs of roads named, for fifty-six miles:

| | 1 | 2 | 3 | 4 | 5 | |
|--|----|----|----|----|----|----|
| St. Louis, Iron Mountain & Southern,..... | 50 | 42 | 38 | 33 | 27 | |
| Little Rock & Memphis,..... | 54 | 43 | 38 | 32 | 25 | |
| The above lines are west of the Mississippi River and have same river transfer to make. | | | | | | |
| | 1 | 2 | 3 | 4 | 5 | 6 |
| Illinois Central..... | 53 | 45 | 39 | 33 | 29 | 26 |
| Louisville, New Orleans & Texas..... | 51 | 44 | 38 | 33 | 28 | 25 |
| Kansas City, Memphis & Bir- mingham..... | 48 | 39 | 31 | 28 | 24 | 20 |
| Memphis & Charleston..... | 41 | 36 | 31 | 25 | 21 | 18 |

These lines are all east of the river, and while rates are based on "Southern Railway & Steamship Association" Classification, which is perhaps lower than that in use west of the river, the rates are higher than our rates to Big Bay Siding by all of the lines except the Memphis & Charleston which average about the same. They have no expensive river transfer and pass through an agricultural and well settled territory, while the lines west of the river pass through the Arkansas "Bottoms," a large percentage of which is swamp lands subject to overflow, producing nothing but forest product and affording but limited traffic either in freight or passengers.

Third: It is complained that the rates from Memphis to Mammoth Spring (144 miles) are made the same as from Memphis to Nichols (288 miles). In answer to this complaint we respectfully state that the road from Memphis to Nichols runs through the swamps of Arkansas to Black Rock, and thence follows the narrow and crooked valley of Spring River to Ozark Mountains, which are followed (grades being heavy and curvature sharp) to Nichols. The country for nearly the whole distance is such as to make construction and maintenance expensive. It produces little and the local business between the points mentioned, at best, cannot be made profitable. With this condition of things it is necessary to establish pretty high local rates.

The rates to Nichols from St. Louis (242 miles) are regulated by the commercial and geographical situation. Before the passage of the Interstate Law the rates from Memphis to stations between Mammoth Spring and Springfield (Nichols) were higher than to Springfield, but had been corrected to conform to that Law as we understand it. To preserve the revenue from the limited local business on that portion of our line, we graded up to the Nichols (Springfield) maximum at Mammoth Spring and carry that rate to all stations on the Ozark Mountain Division; then graded up to the Kansas City maximum, carrying that rate for the remainder of the line. This basis made a marked reduction in rates from Memphis to all local points on our line north of Mammoth Spring and was very satisfactory to all local shippers. We have had no complaints from local shippers as

to existing rates, which we believe to be just and reasonable in themselves; as compared with rates of other lines in similar territory, or as compared with different sections of our own line.

Very Respectfully,
George H. Nettleton,
President and General Manager.

ANSWER in *Memphis Ft. B. v. Kansas etc. R. Co.* No. 169, filed March 19, 1889.

See Complaint, *ante*, 400.

In the matter complained of by the Memphis Freight Bureau in its petition dated January 22, 1889, wherein it is set forth: That this company is engaged in the transportation of property between Kansas City, Mo., and intermediate places; that it is a member of the Western Freight Association of which J. W. Midgley is chairman; that said Midgley publishes tariffs or rates applying to shipments of freight and live stock between Kansas City and Memphis, also between Kansas City and Chicago; and wherein complaint is made that the rates on live stock and other freight between Kansas City and Memphis (487 miles), and between Kansas City and Chicago (458 miles by the shortest line and by two others 488 miles), and that by reason of such higher rates business to and from Kansas City is lost to the City of Memphis.

In reply to the foregoing complaint I will respectfully suggest that no evidence is submitted in support of the claim of loss of business, and say that I am somewhat familiar with the character and volume of business between Kansas City and Chicago, and between Kansas City and Memphis, and do not believe it to be true, as stated, that business has been lost to Memphis by reason of the difference in tariffs referred to. It can hardly be claimed that Memphis is a market for live stock, or that it could probably be made a great market under the most favorable rates of freight. It is a large market for packing-house product, and takes for distribution more of Kansas City's product than Chicago does. It is also a large market for grain and grain products, the comparative rates on which from Kansas City are as follows:

| | To Chicago. | To Memphis. |
|------------|-------------|-------------|
| Wheat..... | 22½ cents, | 20 cents. |
| Flour..... | 22½ " | 22 " |
| Corn..... | 20 " | 20 " |
| Meal..... | 20 " | 20 " |

(See tariff No. 1, Western Freight Association,—Southwestern Division—October 1, 1888, and supplements.)

I think the question that should concern the Memphis merchants, and does very largely concern this company, is, Can they buy, allowing to the carrier something more than the cost of transportation, and profitably sell the grain and grain products of the country tributary to Kansas City, in competition with Chicago and St. Louis? It is certainly to the interest of this company that they should. This is a great, broad question; and I regret to say that equal rates between Kansas City and Memphis and Kansas City and Chicago will not at all times settle it in favor of Memphis. Memphis distributes to the Southeast as does also St. Louis,

Cairo and Cincinnati, and it is more often a question of markets than railroad rates.

Are the rates of this company between Kansas City and Memphis, within themselves, reasonable? I respectfully submit that there is no more reason for assuming that the current rates between Kansas City and Chicago should be the maximum between Kansas City and Memphis than should the current rates for a similar distance from Kansas City, west or southwest, some of which are given on the accompanying sheet.

This company is directly interested in the success of Memphis merchants, and will do everything within reason to enable them to sell in the Southeast the products of the Northwest, in successful competition with every other market.

Very Respectfully,
George H. Nettleton,
President and General Manager.

ANSWER in No. 170, filed March 12, 1889.
See complaint, *ante*, 401.

Respondent for answer to this complaint admits that it is a corporation engaged, as alleged, in the transportation of freight and passengers in the States of Illinois, Missouri and Nebraska, but is not informed whether complainant is a corporation nor of what persons or classes of persons it is composed.

Respondent admits that the rates by its line from Kansas City, Mo., Atchison, Kansas, and Leavenworth, Kansas, to East St. Louis, Ill., and St. Louis, Mo., are alike; and that the rates from St. Joseph, Atchison and Leavenworth to Memphis, Tenn., are higher than from Kansas City to Memphis, but denies that any unjust discrimination is intended or exists by such adjustment of the tariffs.

The shortest line between St. Joseph, Mo., and St. Louis, Mo., or East St. Louis, Illinois, is not by respondent's line, but the rates made by said shorter and more direct line have to be met by respondent's road; otherwise it could not engage in the carriage of this traffic; and in transporting the business from St. Joseph, Mo., to St. Louis, Mo., and East St. Louis, Illinois, respondent carries it through Atchison, Kansas, and Leavenworth, Kansas, and cannot, under the Interstate Law, charge a higher rate from these intermediate points than the rate from St. Joseph, Mo. The shortest and most direct line between Kansas City, Atchison, Leavenworth or St. Joseph and Memphis, and the route on which the rates are based, is via the Kansas City, Fort Scott & Gulf Road; and the tariffs in this case are greater from Atchison, Leavenworth or St. Joseph than from Kansas City. The same reason does not exist for making all of these points uniform as in the case of rates to St. Louis and East St. Louis above referred to, and the respondent in adjusting these tariffs has simply added an additional amount to the Kansas City rate to cover the additional expense of the carriage of the traffic for the greater distance to and from Atchison, Leavenworth and St. Joseph. The rate on cotton piece goods, as enumerated in petitioner's complaint and as shown by the appendant tariff, is

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to Kansas City, Mo., Atchison, Kansas, Leavenworth, Kansas, and St. Joseph, Mo., from St. Louis, an average distance of 318 miles, thirty cents per 100 pounds; from Memphis, an average distance of 520 miles, eighty-five cents per 100 pounds; and the figures so adjusted are based wholly upon the cost of the service, and the circumstances and conditions affecting the adjustment of rates on this traffic, and without any intent to discriminate in favor of or against any of the cities above named.

Respondent further declares that the rates complained of are not unjust and unreasonable, and do not in any manner unjustly discriminate against the City of Memphis, Tenn.; and as complainant does not even allege that the rates complained of are unreasonable, and as these tariffs are made strictly in conformity with the Interstate Commerce Law, the respondent asks that the Commission will dismiss this complaint.

W. H. Newman.

John S. Blair, Atty.

ANSWER in No. 171, filed March 12, 1889.
See complaint, *ante*, 402.

Respondent for answer to this complaint admits that it is a corporation engaged, as alleged, in the transportation of freight and passengers in the States of Illinois, Missouri, and Nebraska, but is not informed whether complainant is a corporation, nor of what persons or classes of persons it is composed.

The respondent admits that the rates by its line between Omaha, Nebraska, and Kansas City, Mo., Atchison, Kansas, Leavenworth, Kansas, and St. Joseph, Mo., on the one hand, and St. Louis, Mo., and East St. Louis, Ill., on the other hand, are alike, while the rates from Omaha, Neb., to Memphis, Tenn., are higher than the rates from Kansas City, Atchison, Leavenworth and St. Joseph, to Memphis, Tenn., but denies that unjust discrimination is intended or exists by such adjustment of the tariff. The shortest line between Omaha, Neb., and St. Louis, Mo., or East St. Louis, Ill., is not by respondent's road, but is via the Wabash Western Railway and its connecting lines; and the rates made by said shorter and more direct line have to be met by respondent's roads, otherwise it could not engage in the carriage of this traffic.

In making the rates between Omaha, Neb., and Memphis, Tenn., the figures are based upon the distance by the shortest and most direct route, which is through Kansas City, and thence via the Kansas City, Fort Scott & Gulf Road, an approximate distance of 697 miles, while the distance to Memphis from the other points by the same route is as follows:

From Kansas City 484 miles; Atchison, Kan., 432 miles; Leavenworth, Kan., 510 miles; St. Joseph, Mo., 551 miles. Therefore it will be seen, that in making the Memphis rates from the points above named, respondent has simply added for the additional distance from Omaha sufficient to compensate for the increased cost of service.

Respondent further declares that the rates so made are not unjust and unreasonable, and do not, in any manner, unjustly discriminate

against the City of Memphis, Tenn., and as the complainant does not even allege that the rates complained of are unreasonable, and as these tariffs are made in conformity with the Interstate Law, respondent asks that the Commissioners will dismiss the complaint.

W. H. Newman.

ANSWER in No. 172, filed March 9, 1889. See complaint, *ante*, 402.

In reply to your notice of the 16th of February, 1889, attached to the petition of the Memphis Freight Bureau, of January 22, 1889, in which petition certain charges are made against the Southern Railway & Steamship Association, I beg to state:

1. That the Southern Railway & Steamship Association is not a corporation; and as an association, it is not subject to the provisions of the "Act to Regulate Commerce."

2. That there is not a common carrier, rail or water, at Memphis or at Nashville that is a member of the Southern Railway & Steamship Association, or has been a member since August 1, 1888; and that the point nearest to Memphis reached by a member of the Southern Railway & Steamship Association is Birmingham, Ala., which is two hundred and fifty-one miles distant from Memphis; and that the point nearest to Nashville reached by a member of the Southern Railway & Steamship Association is Chattanooga, Tenn., 151 miles distant from Nashville.

I assume that this statement of facts, verified by affidavit, in accordance with a rule of your Honorable Commission, makes unnecessary a reply on the merits of the questions presented in the petition of the Memphis Freight Bureau.

As required by Rule V., Rules of Practice, I have today mailed to the Memphis Freight Bureau a copy of this answer.

Very respectfully yours,
Thos. H. Carter,
Commissioner.

SEPARATE answer in No. 173, filed March 9, 1889. See complaint, *ante*, 436.

The Pennsylvania Railroad Company, for answer to the said petition, or so much thereof as it is advised it is necessary for it to make answer unto, saith:

First. That it admits that a through route between the various companies respondent exists, substantially as alleged in said petition, and that the rate of charges for lumber from the points indicated in said petition, that is to say, from Macon and Atlanta in the State of Georgia, and from Johnson City, in the State of Tennessee, to Boston, are, as per their tariffs filed, the same as set out in the said petition.

Second. That whether the petitioners have a large amount of money invested in business in Johnson City, which they cannot withdraw without severe loss, is a fact as to which this respondent cannot be advised, and asks that

the petitioners be held to proof thereof. This respondent, however, denies that the rate which the tariff describes for lumber on said through line from Johnson City to Boston is unjust or unreasonable, or that it greatly injures or unjustly restricts the business of the petitioners.

Third. That the rates from Macon of thirty-six cents and from Atlanta of thirty-four cents per 100 lbs. upon lumber, as well as the rate of thirty-six cents per 100 lbs. from Johnson City, were fixed by the East Tennessee, Virginia & Georgia Railway Company, the initial company; and that the reasons justifying the said rates of thirty-six cents and thirty-four cents per 100 pounds respectively from Macon and Atlanta, respectively 1828 miles and 1240 miles from Boston, as compared with the rate of thirty-six cents per 100 lbs. for the shorter distance from Johnson City, in the State of Tennessee, to Boston, are as follows:

(a.) That the rates in the State of Georgia are fixed and controlled by the railroad commissioners of that State, that commission fixing the charges for transportation to coast cities from mills in the State of Georgia.

(b.) The fact of water competition from Brunswick, Georgia, on the Atlantic Ocean, to Boston and other north Atlantic points; that adding the rate from the mills to Brunswick, as fixed by the railroad commissioners of Georgia, to the rate given by the coast line water carriers to Boston, the aggregate is less than the amount charged, as aforesaid, upon the tariffs of the respondents on their through railroad carriage from Macon and Atlanta to Boston.

(c.) A large amount of freight is received at Atlanta and Macon from eastern cities, including Boston, vessels containing which would have to return empty in large part, but for the fact that they can be returned loaded with lumber.

(d.) The reason why the Atlanta charge is the same as that from Macon arises from the fact that the lumber shipped from Atlanta is manufactured at mills a considerable distance from that city, and transported there over local roads before being marketed.

(e.) That the lumber shipped from Johnson City is for the most part poplar lumber, while that which goes from Georgia territory is exclusively Georgia pine; and that the rate per 100 lbs. per mile for hauling poplar, by reason of its greater bulk, should reasonably be greater than that for hauling pine.

As to all of which matters reference is made for fuller details, to the answer of the East Tennessee, Virginia & Georgia Railway Company.

Wherefore this respondent prays that the said petition be dismissed.

The Pennsylvania Railroad Company,
By William H. Joyce,
General Freight Agent.

James A. Logan,
Asst. General Solicitor.

The defendant, the East Tennessee, Virginia & Georgia Railway Company adopts the answer of the Pennsylvania R. R. Co. as its answer.

SEPARATE answer in No. 173, filed March 9, 1889. See complaint, *ante*, 436.

The New York and New England Railroad Company, one of the respondents in the above entitled cause, separately answering such portions of the complainants' petition as it is advised it is important and necessary to make answer unto, says:

That it is not true, as averred in the first paragraph of the said complaint, that the respondent with the other companies named therein form one connecting through line under joint traffic arrangements; that the respondent has no contract or contracts or traffic arrangements with the East Tennessee, Virginia & Georgia Railway Company nor the Norfolk & Western Railway Company, nor with the Shenandoah Valley Railroad Company; that it has no contract or contracts or traffic arrangements with the respondents named herein whose railroads are located south of the Cumberland Valley Railroad Company; the lumber received by the respondent from points south of the Cumberland Valley Railroad is re-billed by said Cumberland Valley Railroad Company and again re-billed by the New York, New Haven & Hartford Railroad Company at Harlem River.

It admits that it has carried lumber at the rate of thirty-six cents per 100 lbs. in full car load lots, which it is informed has come from Johnson City, in the State of Tennessee, to Boston as aforesaid; but the respondent denies that it has carried any lumber from Atlanta, Ga., or any other point south of Hagerstown at a rate of thirty-four cents per 100 lbs. from such initial point to Boston; and it denies that it has charged or received any greater compensation in the aggregate for the transportation of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.

It admits that it has carried lumber over this road which it is informed has come from Macon in the State of Georgia to Boston at a rate of thirty-six cents per 100 lbs., and says that this rate was made by the initial road without consultation with this respondent.

And the respondent, further answering, says the rate of thirty-six cents per 100 lbs. for transportation of lumber from Johnson City to Boston, a distance of 915 miles, which rate of thirty-six cents is less than eight mills per ton per mile, and which is divided among seven railroad companies, for which service this respondent is required to furnish expensive terminal facilities, is not in itself an unreasonably high rate, and that said rate should not be reduced.

This respondent denies each and all of the allegations of the petitioners' complaint not hereinbefore admitted or denied.

New York & New England R. R. Company,
By W. P. Shinn,
Vice-President.

The answers of the other defendants refer to the East Tennessee, Virginia & Georgia R. Co. as being the initial carrier and as having made the rates complained of.

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ANSWER of the Chicago and Alton Railroad Company, in No. 173, filed Apr. 8, 1889, to the complaint against it of A. Leonard, *ante*, 416.

Defendant denies the complaint except as specifically admitted; denies that it received any cattle from the complainant on the 21st day of January 1889, but says that on the 22d day of January 1889, it received from the complainant, at said Mt. Leonard Station, nine cars of cattle for transportation to Chicago in the State of Illinois, and on the same day at said station it received from one L. B. Chappell five cars of cattle for transportation to the same place, but denies knowledge of ownership; denies that complainant was compelled to load any particular number of cattle into said cars, or that he was in any way restricted as to the number of head or weight to be loaded into the same, except in so far as he was restricted, for the safety and comfort of the animals, by the limit to the capacity of the car; says that its regular tariff rate to Chicago was twenty-four cents per one hundred pounds, and the minimum charge was for twenty thousand pounds per standard thirty-foot cars; that the weight of complainant's cattle in said nine cars, after allowing a reasonable deduction per car for shrinkage in weight, was 185,300 pounds, and that this defendant charged and the complainant paid the sum of \$444.72 and no more, which was 24 cents for one hundred pounds—the regular tariff rate of this defendant for the transportation of said cattle; and that the sum paid was about \$49.42 per car and not more than \$50 per car as alleged in complaint; that the distance from said Station of Mt. Leonard to Chicago, Illinois, is about four hundred and fifteen miles and that the charge of 24 cents per one hundred pounds for the transportation of cattle that distance is in all respects just and reasonable; that the rate on an average is less and not greater than the old rate of fifty dollars per car; that the system of weighing the animals in force on its line of railroad is not unjust and inequitable as charged in said complaint.

[SEAL]. The Chicago & Alton Railroad Company.

Attest: By C. Beckwith, its General Solicitor.
C. H. Foster.

Secretary.

[Verified Apr. 5, 1889.]

Answer of same in No. 179, filed April 8, 1889, to complaint of Chappell, *ante*, 416, is so similar to the foregoing as not to be needed here.

C. H. BROWNELL
v.

COLUMBUS & CINCINNATI R. CO.

(No. 187.)

COMPLAINT, filed March 29, 1889, that the practice now in use by the Columbus & Cincinnati Railroad Company in refusing carload classification rate of freight on eggs when shipped by one consignor to one consignee is discriminating against shippers of eggs, when sugar, coffee, starch, soap, oranges,

celery, pumpkins, squash, etc., have a car load classification.

That the freight on a car of eggs of 20,000 pounds weight from this place to New York City is now \$107, which is unreasonably high and excessive when compared with other car load freights to New York.

TOLEDO PRODUCE EXCHANGE *et al.*

v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO.; Michigan Central R. Co.; New York Central & Hudson River R. Co.; and Boston & Albany R. Co.

(No. 188.)

COMPLAINT filed April 1, 1889.

To the Honorable Interstate Commerce Commission:

The Toledo Produce Exchange, the Detroit Board of Trade, and the Cleveland Board of Trade, unite in a complaint against all eastern trunk railways making freight rates from western points to Boston, and to the points in New England called Boston points, and to which the freight rates correspond with Boston.

But this complaint is made especially against the Lake Shore & Michigan Southern, the Michigan Central, the New York Central, and the Boston & Albany Railway Companies.

The basis of our complaint is: *First.* The differential charged from all western points to the points we have referred to, namely, Boston and Boston points, of 5 cents per 100 pounds on third, fourth, fifth and sixth class freight, and 10 cents per 100 pounds on first and second class freight, above the rates charged on like classifications of freight from the West to New York.

Second. We complain of the railways last referred to, namely, the Lake Shore & Michigan Southern, the Michigan Central, and the Boston & Albany, that while they are associated together as one line of road in making and charging this differential of 5 cents per 100 pounds from all western points on the classes of freight referred to, the New York Central and all other roads leading east from Buffalo, in connection with the Boston & Albany, the Connecticut River, the Providence & Worcester and other roads, only make and charge a differential from Buffalo to Boston and Boston points of $2\frac{1}{2}$ cents per 100 pounds over the rate made and charged from Buffalo to New York, on the classes of freight below second class.

The trade organizations making this complaint are aware that the trade organizations of Boston have been before your honorable body in a petition relating to the first clause of our complaint, namely: for relief from this differential of 5 cents per 100 pounds in favor of New York, "because it is unreasonable and unjust discrimination against Boston."

We have before us the written decision of *Mr. Commissioner Schoonmaker* in this case; but, as before stated, the complaint had reference to Boston only, and the argument and decision was of course on the basis of the com-

plaint. It will be seen that our complaint includes New England with Boston, or such portions of New England as take Boston rates.

It may be appropriate to notice here that while our complaint covers all the classes of freight, it is the sixth class, including grain and flour, that we shall address ourselves to in our discussion of the question.

It is in the interest of Boston, New England and the West that we make this complaint. New England is a great consumer of flour, wheat, corn and oats; and their interest in cheap food touches the interest of the great agricultural West in low freight, as an aid in supplying the demand. Thus the two interests are united. Neither the East nor the West will wholly gain the reduction in freight we ask for, but the benefit will inure to both, and perhaps never was a complaint made before your honorable body that involved wider American interests.

At the advent of railways, and in their earliest days, the rates of freight were added to for every minor adverse condition. At an early period in the adoption of through rates of freight the railway system of New England was comparatively in its infancy. It was then that these and greater differentials were imposed; and at that period they justly represented the grades and other difficulties of New England railroading, as compared with some other sections. But these conditions have been in a very great degree overcome. New England is covered with a network of railways. Connections here and there have reduced aggregate distances and avoided grades, so that today, in the opinion of your petitioners, there is no just ground for this unreasonable addition to the cost of freight to New England over the rate to New York.

Mr. Commissioner Schoonmaker in his printed decision, on page 21, says:

"The large trains drawn by one engine over the easy routes of the Lake Shore and New York Central Roads are broken up at Albany, taken over the Albany bridge and switched to the tracks of the Boston & Albany Road, and on account of the heavy grades of that road are made up into much smaller trains, requiring more engines, additional consumption of coal, and a greater number of trainmen. The detention of cars at Boston and in New England is also somewhat greater than at New York. These are items that enter into the cost of service; and, though they may not be large, they affect it to a material extent."

We do not deny that the grades in New England are less favorable than along the New York Central Railway; but permit us to make some comparisons with other roads which transport to New York in competition with the New York Central. Are the grades to Boston and New England less favorable than on the New York, Penn. & Ohio, once called the Erie Railway? Are they not far better than on the Pennsylvania and the Baltimore & Ohio Railways? We deny the statement that the trains of the New York Central Railway are broken up at Albany. Railroads do not make up trains that way. The New York Central Railroad traffic arriving at Albany crosses the bridge whether designed for the Hudson River

*1 Inters. Com. Rep. 391.

*1 Inters. Com. Rep. 761, top of left column.

Road or New England; and the trains are made up with reference to these connections. There is no more detention for the Boston and England connection than for the Hudson River. Both points are weak efforts on the part of the defending railways at pettifoggery. Sixty per cent of the grain and flour transported from the West to Schenectady and Albany for consumption in this country is consigned to New England and Boston. Deducting the export business of Boston, her interest in this reduction of rates touches only her own consumption and the points that may depend upon her for supplies.

But in addition to the railway traffic, the Erie Canal transports very largely of corn to Albany dealers, which is distributed all over New England by rail. One firm at Albany, Messrs. Durant, Elmore & Bliss, received last year 2,500,000 bushels of corn by canal, and so distributed it. This movement by canal increases the percentage of the aggregate movement into New England as compared with seaboard receipts for consumption; and we are at a loss for logic to prove the reasonableness, or fairness, or consistency, of charging the American consumers in New England 5 c. per 100 pounds more on flour and grain for food and feed, than is charged for the same and for greater distances, for export via Boston and New York for foreign consumption.

Let us present a comparative statement of distances to the points where a large portion of the flour and grain from the West for New England is consigned, and from whence it is distributed in all directions, and very largely by arrangement between consignee and the railway the property is left at intervening and shorter distances without arriving at destination, with the distance from Albany to New York. This distance from East Albany is 142 miles. The distance from same to Springfield, Mass., is 103 miles. To Worcester, Mass., 157 miles. To Hartford, Conn., 130 miles. To Providence, R. I., 201 miles. To Boston, 201 miles.

In *Mr. Commissioner Schoonmaker's* decision is given, on page 15,* the net rate per cent of Boston's receipts, out of the aggregate, by five cities, which is 3.6 per cent, or in grain of all kinds and flour, expressed in bushels, about 9,000,000 bushels. We quote it to illustrate what we have heretofore said, that the business of Boston for consumption is a very small proportion of what the West sends to New England in flour and grain. To the four New England cities we have named, besides Boston, the distances average 143 miles, as against 142 miles to New York. We should be surprised if that average was not found to fairly represent the distance over which 50 per cent of the movement from East Albany to New England was transported. As we said it is 148 miles against 142 miles to New York. If we add Boston to the calculation, the average distance is 153 miles and a fraction. There is no sound and sufficient reason for loading down this traffic with this additional rate of transportation over the cost to New York.

But we have reserved our strongest reason against this differential to the last: Chicago is

the initial base of freight rate adjustments. Out of that rate, and out of all rates, from all western points to New York, there is a terminal charge of 3 c. per 100 pounds in New York, which is first deducted from all rates on flour, grain, etc., and the remainder is divided, or prorated. For example: the rate of freight from Chicago to New York is 25c. per 100 pounds on grain, against 30c. per 100 to Boston and New England. From the rate to New York, the New York terminal of 3c. is deducted, and that is paid to the New York light-erage companies. The remainder, or 22c. per 100 pounds, is the actual rate that is paid to the railway lines for the transportation of 100 pounds of grain from Chicago to New York. This 22c. per 100 pounds is divided between the roads, Chicago to New York, as against 30c. per 100 pounds to Boston and New England, making the actual differential 8c. per 100 pounds instead of 5c. There is no differential at any of the points we have named, except at Boston, and at Boston it is charged only on export grain and flour; and it will be remembered that notwithstanding this terminal charge on export property the Boston export rate is the same as to New York. The logic of the question is all on one side and against the continuance of this differential.

Another potential reason for its discontinuance is the fact that the railways do not always insist upon it, but play fast and loose with it; and that leads us to our second complaint, noted on page 1. [*Ante*, 492.]

As a matter of fact the railways themselves have apparently arrived at the conclusion to which we are asking the mind of the Commission, for the reason that they do not now attempt to impose this differential in a uniform manner at all points alike. For example: at Buffalo all the lines leading east make a differential of only 2½ cents per 100 pounds on flour and grain to Boston and New England, over the rate to New York. The honorable Commission need no suggestions to prove the unfairness and oppressive nature of this discrimination against western points, but we venture to give you an example:

| | |
|--|-----------|
| From Danville, Ill., the rate on grain to Toledo and Detroit is, per 100 pounds..... | 10 |
| Toledo to Boston and New England | 24½ |
| | <hr/> 34½ |
| The rate from Danville to Buffalo is..... | 15 |
| Buffalo to Boston and New England..... | 15½ |
| | <hr/> 30½ |

This is a fair example of the unjust arrangement of rate on many of the western roads, touching Toledo traffic.

In conclusion we have to say that the differential we have called your attention to is a relic of the past. There is no place for it, at this day, in any fair and equitable adjustment of the great transportation system, and we ask you to abolish it.

In connection with this complaint, we hand you published rates of the railways and ask

* *Inters. Com. Rep.* 759.

your attention to their correspondence to our statements.

Toledo, O., Feb. 20, 1889.

| | |
|------------------|-------------------|
| Denison B. Smith | } Toledo Com'tee. |
| C. A. King | |
| J. F. Zalm | |
| John H. Wendell | } Detroit Com. |
| Wm. Carson | |
| James T. Gunn | |
| M. B. Clark | } Cleveland Com. |
| Chas. G. Hickar | |
| Geo. W. Lewis. | |

Transportation Com., Chicago Board of Trade by

D. E. Richardson,
Chairman.

Tariffs filed with Complaint.

New York, Lake Erie & Western Railroad. No. 1037, in effect December 17, 1888.

Pennsylvania Company operating the North-western Ohio Railway—Star Union Line—Erie Despatch. No. 18, in effect February 25, 1889.

Red Line Transit Co., Fast Freight Line via Lake Shore & Michigan Southern Ry. No. 4, in effect December 17, 1888.

Wheeling & Lake Erie Railway. No. 6, in effect December 17, 1888.

Baltimore & Ohio Railroad. Special Freight Tariff No. 18, in effect December 17, 1888.

IN THE MATTER OF FREE PASSES AND FREE TRANSPORTATION.

(No. 191.)

At a meeting of the Interstate Commerce Commission, held at its office in the City of Washington on the sixteenth day of April, in the year 1889:

Present: ALL THE COMMISSIONERS.

It was ordered by the Interstate Commerce Commission that notice issue to each of the following carriers, to wit:

Boston and Albany Railroad Company,
Boston and Maine Railroad Company,
Baltimore and Ohio Railroad Company,
Buffalo, Rochester and Pittsburgh Railway Company,
Central Railroad Company of New Jersey,
Central Vermont Railroad Company,
Delaware and Hudson Canal Company,
Delaware, Lackawanna and Western Railroad Company,
Fitchburg Railroad Company,
Grand Trunk Railway Company,
Lehigh and Hudson River Railway Company,
Lehigh Valley Railroad Company,
Maine Central Railroad Company,
New York and New England Railroad Company,
New York Central and Hudson River Railroad Company,
New York, Lake Erie and Western Railroad Company,
New York, New Haven and Hartford Railroad Company,
New York, Ontario and Western Railway Company,
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New York, Philadelphia and Norfolk Railroad Company,

New York, Providence and Boston Railroad Company,

New York, Susquehanna and Western Railroad Company,

Pennsylvania Railroad Company,
Philadelphia and Reading Railroad Company,

Providence and Worcester Railroad Company,

Rome, Watertown and Ogdensburgh Railroad Company,

Western, New York and Pennsylvania Railroad Company,

West Shore Railroad Company,
to be and appear before The Interstate Commerce Commission at its office in the City of Washington on the 3d day of May in the year 1889, at 10 o'clock A. M. of said day, then and there to answer and set forth before the said Commission the persons and classes of persons, if any, to whom each of them, respectively, have issued free passes or free transportation to persons other than its own officers or employees and the officers and employees of other railroad companies, and all the conditions and limitations connected therewith in each instance, and how they do this branch of their business.

As it is intended to make this investigation full and complete, each of said carriers will save time and expense by bringing with it from its records a true and correct list of the names of all persons, if any, to whom it has issued free passes or free transportation, who are not its own officers or employees or the officers and employees of other railroad companies, between November 1st, 1888, and the time of such investigation, if any of them have done such business, with an explanation as to how and why this was done in each instance; and each of said carriers will at that time be expected and required by The Interstate Commerce Commission to present such a list as aforesaid for the purpose of said investigation and to verify the same by proper proof; and the said investigation will relate to the details of all this kind of business as done by each of said carriers.

IT WAS FURTHER ORDERED by the Interstate Commerce Commission that a copy of this order and notice be forthwith mailed, by the Secretary, to each of said railway carriers under the official seal of the Interstate Commerce Commission.

Done at the City of Washington on this the sixteenth day of April, in the year 1889, and of the Independence of the United States the 113th year.

A true copy.

Edw. A. Moseley,
Secretary.

IN THE MATTER OF COMMISSIONS ON THE SALE OF TICKETS.

(No. 192.)

At a meeting of the Interstate Commerce Commission, held at its office in the City of Washington on the sixteenth day of April, in the year 1889:

Present: ALL THE COMMISSIONERS.

It was ordered by the Interstate Commerce Commission that notice issue to each of the following carriers, to wit:

Burlington, Cedar Rapids & Northern Railway Company,

Chicago & Alton Railroad Company,

Chicago, Burlington & Quincy Railroad Company,

Chicago, Burlington & Northern Railroad Company,

Chicago, Burlington & Kansas City Railway Company,

Chicago, Kansas & Nebraska Railway Company,

Chicago, Milwaukee & St. Paul Railway Company,

Chicago & Northwestern Railway Company,

Chicago, Rock Island & Pacific Railway Company,

Chicago, Santa Fé & California Railway Company,

Chicago, St. Paul & Kansas City Railway Company,

Chicago, St. Paul, Minneapolis & Omaha Railway Company,

Wisconsin Central Railroad Company,

Chicago & Atlantic Railway Company,

Chicago & Grand Trunk Railway Company,

Detroit, Grand Haven & Milwaukee Railway Company,

Detroit, Lansing & Northern Railroad Company,

Flint & Pere Marquette Railroad Company,

Illinois Central Railroad Company,

Lake Shore & Michigan Southern Railway Company,

Louisville, New Albany & Chicago Railway Company,

Michigan Central Railroad Company,

New York, Chicago & St. Louis Railroad Company,

Pittsburgh, Fort Wayne & Chicago Railway Company,

Wabash Railway Company,

Wabash Western Railway Company,

to be and appear before The Interstate Commerce Commission, at its office in the City of Washington, on the seventh day of May, in the year 1889, at ten o'clock A. M. of said day, then and there to answer and set forth before the said Commission what commissions, if any, each of them pays upon the sale of passenger tickets, and to whom, and how this business is conducted by each of them.

IT WAS FURTHER ORDERED by the Interstate Commerce Commission that a copy of this order and notice be forthwith mailed, by the Secretary, to each of said railway carriers under the official seal of the Interstate Commerce Commission.

Done at the City of Washington on this the sixteenth day of April, in the year 1889, and of the Independence of the United States the 113th year.

A true copy. Edw. A. Moseley, *Secretary*.

IN THE MATTER OF TRACKAGE AND CAR MILEAGE.

(No. 193.)

At a meeting of the Interstate Commerce
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Commission, held at its office in the City of Washington on the sixteenth day of April, in the year 1889:

Present: ALL THE COMMISSIONERS.

It was ordered by the Interstate Commerce Commission that notice issue to each of the following carriers, to wit:

Burlington, Cedar Rapids & Northern Railway Company,

Chicago & Alton Railroad Company,

Chicago, Burlington & Quincy Railroad Company,

Chicago, Burlington & Northern Railroad Company,

Chicago, Burlington & Kansas City Railway Company,

Chicago, Kansas & Nebraska Railway Company,

Chicago, Milwaukee & St. Paul Railway Company,

Chicago & Northwestern Railway Company,

Chicago, Rock Island & Pacific Railway Company,

Chicago, Santa Fé & California Railway Company,

Chicago, St. Paul & Kansas City Railway Company,

Chicago, St. Paul, Minneapolis & Omaha Railway Company,

Wisconsin Central Railroad Company,

Chicago & Atlantic Railway Company,

Chicago & Grand Trunk Railway Company,

Detroit, Grand Haven & Milwaukee Railway Company,

Detroit, Lansing & Northern Railroad Company,

Flint & Pere Marquette Railroad Company,

Illinois Central Railroad Company,

Lake Shore & Michigan Southern Railway Company,

Louisville, New Albany & Chicago Railway Company,

Michigan Central Railroad Company,

New York, Chicago & St. Louis Railroad Company,

Pittsburgh, Fort Wayne & Chicago Railway Company,

Wabash Railway Company,

Wabash Western Railway Company,

to be and appear before The Interstate Commerce Commission at its office in the City of Washington on the 8th day of May in the year 1889, at ten o'clock A. M. of said day, then and there to answer and set forth before the said Commission what allowance, if any, each of them pays for trackage, and to whom in each instance, and how this is done; and what allowance, if any, each of them pays for different classes of cars furnished by shippers, car companies, individuals, or connecting lines, and how this business is conducted and done by each of them, and as to what is a fair and just allowance for such different classes of cars.

IT WAS FURTHER ORDERED by the Interstate Commerce Commission that a copy of this order and notice be forthwith mailed, by the Secretary, to each of said railway carriers under the official seal of the Interstate Commerce Commission.

Done at the City of Washington on this the sixteenth day of April, in the year 1889, and of

the Independence of the United States the 113th year.

A true copy.

Edward A. Moseley,
Secretary.

RICE, ROBINSON & WITHEROP

WESTERN NEW YORK & PENNSYLVANIA R. CO.

(No. 119.)

1. **After a case has been decided**, a petition to open it for further testimony and a **rehearing** should be verified, and should indicate the nature of the new testimony and its purpose.
2. **When** a question of general public interest is involved, the **Commission**, in its own discretion, and in furtherance of justice, **may open a case** to give parties the benefit of a more extended investigation of the same subject matter, in other pending cases.

(Received and decided April 15, 1889.)

PETITION by complainants for leave to open this case and take further testimony therein. *Granted.*

MEMORANDUM.

By the Commission:

A decision adverse to the complainants was rendered in this case on the 30th day of November, 1888.*

Since that date complaints have been filed by other refiners and shippers of oil in the same territory, against the same railroad company and other lines of road, concerning the rates charged for transporting refined oil; and those cases, being at issue, have been set for hearing at Titusville, on the 15th and 16th of May next. The complainants ask for leave to give further testimony in this case at the same time and place.

The petition now presented sets forth certain points in support of which further testimony is asked to be taken. These are substantially the same questions litigated on the former hearing, and it is not stated that new testimony has been discovered or that material evidence of a different character can now be given; nor is the petition verified, as, strictly, such petitions should be.

It is set forth, however, that the traffic will not bear the rate charged to Buffalo, and that the condition of respondent's business warrants a reduction of the rate.

As conditions of transportation vary from time to time, and rates should ordinarily be adjusted to such changed conditions, it is possible that the petitioners may be able to show that a lower rate at the present time is reasonable and just; and it is only fair that they should have the opportunity to do so. The petition, however, would be insufficient in a court of law, as it is only unspecified cumulative evidence, upon points already adjudicated, that is proposed to

be given; and standing alone it would not be sufficient here, although technical rules of procedure are not insisted on, and equitable considerations largely enter into the question of rates. But as the whole subject of rates upon refined oil is to be investigated in the same locality, and all the refiners similarly situated have interests in common, these petitioners ought not to be precluded from sharing the benefit of any light that may come from that investigation. In view of that fact, and in furtherance of justice, the defects of the petition may be disregarded. Under such circumstances the Commission might with propriety open a case without an application for the purpose, and without previous notice to either party.

An order may be entered, therefore, that the case will be regarded as opened for further evidence at the time and place mentioned, upon the points specified in the petition, and the testimony taken in the other cases to be considered in this case so far as it may be applicable.

Re EXPORT RATES BY TRUNK LINE CARRIERS.

(No. 176.)

At a general session of the Interstate Commerce Commission, held at its office in Washington on the 8th day of March, A. D. 1889:

Present: All the Commissioners.

IN THE MATTER OF EXPORT RATES BY TRUNK LINE CARRIERS:

It is ordered: That a notification be sent to each of the railway carriers comprising what is known as The Trunk Line Association to appear before the Interstate Commerce Commission in the City of Washington on Saturday, the 16th day of March, 1889, at 10 o'clock A. M. of said day, for the purpose of fully and particularly setting forth and showing what their export rates are, and how these export rates are made by each of them; and a/s/o for the purpose of giving each of said carriers an opportunity to be heard concerning the manner of making and publishing said rates in order to comply with the provisions of An Act to Regulate Commerce, approved February 4, 1887, as amended by An Act to amend said Act, approved March 2, 1889.

A true copy.

Edward A. Moseley, Secretary.

IN THE MATTER OF THE INVESTIGATION OF THE ACTS AND DOINGS OF THE GRAND TRUNK RAILWAY COMPANY OF CANADA IN THE TRANSPORTATION OF TRAFFIC FROM THE UNITED STATES INTO CANADA.

(No. 186.)

- *1. **The provisions of the Act to Regulate Commerce apply to foreign as well as domestic common carriers**

*Head notes by SCHOONMAKER, C.

*See ante, 298.

engaged in the transportation of passengers or property, for a continuous carriage or shipment, from a place in the United States to a place in an adjacent foreign country.

2. The common carriers engaged in such transportation are **subject to the provisions of the Act in respect to the printing of schedules of rates, fares, and charges**, for the traffic they carry, the **posting and filing** with the Interstate Commerce Commission of copies of such schedules, the notice of advances and reductions, and the maintenance of the rates, fares and charges established and published and in force at the time.
3. Such common carriers are **also subject to the provisions of the Act in respect to joint tariffs** of rates, fares and charges for continuous lines or routes.
4. The carriage of freights can not be prevented from being **treated as one continuous carriage** from the place of shipment to the place of destination by any means or devices intended to evade any of the provisions of the Act.
5. Under the provisions of the Act the **Grand Trunk Railway Company of Canada** is required to print, **post and file its schedules of rates and charges** for the transportation of property from points in the United States to points in Canada, and **cannot lawfully charge, demand, collect, or receive from any person or persons a greater or less compensation** therefor, or for any services in connection therewith, **than is specified in such published schedule** as may at the time be in force.
6. Upon an investigation by the Commission it appeared that the Grand Trunk Railway Company of Canada transports coal and coke under a schedule specifying a total rate from Buffalo, Black Rock, and Suspension Bridge, in the United States, to Hamilton, Dundas, and several other points in Canada; and that the published tariff rate for such transportation from the points named to Hamilton and Dundas is \$1 a ton, but that it accepts a reduced charge, or allows a rebate of 25 cents a ton in favor of certain consignees at Hamilton, Dundas, and other points in Canada.
7. **Held, That the reduced charge accepted, or rebate allowed, is in violation of the Act to Regulate Commerce and unlawful.**
8. The Interstate Commerce Commission has authority to institute investigations and to deal with violations of the law **independently of a formal complaint**, or of direct damage to a complainant.

(Hearing at Washington, April 4, 1889.—Decision filed April 18, 1889.)

Application of the provisions of the Act to Regulate Commerce to Inter-
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national Traffic with an Adjacent Foreign Country.

AT a meeting of the Interstate Commerce Commission held in the City of Washington on the 26th day of March, A. D. 1889.

Present: All the Commissioners.

Whereas, information has been lodged with the Interstate Commerce Commission to the effect that the Grand Trunk Railway of Canada, and also of the laws of several States of the American Union, and a common carrier of persons and property to and from various points in the United States to and from various points in the Dominion of Canada, and as to such traffic subject to the Act to Regulate Commerce, has violated and is still violating said Statute in divers particulars, by granting rebates on traffic taken and carried by it from points in the United States to points in the Dominion of Canada, and by charging less than its published tariff of rates on traffic taken by it from points in the United States to points in the Dominion of Canada.

It is therefore ordered by the Interstate Commerce Commission that the said, the Grand Trunk Railway of Canada, be, and the same is, hereby notified to appear before the Interstate Commerce Commission at its office in the City of Washington on the 4th day of April, in the year 1889, at 10 o'clock A. M. of the said day, then and there to answer before said Commission concerning all the matters aforesaid, and then and there to submit to such investigation as may be made thereof by the said Commission.

And it is further ordered by the Interstate Commerce Commission that certified copies of this order, under the seal of the Commission, be furnished by the Secretary forthwith for the said, the Grand Trunk Railway of Canada, to each of the following officers of the said corporation, namely: Joseph Hickson, Esq., General Manager, at Montreal, Canada; J. W. Loud, Esq., General Freight Agent of Through Traffic, at Detroit, Michigan; A. H. Harris, Esq., Assistant General Freight Agent of Through Traffic, at Buffalo, N. Y.; and that he also furnish a like copy of this order to H. B. Ledyard, Esq., President of the Michigan Central Railroad Company at Detroit, Michigan.

Done in the City of Washington on this, the 26th day of March, in the year 1889, and of the Independence of the United States the 113th.

Mr. Ashley Pond, for Michigan Central Railroad Co.

Messrs. Otto Kirchner and E. W. Meddaugh, for Grand Trunk Railway Co.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

On the 26th day of March, 1889, documentary evidence was filed with the Interstate Commerce Commission, by the Michigan Central Railroad Company, tending to show that the Grand Trunk Railway of Canada had violated, and was still violating, the provisions of the Act to Regulate Commerce, by granting re-

bates on traffic taken and carried by it from points in the United States to points in the Dominion of Canada, and also by charging less than its published tariff rates on such traffic. The Commission thereupon, on said 26th day of March, 1889, issued an order notifying the said Grand Trunk Railway Company of Canada to appear before the Interstate Commerce Commission, at Washington, on the 4th of April, 1889, to answer concerning the aforesaid matters, and to submit to such investigation as might be made by the Commission. The order having been duly served, the Grand Trunk Railway Company duly appeared on said day, by its counsel and its traffic manager, and the Michigan Central Railroad Company also appeared by its president and its counsel.

By consent of the respective parties the facts as they appeared in the documentary evidence which had been filed, were for the purposes of the hearing, admitted to set forth correctly the facts in the case.

The material facts are as follows: The Grand Trunk Railway Company, a corporation chartered under Canadian laws and operating its principal lines in that country is engaged in the transportation of traffic from points in the United States to divers points in the Dominion of Canada, and uses for the purpose of such transportation the Suspension Bridge across the Niagara River near Lewiston. For the purpose of such transportation said Grand Trunk Railway Company publishes and files with the Interstate Commerce Commission tariffs of its rates and charges upon such traffic. A tariff sheet for this purpose, taking effect October 15, 1888, was published and filed with the Commission. This tariff shows rates from Buffalo, Black Rock, and Suspension Bridge, all in the United States, to divers points in the Dominion of Canada. The rates from the points named to Hamilton and Dundas, in Canada, are \$1 per ton on coal and coke, and to Chatham, \$1.25 per ton, and different rates to other different points.

Some correspondence having taken place in November and December, 1888, and January, 1889, in reference to the consignment of three car loads of coal, by mistake, from the Buffalo, Rochester & Pittsburgh R. R. Co. and N. Y. Central R. R. Co. to the Michigan Central Railroad, that were intended to be consigned over the Grand Trunk Railway, to Hamilton, in Canada, it appeared by a claim made for a reduced rate on the coal, by the consignees at Hamilton, that the Grand Trunk Railway allowed certain rebates, or accepted rates less than those specified in the published tariffs, to certain consignees in Canada. Following this discovery, on the 8th of February, 1889, President Ledyard, of the Michigan Central Railroad Company, addressed to General Manager Hickson, of the Grand Trunk Railway Company, at Montreal, a letter, of which the following is a copy:

DETROIT, MICHIGAN, *February 8, 1889.*

JOSEPH HICKSON, Esq.,

General Manager of the Grand Trunk Railway, Montreal.

DEAR SIR: Written evidence, of the reliability of which there seems to be no question, has come into my possession, showing that during

the month of October last the published tariff of your company on coal, coke, etc., from Buffalo, Black Rock and Suspension Bridge, to certain points in Canada, being \$1.00 per ton, special rates of 75 cents per ton on this traffic were quoted by your company and the traffic carried at such rates.

Your traffic officers hold, I am advised, that traffic consignments from Buffalo, Black Rock or Suspension Bridge to Canadian points, is not subject to the provisions of the Interstate Commerce Act. I hold differently and, in order to settle the matter, propose, unless you have serious objections thereto, to lay these papers before the Interstate Commerce Commission, and ask for a ruling thereon.

Yours truly,

(Signed)

H. B. LEDYARD,

President.

On the 16th day of February, 1889, the general manager to whom the foregoing letter was addressed, replied as follows:

DEAR SIR: I duly received your letter of the 8th inst., respecting the rates charged by the Grand Trunk Company, on coal from Buffalo and Suspension Bridge, to certain points in Canada.

You are correct in stating that a portion of this traffic has been carried on a rate of 75 cents per ton. This 75 cent rate is not concealed; and every shipper similarly circumstanced has the benefit of the conditions.

In the case of the smaller shippers, our yards are incumbered with consignments to be taken away as found convenient by consignees. In the case of large shippers, yards are provided or arrangements made for at once releasing the cars. The "circumstances and conditions" therefore are not similar; and there is no unreasonable or unfair discrimination in quoting a lower rate to all shippers who provide special facilities for promptly handling large consignments of coal.

This course appears to me to be consistent with the interests of the railway carriers; and there is no principle involved which would conflict with the laws of the United States.

I cannot see that anything will be gained by taking the matter before the Interstate Commerce Commission; and I trust that on further consideration you will not think it necessary to do so. Are the interests of the Michigan Central Company in any way prejudiced by the existing arrangements?

The Grand Trunk Company are acting strictly under legal advice in regard to this business.

Yours truly,

(Signed)

J. HICKSON,

General Manager.

H. B. LEDYARD, Esq., *President Michigan Central Rd. Detroit, Michigan.*

Further correspondence took place, the whole of which need not be given. On the 21st of February, 1889, Mr. Ledyard again wrote to Mr. Hickson as follows:

DETROIT, MICHIGAN, *February 21, 1889.*

JOSEPH HICKSON, Esq.,

General Manager, Grand Trunk Railroad, Montreal.

DEAR SIR: I have your letter of February 16, with regard to the concessions from tariff allowed by your company on shipments of

hard coal and coke from Suspension Bridge and Buffalo.

About a year since, I wrote to the Interstate Commerce Commission, asking for a decision as to whether traffic originating at the American Frontier, consigned to points in Canada, was subject to the provisions of the Interstate Commerce Act, and received reply from the Commission that it would so hold.

In this case the situation is simply this: Your company and this agreed upon the tariff from Buffalo and Suspension Bridge to common points in Canada. We found after a period, that certain dealers at certain points where our systems come in competition, had been allowed by your company concessions, and dealers by our line at once set up the claim that they must receive a similar consideration. I do not think that the question as to whether a shipper sends a large amount or a small amount, or whether he has his own terminals, or uses those of the railroad company for unloading the freight, would in any way be construed by the Interstate Commission as entitling your company to give to largest shippers, or those who own their own terminals, lower rates than you do similar shippers not so circumstanced. At any rate, if your construction of the Law is correct it should be known, as then the whole question of rates to be charged would turn upon the relative amounts of shipments, and the relative facilities for taking care of the same.

This company certainly cannot consent to the system you have established in Canada, of paying rebates on this traffic, being continued, no matter what the circumstances are, unless it shall be shown that payment of such rebates is, under the provisions of the Interstate Commerce Act, proper. Our counsel holds that it is not. We have the ruling of the Commission, as I have before stated, that this traffic is subject to the provisions of that Act.

It is, therefore, my purpose, with your consent, to simply lay the matter before the Commission, and, if necessary, make a friendly complaint against your company, in order to obtain a ruling as to whether the views of your counsel or of ours are correct. If you prefer, and it can be done, the best way might be to send a copy of your letter, with the papers I have, to the Commission, asking them to make a ruling thereon. Should they decline to do so, then the friendly complaint will probably be admitted.

While you state in your letter that the 75 cent special rate is not concealed, yet I would call your attention to the fact that the tariffs of your company, of which I have several, publish a rate of \$1.00, and that so far as the public is concerned, that must be the governing rate. I do not believe that any carrier is authorized to carry at a rate less than that named in its tariff.

Yours truly,
(Signed)

H. B. LEDYARD,
President.

This was answered by Mr. Hickson on the 6th of March as follows:

MONTREAL, March 6, 1889.

MY DEAR SIR: A pressure of engagements connected with the legislation pending at Ottawa INTER S.

wa has prevented me replying earlier to your letter of the 21st ult.

I really do not see that anything would be gained by bringing the matter of the rates for coal coming into Canada, before the Interstate Commissioners. Of course if you have determined to do so it is probable that anything I may say on the subject will not change your decision.

The shippers practically arrange for the rates for coal up to the Canadian boundary, and what they pay to the United States Railway Companies we do not know, and have not thought it necessary to inquire.

If the fact that the coal is hauled across the International Bridges by the Grand Trunk Railway Company constitutes it international traffic, and subject to the cognizance of the Interstate Commissioners, I think it is quite certain that the shippers would arrange to have the work of taking the coal over the bridges done for them by the United States companies. The Royal Commission, which recently reported upon the railway rates, etc., in Canada, recommended that it should be permissible to make concession where large quantities of traffic were moved.

As a matter of courtesy the tariffs for this coal traffic were sent to the Interstate Commission, but we were advised that it was really not obligatory upon the company to forward them.

Have the reductions in rates really affected the business of your company? I am advised that they have been made at points, in the traffic of which you are not interested. To common points I agree with you that the rates should be agreed and adhered to.

Would it not be the most sensible way of putting matters upon a satisfactory footing that your officers should meet ours and agree upon a tariff to common points, *i. e.*, if there is really any difference in the rates prevailing by your line and ours for traffic in which both companies are interested?

Yours truly,
(Signed)

J. HICKSON,
General Manager.

H. B. LEDYARD, Esq., *Detroit.*

The leading fact that appears by this correspondence is that the Grand Trunk Railway carries coal from points in the United States to points in Canada at less than its published tariff rates; and claims the right to do so on two grounds: *first*, that its Canadian line is not subject to the Act to Regulate Commerce, nor to the jurisdiction of the Interstate Commerce Commission; and *second*, that the circumstances and conditions of the traffic are different in the cases in which the rebate is allowed by reason of the consignees in those cases having certain facilities for unloading cars, that are not possessed by smaller shippers.

In addition to its Canadian lines proper, the Grand Trunk Railway Company controls and operates several important lines of railroad within the United States, which have an extensive business and yield a large revenue.

By the official reports filed with the Commission, and showing the operations of these various lines to the 30th day of June, 1888, the following facts appear, the corporate names of

the subordinate roads being given, and the capital stated including stock, bonds and floating indebtedness:

The Atlantic & St. Lawrence Railroad Company, extending from Portland, Maine, through New Hampshire and Vermont, to the national boundary; mileage, 166.58; capital, \$8,443,000; gross earnings from operation, \$1,107,764.77; total freight tonnage, 836,152.

The Detroit, Grand Haven & Milwaukee Railway Company, extending from Detroit to Grand Haven, in the State of Michigan; mileage, 189; capital, \$6,995,347.92; gross earnings from operation, \$1,148,316.70; total freight tonnage, 618,012.

The Chicago & Grand Trunk Railway Company, including two short terminal lines to enter Chicago, extending from Port Huron, Michigan, through Indiana, to Chicago, Illinois; mileage, 335.27; capital, \$22,601,316.83; gross earnings, \$3,487,589.08; total freight tonnage, \$1,540,659.

The Lewiston & Auburn Railway Company, extending from Lewiston, Maine, to Lewiston Junction; mileage, 5.41; capital, \$300,000; gross earnings, \$35,685.22; total freight tonnage, 53,536.

The Michigan Air Line Railway Company, extending from Lennox to Jackson, Michigan; mileage, 105.59; capital, \$1,808,666.67; gross earnings, \$169,176; total freight tonnage, 262,791.

The Chicago, Detroit & Canada Grand Trunk Junction Railway Company, extending from Detroit Junction to Fort Gratiot, Michigan; mileage, 59.37; capital, \$2,881,141.46; gross earnings, \$248,123.52; total freight tonnage, 375,904.

The Toledo, Saginaw & Muskegon Railway Company, extending from Muskegon, to Ashley, Michigan; mileage, 96; capital, \$3,248,000; earnings and tonnage not reported.

The totals of these statistics are as follows: Mileage, 857.22; capital, \$46,277,472.88; gross earnings, \$6,196,655.29; tonnage, 3,687,054.

Besides these lines, which are directly controlled and operated by the Grand Trunk Railway Company, that company has traffic connections with a large number of domestic lines reaching various portions of the United States.

These statistics do not embrace any of the business of the Grand Trunk Railway over the International Bridge near Niagara, nor at certain other points where traffic crosses the boundary, to wit: Rouse's Point, where it has a road into the United States about two miles in length; at Mooer's Junction, where it has a road into the United States about three miles in length; and at Fort Covington, where it has a road into the United States about one mile in length.

There are no reports filed with the Commission showing the international business at these points, nor do the statistics given embrace any international business of the Canadian Pacific Railway Company.

The Michigan Central Railroad Company, a corporation within the United States, is the lessee of a line in Canada, the Canada Southern Road, which runs from Detroit to Buffalo through Canada, and is also engaged as a competitor of the Grand Trunk Railway in the transportation of coal from the United States

to points in Canada. The Michigan Central Railroad Company also publishes and files with the Commission its tariffs on coal and coke from Buffalo, Black Rock, and Suspension Bridge in the United States, to divers points in the Dominion of Canada.

The counsel for the Grand Trunk Railway, in opening the discussion, stated the action of the company he represented as follows:

"I desire in making this presentation of the question that the facts as they exist should appear, and therefore I put it in this precise form. The schedule of rates as published and filed is adhered to in all cases except where an arrangement is made with the receiver of coal in Canada; and in such cases the rate covers the carriage in Canada and the toll for taking the load over the bridge at the border."

In answer to questions by the Commission he further said that the rate is a total rate, and is made at one gross sum from a point in this country to a point in Canada.

He also added:

"The Grand Trunk Railway Company receives the goods on the American side of the bridge, they then transport them across the bridge to the point of destination in Canada at a gross rate, say 75 cents, out of which the Grand Trunk Railway Company pays the toll to the Bridge Company."

The bridge toll was stated to be a certain charge per car. The tolls however, mainly, if not all, go to the Grand Trunk Railway, as is shown by the reports of that company.

Upon the documents filed with the Commission in this proceeding, also the tariffs filed with the Commission by the Grand Trunk Railway Company, and upon the statements made by the counsel for said railway company on the hearing, the Commission finds specifically the following facts:

(1) That the Grand Trunk Railway Company of Canada, an incorporated railway company of the Dominion of Canada, doing international business with connecting railway lines of the United States, is, and since a period of time prior to the 15th day of October, 1888, has been engaged in the transportation of property for a continuous carriage or shipment from points within the United States to points within the Dominion of Canada. In this case the property transported was anthracite coal.

(2) That the said Grand Trunk Railway Company, for the purposes of such transportation, publishes, and files with the Commission tariffs of its rates and charges from points in the United States to points in the Dominion of Canada.

That such a tariff was filed with this Commission on the 20th day of October, 1888, which tariff sets forth in print as follows:

"L. X. Canceling Tariff L. X. 1, of July 2, 1888. Grand Trunk Railway. Special Tariff on coal and coke, in car loads of not less than 24,000 pounds each. From Buffalo (River Street), Black Rock and Suspension Bridge. Entirely at owner's risk of loss or shortage. Exclusive of customs charges. Taking effect October 15, 1888."

The tariff then gives the rates on coal and coke to a large number of points in Canada, among

them Hamilton and Dundas, to which the rate named is \$1 a ton, and Chatham, to which the rate named is \$1.25 a ton.

(3) That the said Grand Trunk Railway Company, since the said 15th day of October, 1888, has not maintained or adhered to its said published tariff rates and charges for the transportation of anthracite coal from the points named in the United States to the points named in the Dominion of Canada, but without changing its tariff as published and filed has transported coal from said points in the United States to points in the Dominion of Canada, at less than said published tariff rates, that is to say, to Hamilton, in the Province of Ontario, at the rate of 75 cents a ton, inclusive of the tolls for crossing Suspension Bridge.

(4) That the transportation of coal as aforesaid by said Grand Trunk Railway Company at such reduced rates was in violation of the published schedule of rates and charges in force at the time.

APPLICATION OF THE LAW TO THE CASE.

The position of the Grand Trunk Railway Company in respect to the traffic under consideration was concisely stated as follows: "We contend that a shipment from a place in the United States to a place in Canada is not within the Act."

A further point in the nature of an objection to any action by the Commission was also made, as follows: "I make the point at the outset that there is no American corporation, or any corporation within the cognizance of this Commission, or within its jurisdiction, that can in any way be injured by the acts here complained of; and it seems to me that this is sufficient reason why this Commission should not take further cognizance of this case."

The claim is distinctly made, therefore, that a foreign carrier, either by itself or in connection with a domestic carrier, may carry freight on a through rate from any place in the United States to any place in Canada independently of the provisions of the Act to Regulate Commerce, and gives such rebates or preferences, and discriminate in its traffic charges in such manner as it may see fit, with impunity.

The argument upon which this claim is founded is in substance that the Act omits to provide for traffic carried into an adjacent foreign country, and by its terms only applies to the boundary line. This construction, it was conceded, "standing alone would perhaps be very narrow and technical," but taken in connection with other portions of the first section of the Act was claimed to be the only construction which is at all permissible.

The positions so broadly taken demand some inquiry whether the transportation in question is subject to the provisions of the Act.

It is fair to assume that in framing a law to regulate commerce the intention of Congress was that all transportation by the carrying agencies described in the Act should be subject to the regulations prescribed, and that the subjection should be such as to render the Act effective for its declared purposes.

The power of Congress to regulate the transportation of property by continuous carriage or shipment from any place in the United States

to a place of destination in an adjacent foreign country, it is not the province of the Commission to question. Its function is to give effect to the law as declared, and with a reasonable interpretation of its language.

If any questions relating to rights of sovereignty are involved, or that are governmental in their character, they may be dealt with in a spirit of justice by treaty stipulations, or by appropriate legislation on the part of the respective governments.

It may be observed, however, that the power of Congress to levy import and export duties is not questioned. And the power to regulate commerce among the States and with foreign nations, including all the elements and agencies implied in the term, is equally clear. Commerce, as has been often declared by the courts, embraces transportation, traffic, intercourse, and navigation. Transportation has been said to be an essential element of commerce (82 U. S. 15 Wall. 232 [21 L. ed. 146]; 18 Fed. Rep. 151), including transportation of freight and passengers between the States, or with foreign countries. *Lord v. Steamship Co.* 102 U. S. 541 [26 L. ed. 234]. And commerce with foreign nations signifies transactions which at some stage of their progress must be extra-territorial (*Same case*, 544).

An examination of the Act can leave no reasonable doubt of the intention of Congress. It purports by its title "to regulate commerce." This, as has been shown, includes traffic, transportation, and the instrumentalities employed. By the first section the provisions of the Act are declared to apply "to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory * * * to any other State or Territory, * * * or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States."

It will be observed that the word "to" in these three separately described kinds of transportation is used to express the destination of the property by continuous carriage. It is declared to be *to* another State or Territory, or *to* an adjacent foreign country, or *to* another place in the United States. In what sense is the word "to" used in these sentences? The answer given by the Grand Trunk Railway is that it signifies at the boundary line of another State or Territory, or of an adjacent foreign country, or of another place in the United States. This construction is, however, obviously so "very narrow and technical," when applied to commerce among the States, as to render the law nugatory, and a broader meaning therefore was necessarily intended. It is an elementary rule that when a word is used in an instrument, whether a statute or a private document, which is susceptible of different interpretations, that is to be adopted which will give effect to the evident intent of the instrument taken as a whole. An elaborate system of regulation of commerce from one State to another, that becomes inoperative at the state line, would fail so entirely to accomplish any

useful purpose that practically there would be no regulation. The word "to," therefore, in this instance means the destination of the property into, or at any place within, the State reached by the continuous carriage or shipment; and the regulation intended is from the origin to the destination of the carriage.

If the sentence referring to commerce among the States necessarily has this meaning there is no reason for supposing that the next sentence, which refers to transportation to an adjacent foreign country, has a more restricted meaning. The same word must, by familiar rules of interpretation, be presumed to be used in the same sense when repeated in a similar connection in the same paragraph of a statute, and in relation to the same general subject. All the reasons that apply in the first instance for making the regulation effective, also apply in this case. To an adjacent foreign country, therefore, signifies any destination in an adjacent foreign country to which the continuous carriage extends.

This view is strengthened by the next sentence in the same paragraph, which applies the provisions of the Act "also to the transportation in like manner [that is, continuous carriage] of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country." This clause clearly provides for carriage partly in the United States and partly in an adjacent foreign country, either to a port of transshipment or from a port of entry.

The proviso immediately following the clause last cited furnishes further confirmation. It declares "That the provisions of this Act shall not apply to the transportation of passengers or property * * * wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid." The Act applies, therefore, to the transportation of property wholly within one State when shipped to or from a foreign country.

The word "to" is evidently employed in the descriptive sentences of the first section in accordance with ordinary usage, as when a person speaks of going to some city, or to some other country. He does not mean only to the boundary line, but into the city or country. A like usage is also found in statutes, as in grants of railroad charters, which frequently describe the line of road to be from some town to some other town, and no one has doubted that its termini under such language might be in any portion of the towns named where rights of way might be procured.

Evidence of the intention of the Act in this respect that seems to be conclusive is found in the sixth section. The intention is to be deduced from the entire Act, and not from only one clause. The sixth section relates to the filing and publication of tariffs, and their observance by the carriers, and for the transportation described in the first section. It is therefore explanatory of the first section. It provides, among other things, as follows:

"That every common carrier subject to the provisions of this Act shall print and keep open

to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges."

Another provision is as follows:

"Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed."

It is further provided that—

"When any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."

Provisions relating to joint tariffs are then found, after which it is enacted as follows:

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated, or wherein such offense may be committed, and if such common carrier be a foreign corporation in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this Act; and the failure to comply with its requirements shall be punishable as and for a contempt; and the said commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of

injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this Act, until such common carrier shall have complied with the aforesaid provisions of this section of this Act."

The designation of foreign corporations among the common carriers to be proceeded against for disobedience to the law, and the remedy by injunction to restrain a derelict common carrier from receiving or transporting property among the several States and Territories of the United States, and between the United States and adjacent foreign countries, or between ports of transshipment and entry and the several States and territories—such ports of transshipment or of entry being, as mentioned in the first section, either in the United States, or an adjacent foreign country—indicate very clearly the scope of the application of the Act both as to carriers and traffic, and that the carriage of property into, and out of, as well as through adjacent foreign countries is designed to be subject to its provisions. Whenever the carriage originates in the United States and goes to a destination in an adjacent foreign country, or comes from a port of entry or other place in an adjacent foreign country to a destination at a place in the United States, it is intended to be subject to the provisions of the Act. Its origin in the one case and its destination in the other within the jurisdiction of the United States give authority to the Government to prescribe such conditions for the conduct of the business as it may deem just. The carriage is of property produced in or destined to the territorial sovereignty of the United States, and the business is in competition with domestic carriers. The government has the right, and owes it to its own citizens to say, that foreign competitors in the business shall be governed by the same rules of justice and fair dealing that apply to domestic carriers. This is not, as argued by counsel, an attempt to regulate the internal affairs or to antagonize the laws of another country, but, on the contrary, is the assertion of proper control over our own business, and the protection of our own citizens against unfair practices which unjustly affect their interests.

Nor is the object the protection of subjects of another government against unjust discriminations and unreasonable prejudice. That is the concern of the government to which they owe allegiance. The object is that the foreign transportation agencies that find it profitable to seek business within our jurisdiction shall not abuse their privileges to the injury of the carriers whose legitimate territory they penetrate. It is expected that in return for the hospitality of entering our domain for business purposes, enjoying the protection of our laws, maintaining agencies, soliciting business, making contracts, receiving and discharging freight, and participating generally in the operations of commerce, they will observe in good faith the rules of commercial honesty that the law

has prescribed in the public interests as expedient for the regulation of the business.

Independently of legal obligation, comity alone demands as a just recognition of liberal commercial advantages and extensive vested interests in the United States from which a large revenue is derived, that the laws of the friendly country under which these privileges are permitted, intended for the equal protection and regulation of these interests and similar domestic interests, should be scrupulously obeyed.

The vested interests of the respondent in the United States include a railroad mileage of 857 miles, representing a capital of \$46,277,472.88, with a business for the last fiscal year of 3,687,054 tons of freight, and a gross revenue of \$6,196,655.29.

The question in the case, however, rests on formal enactments of law, and not merely on obligations of comity. Considerations of that nature may be fairly assumed to add weighty reasons for compliance with the mandates of the law. But the duty of compliance is imperative under the law. And the acceptance of benefits under statutes that impose duties, is also an acceptance of the correlative obligations imposed.

A further provision to prevent any device or artifice to defeat the purpose of the law is contained in the seventh section, which is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of the Act."

The whole question resolves itself within a narrow compass. The law interposes no obstructions to transportation by foreign carriers from or into the United States, but requires them in conducting the business to conform to the same regulations that govern domestic carriers. This is the sole condition. The foreign carriers say they intend to participate in the business, but reject the condition, and claim that because they are aliens they have immunity from the law. The Act, however, says that unless they comply with the law they may be prohibited by the courts from receiving or transporting property between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States.

If the contention of the respondent can be sustained the law is only a contrivance to injure domestic carriers, and to divert most of

the export and import business of the United States, and the international business with Canada to foreign transportation lines. Under the construction claimed property from any place in the United States destined to a place in Canada, or to a Canadian port of transshipment for export, would be exempt from the provisions of the law, and concessions in the form of rebates, as upon the coal transportation in question, could be made, that would offer inducements to invite the business, and give substantial advantages to foreign purchasers. The same rule would apply to imported traffic destined to a place in the United States either on through bills or consigned locally from a place in Canada, and under such conditions the demoralization of trade and transportation that would inevitably follow are entirely evident. The general effect therefore of the construction claimed by the respondent would be that this carrier, on freight it takes from or brings into the United States could practice unjust discrimination of the grossest character against localities in the United States not greatly distant from the boundary line, and in favor of localities or persons in Canada.

The question is therefore one of supreme importance, and no presumption is to be indulged that Congress designedly omitted the commerce in question from the regulations of the Act, or overlooked the consequences of such omission. The careful language of the Act affords no reasonable support for the exemption claimed, but decisively negatives the theory.

The Commission is of opinion therefore that the provisions of the Act to Regulate Commerce apply to the transportation in question, and that the carriers engaged in it are subject to its regulations. They are required to publish their tariffs and to maintain the published rates shown by the tariffs in effect.

The minor question raised by the respondent that no domestic carrier or other complainant makes proof of specific injury from its disregard of statutory duty, and that without such proof the Commission should not interfere, calls for no extended discussion. This position, if sustained, would make some of the most important provisions of the statute of little or no importance. Would a claim be well founded that no one shall complain of the failure to post rates unless he can show damage therefrom to himself? Or of the failure to notify an advance or reduction in rates? Or of any other violation of law when from the very nature of the case the mischief is general rather than particular?

Very clearly a doctrine so damaging to the efficiency of the law is not to be sanctioned. It is quite possible that a discrimination in charges might be made upon traffic from the United States delivered in Canada that would inflict no appreciable wrong upon any citizen of this country; but it would nevertheless be a public wrong, for it would introduce demoralization into traffic by rail, and invite and encourage other wrongs that are denounced and prohibited by the law. Probably the belief that there might be cases where no one on his own account would be inclined to complain, or have a direct interest in doing so, was one of the reasons that authority to institute investi-

gations independently was conferred upon the Commission.

Neither a formal complaint, nor direct damage to a complainant is necessary to give jurisdiction to the Commission. By the twelfth section of the Act it has authority to inquire into the management of the business of all common carriers subject to its provisions, and is required to keep itself informed as to the manner and method in which the same is conducted. The Commission is further authorized and required to execute and enforce the provisions of the Act.

The thirteenth section provides that the Commission "may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

The same section further provides that "No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Information lodged with the Commission, therefore, of a violation of the Act, as in this case, is sufficient to authorize proceedings to be taken. The statute confers jurisdiction, with or without a complainant who has sustained damage, both to ascertain whether its provisions have been violated, and to deal with actual violations.

CONCLUSIONS.

The conclusion of the Commission is that the Grand Trunk Railway Company of Canada, by reason of the facts hereinbefore found, that is to say, at divers times between the 15th day of October, 1888, and the 26th day of March, 1889, by charging and collecting less than its established and published rates and charges for the transportation of coal from Buffalo, Black Rock, and Suspension Bridge, in the State of New York and within the United States, to the City of Hamilton and other points in the Dominion of Canada, has violated the 6th section of the Act to Regulate Commerce.

The Commission therefore orders that the said Grand Trunk Railway Company be notified to cease and desist from such violation immediately upon the service of such notice.

FORT WORTH ICE CO.; Corsicana Ice & R. Co.; Denison Crystal Ice Co.; Laredo Ice Co.; Texarkana Ice Co.; Richardson's Ice Works; and Dallas Ice Factory

v.

MISSOURI PACIFIC R. CO.; Texas & Pacific R. Co.; Gulf, Colorado & Santa Fé R. Co.; and Fort Worth & Denver City R. Co.

(No. 190.)

A BSTRACT of complaint filed April 16, 1889.

Petitioners show that they are actively engaged in the manufacture and sale of ice, in the Cities of Dallas, Fort Worth and other points in Texas; that they are informed and believe

that defendants are unjustly discriminating against them in freight rates from the Cities of Hannibal and St. Louis, Mo., Quincy, Ill., and Colorado Springs, Colo., to Dallas, Fort Worth, and other points in Texas, and present the following statement of facts to this Commission for its consideration and investigation:

Petitioners show that previous to entering into the manufacture and sale of ice in said Cities of Dallas, and Fort Worth, to wit, about the year 1882, the rate on ice from said Cities of Hannibal and St. Louis, Mo., and Quincy, Ill., to Dallas and Fort Worth, Texas, was \$120 per car load of ten tons, and that said cars were given no preference in time over other ordinary freight; that after that, said railroads reduced the rate on ice to said cities to half the rate in operation previous to the time said ice factories were started; that during the year 1886, said railroads, in order to further crush and destroy the business of your petitioners so that said roads might secure the transportation of all ice used in said markets, made another reduction in said rate, and put rates at \$60 per car load of 12 tons, and that at this time, said roads are transporting ice to said cities at a still lower rate, to wit, at the rate of \$65 per car load of from 15 to 20 tons, and that said shipments are given preference over other ordinary freight and are hurried through to destination with the least possible delay; that the rate on corn is 43 cents per 100 lbs. in car loads; that the rate on flour is 53 cents per 100 lbs.; that the rate on potatoes is 60 cents per 100 lbs., between those points; that on all of said articles, the actual weight loaded in the cars is charged for, while the rate on ice as above stated is virtually 15 cents per 100 lbs. Petitioners show that this rate on ice is out of all proportion to the rate charged on other classes of freight from and to said points and to points of like distances, and that the same is an unjust discrimination against your petitioners in their said business; that the rates on almost all classes of freight from the same and similar points to this territory, since the inauguration of the Interstate Commerce Law, have been increased; and they cite as an illustration of that fact, that before said law went into effect, the rate on ammonia (which is used in large quantities by petitioners in the manufacture of their product) from St. Louis to Dallas was 67 cents per 100 lbs., and that since said law has been in force, the rate on said article is \$1.20 per 100 lbs.

Petitioners pray that the Commission speedily investigate this matter and compel said roads to produce before it such of their records, books, copies of billing, freight expense bills, etc., as will enable it to ascertain the facts, etc.

Signed by representatives of the respective complainants and duly verified Apr. 10, 1889.

CHICAGO BOARD OF TRADE

v.

CHICAGO & ALTON R. R. CO. *et al.*

(No. 175.)

ABSTRACT of separate answer of the Chicago & Alton Railroad Company, in No. 175, filed March 18, 1889.

(See Complaint *ante*, 410.)

2 INTER S.

This defendant, denying all allegations not specifically admitted, admits its corporate existence, under the Laws of Illinois, its business as a common carrier; also the truth of the statement in the complaint as to rates and differences alleged for the transportation of live hogs and packing house products.

It alleges that the difference in rates in live hogs and packing house products is fully warranted by the fact that the transportation of live animals is attended with greater cost and risk than the transportation of the dead product, and the further fact that of the latter, 24,000 to 40,000 pounds, is loaded into one car, while cars of similar dimensions provided for live hogs, hold only from 14,000 to 16,000 pounds.

It alleges, further, that rates on packing house products from Kansas City and other Missouri River points, is largely influenced by lines operating south and southeast of Kansas City, which transport few if any live hogs, but do transport large quantities of hog products, on which they make low rates in order to compete with a section of country that is largely furnished by Cincinnati and Louisville

(Verified March 16, 1889.)

C. Beckwith, General Solicitor.

THE SEPARATE ANSWER of the Chicago, Burlington & Quincy R. R. in same case, No. 175, filed March 12, 1889.

Admits the substantial truth of the complaint as to rates now existing and the difference therein, between live hogs and packing house products; admits shrinkage of hogs in packing, also the decrease of packing in Chicago between 1880 and 1888; alleges that the disparity in situation of the Chicago packer, as compared with the interior packer, is not great, as the latter must previously pay to the respondent or other carriers freight on hogs to such interior packing points, and that the sum of the rate on such from the point of origin to the packing point, plus the rate on the product from the packing point to Chicago is not, in most cases, greatly less than the rate on live hogs from the original shipping point to Chicago direct.

Respondent further states that the interior packer benefits the carrier by shipping over the line of respondent or other carriers, more or less supplies, such as coal, salt, cooperage, etc., for the purpose of curing and packing meats, etc.

(Verified March 21, 1889.)

Wirt Dexter, Solicitor.

THE SEPARATE ANSWER of the Chicago, Milwaukee & St. Paul R'y Co. in same case, filed April 8, 1889, substantially agrees with the answer of the Chicago & Alton R. Company.

(Verified April 4, 1889.)

John T. Fish, General Solicitor.

THE SEPARATE ANSWER of the Chicago, Rock Island & Pacific R. Company, in

same case, No. 175, filed March 21, 1889, substantially agrees with the answer of the Chicago & Alton R. Company; and further alleges that the real contention in this investigation is between the packers in Chicago and others engaged in the same business at several points west of the Mississippi River.

(Verified March 18, 1889.)

Thos. F. Witherow, Counsel for Deft.

THE SEPARATE ANSWER of the Chicago, St. Paul & Kansas City R'y Company, in same case, filed April 13, 1889.

This answer does not materially vary from the preceding.

(Verified April 8, 1889.)

Lusk & Bunn, General Solicitors.

THE SEPARATE ANSWER of the Chicago, Santa Fé & California R. Co., in same case, filed March 21, 1889, agrees with foregoing.

(Verified March 22, 1889.)

Norman Williams, Solicitor for Ill.

THE SEPARATE ANSWER of the Chicago & Northwestern R'y Company, in same case, filed April 8, 1889, substantially agrees with the answer of the Chicago & Alton R. Company, only less specific.

(Verified April 5, 1889.)

W. C. Goudy, General Counsel.

JOINT ANSWER of the Illinois Central Railroad Company, and of the Dubuque & Sioux City Railroad Company, in same case, filed April 1, 1889.

The latter company voluntarily joins in this answer which does not materially vary from the preceding, except as follows:

It alleges that for fifteen years past, it has been the custom and practice, to charge from Sioux City to Chicago a lower rate on packing house products than on live hogs, and that the rate on live hogs is too low to afford reasonable compensation for their transportation.

(Verified March 30, 1889.)

E. T. Jeffrey, G. M.

THE SEPARATE ANSWER of John McNulta, as receiver, of property formerly owned or controlled and operated by the Wabash, St. Louis & Pacific Ry. Co., in same case filed April 5, 1889, alleges that, from no point on the line of said property are both live hogs and packing house products shipped; that only from Keokuk can any interstate shipments of packing house products be made. In all material respects, the answer conforms to the preceding.

(Verified April 3, 1889.)

Isham, Lincoln & Beale, Gen. Counsel.

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JOINT ANSWER of the Armour Packing Co., Geo. Fowler & Son, Kingan & Co. (Limited), Jacob Dold Packing Co., Morrison Packing Co., Allcutt Packing Co., and Kansas City Packing Co., in same case filed April 9, 1889, alleges that these respondents are, and most of them have been for many years, engaged at Kansas City, Mo., in the business of slaughtering hogs and curing their products, where they have, at great expense, established large plants, and during the year 1888, slaughtered at their said plants, between one million five hundred thousand and two million hogs.

In addition to what is comprehended in the foregoing answers, these defendants further allege that the causes for the removal of the great packing center of the country, first from Cincinnati to Chicago, and then from Chicago to the Missouri River, in the States of Iowa, Missouri, Kansas and Nebraska (the greatest hog producing regions of the country), the central point in which it is alleged is Kansas City, is the result of natural development and progress of the West in the prosecution of enterprises which were formerly confined to localities further east; that it would be repugnant to public policy, and to the theory of the Interstate Commerce Act, that, at the demand of any local interest, rates of transportation should be established for the purpose of overcoming natural advantages enjoyed by one locality over another, or for the purpose of taking from one locality a part of its business which has been built up, relying on such natural advantages of location and giving it to another, less favorably located.

(Verified April 6, 1889.)

Gage, Ladd & Small, Attys.

INTERVENING ANSWER of the Des Moines Packing Co., William Ellsworth, Haakinson & Co., James E. Booge & Sons, Silberhorn & Co., Mackeown & Sons, L. B. Doud & Co., Brittain & Co., John Morrell & Co. (Limited), T. M. Sinclair & Co., Wm. Ryan & Sons, and Coey & Co., in same case filed March 21, 1889.

These respondents allege that they are vitally interested in the investigation proposed by the complaint, and in the judgment that shall be rendered herein; that they are, and have been for many years past, engaged in hog packing at Des Moines and Sioux City, in the State of Iowa, and have large sums of money invested in property, machinery and appliances suitable for said business, and that the aggregate daily capacity of the packing houses owned by them is more than eighteen thousand hogs; that all of said property, machinery and appliances, would be rendered substantially worthless, and said business in great part, if not wholly, destroyed if the relative rates upon live hogs and packing house products, prayed for by the complaint, should be established.

So far as the results to the railroads are concerned, this answer is substantially like the others, except that many arguments and illustrations are added.

It denies that the transfer of the business of pork packing from Chicago to cities in Iowa, Nebraska, Kansas, and Missouri, has been occasioned by any unjust discrimination in rail-

road rates, or by protection afforded the western packers; and alleges that such transfer is the result of natural and inevitable laws of trade which, in prior years, gave to Chicago, the business of Cincinnati—the manufactory moving to the “raw material.”

This answer further alleges affirmatively, that, considering the traffic in the two commodities, viz.: live hogs and packing house products, solely in view of the cost of service, not only is the product entitled to the lower rate, but a greater difference than now exists could be easily justified; and in that behalf, they allege:

First. That the risk of transportation is much greater in live hogs than upon packing house products.

Second. That in the transportation of the product there is no necessity for fast trains or for special attention to the freight, thereby diminishing the cost of the service.

Third. That in the transportation of the product, it is not necessary to reach Chicago for a particular market as is the case with trains of live hogs, and therefore the carrier is relieved of the continuous demands for damage arising from delay.

Fourth. That the maximum weight of a car load of product is 40,000 pounds whereas the maximum weight of a car load of live hogs is 20,000 pounds. Thus, by carrying the product instead of the live hogs, there are required fewer trains, fewer employes, fewer cars, the transportation companies are subjected to fewer accidents of all kinds and a consequent less liability to passengers, shippers and employes.

Fifth. That in the transportation of live hogs it is a general rule that a shipper, is entitled to a free passage for one person, from the point of shipment to Chicago, upon the freight train, and return upon a passenger train, for each car of hogs. From this burden the railroad companies are wholly relieved in the shipment of product.

Sixth. That the aggregate tonnage to the railroads is greater when the product is shipped to Chicago, than it is when the hogs are shipped; and the greater tonnage is carried with no larger expense than the less would be.

Seventh. That upon live hogs carried to Chicago there is a loss of freight to the carrier upon not less than 1,200 pounds for each car, which is caused (1) by a shrinkage *en route* of 700 pounds per car; (2) by an arbitrary deduction of 500 pounds per car at the Chicago stock yards.

Eighth. That when hogs are carried to Chicago a further loss in freight arises as follows: The hogs are weighed at Chicago and freight is paid upon actual weight less the deduction and subject to the shrinkage above mentioned; whereas, the freight upon hogs delivered at Iowa packing points is paid upon the basis of 18,000 pounds as a minimum car load and upon actual weight, if in excess of the minimum; and as heretofore shown the average weight of a car load is greatly less than 18,000 pounds.

Ninth. That when hogs are carried to Chicago the cars are weighed twice at the expense of the carriers, to which expense they are not

subject in delivering hogs to Iowa packing points and in taking the product out.

Tenth. That the owners and shippers of hogs are entitled to such an adjustment of rates as will require the shortest practicable haul upon the live animal, because the shrinkage of 700 pounds per car already referred to must be borne either by them in loss of weight, or by the consumer of the product, in the price of the commodity.

The interveners further charge the fact to be, that the practice of making higher rates upon live hogs than upon the product has been continued for twenty years or more and under it the interveners have expended large sums of money in the construction and acquisition of property, fit and suitable, for the business in which they are engaged; that all kinds of trade and commerce in the territory covered by the complaint have been organized and developed upon the basis of a continuance of said rates; and to now change them, as prayed by petitioner, would not only destroy the capital immediately invested in packing property, but would disorganize and seriously affect many other industries incidental to and connected with the packing business.

Wherefore, these interveners pray that they may be permitted to introduce evidence and be heard in argument upon the allegations of the complaint and of this answer; and that upon investigation and hearing, said complaint may be dismissed.

(Verified March 19, 1889.)

Cummins & Wright, Attys.

At a meeting of the *Interstate Commerce Commission*, held at its office in the City of Washington on the 18th day of April, in the year 1889:

Present: ALL THE COMMISSIONERS.

In the Matter of the Complaint of George
RICE, *Petitioner*.,

v.

THE CINCINNATI, WASHINGTON &
BALTIMORE R. CO. *et al.*

(Two Cases, Nos. 184 and 185.)

It appearing to the Commission in the above cases that in addition to the question of the reasonableness of rates, the following other questions are also raised, namely:

1. The question of the like classification of barrel and tank oils, and of the right of the railroad companies to charge for the weight of the barrel package in addition to the weight of the contents.

2. The question of discrimination arising from the returning of empty tank cars free of charge and also of the paying a mileage rate on such empty tank cars.

3. The question of whether railroad companies are not obliged to furnish tank cars as well as cars of other descriptions for oil transportation.

And it further appearing to the Commission that the questions here presented are such as

will affect, or may affect, nearly all the railroads of the country over which oil is shipped, in order to avoid multiplicity of complaints and to secure, as far as possible, a settlement of these questions that may be general and just, and in order to give all of the principal railroad companies of the country an opportunity to be heard, if they desire to do so, upon these questions in these proceedings, it was ordered by the Commission that the pendency of said proceedings be made known to said carriers by notice from the Commission; and such notice is accordingly given to the following railway carriers:

Atlanta & West Point Railroad Company [here follow the names of 149 other companies], and each of the said above named railway carriers is hereby informed that upon prompt application by such of them as desire to intervene or to be heard in these proceedings, a copy of the complaint in these cases will be furnished to them by the Interstate Commerce Commission; and they can, if they desire, present arguments and be heard upon the questions involved. Any other railroad company in any State or Territory of the United States not named in the above list may avail itself, if it so desires, of the opportunity afforded by this notice in the same manner in all respects as if named therein.

Done at the City of Washington on this the eighteenth day of April in the year 1889, and of the Independence of the United States the 113th year.

Edw. A. Moseley,
Secretary.

A true copy.

At a meeting of the *Interstate Commerce Commission*, held at its office in the City of Washington on the 27th day of April, in the year 1889:

Present: ALL THE COMMISSIONERS.

In the Matter of the Complaint of George RICE, *Petitioner*,

v.

THE LOUISVILLE & NASHVILLE R. CO., *Defendant*

(No. 194.)

On motion of the petitioner, and it appearing to the Commission in the above cause that in addition to the question of the reasonableness of rates, the following other questions are also raised, namely:

1. The question of the proper classification of cotton-seed oil and turpentine as compared with petroleum and its products.

2. The question of discrimination in favor of petroleum and its products when carried in tank cars, resulting in giving a low rate on cotton-seed oil or turpentine, or either, when carried as back-loading in such tank cars.

3. The question of the duty of railroad companies to furnish shippers with tank cars in cases where the traffic of their lines can profitably or properly be carried in such tank cars and is large enough to justify the expenditure.

2 INTER S.

It further appearing to the Commission that the questions here presented are such as may affect the business, directly or indirectly, of nearly all the railroads of the country over which these articles are shipped, and that said carriers, generally, are interested in these questions, and in order to avoid a multiplicity of complaints and to secure as far as possible a settlement of all these questions that may be general and just, and in order to give all of the railway companies of the country an opportunity to be heard, if they desire to do so, upon these questions in this proceeding, it was ordered by the Commission that the pendency of said proceeding be made known to said carriers by notice from the Commission, and such notice is accordingly given to the following carriers:

Atlanta & West Point Railroad Company [here follow the names of 150 other companies], and each of the said above named railway carriers is hereby informed that upon prompt application by such of them as desire to intervene or to be heard in this proceeding, a copy of the complaint in this case will be furnished to them by the Interstate Commerce Commission, and they can, if they desire, present arguments and be heard upon the questions involved. Any other railroad company in any State or Territory of the United States not named in the above list may avail itself, if it so desires, of the opportunity afforded by this notice in the same manner in all respects as if named therein.

Done at the City of Washington on this the twenty-seventh day of April, in the year 1889, and of the Independence of the United States the 113th year.

Edw. A. Moseley,
Secretary.

A true copy.

William H. HEARD, *Petitioner*,

v.

GEORGIA R. CO.

(No. 166.)

1. **It is a lawful duty that a carrier**, like the defendant, owes to the traveling public in carrying out its rule of **furnishing separate cars** to white and colored passengers on its line engaged in interstate travel, **to make them equal in comforts**, accommodation, and equipment without any discrimination.
2. **It is a lawful duty which a carrier**, like the defendant, **owes** to the traveling public engaged in interstate travel over its line, **to afford the equal protection** of the law alike to all such passengers without regard to race, color, or sex, against undue prejudice and disadvantage from disorderly conduct on the part of other passengers or persons.
3. On the facts in this proceeding, *held*, that the defendant violated the Law in each of the foregoing respects as against petitioner.

(Argued and submitted April 10, 1889.—Decided May 8, 1889.)

COMPLAINT of a colored passenger, that he was excluded from a first class car although he held a first class ticket. See complaint, ante, 392—also report and opinion of the Commission in a similar complaint and proceedings between the same parties, 1 Inters. Com. Rep. 719.

The facts are fully stated in the opinion. *Messrs. John W. Cromwell* and *William C. Martin* for petitioner.
Mr. Joseph B. Cumming for defendant.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The conceded facts in this case are that on the 25th day of January, 1889, at Philadelphia, in the State of Pennsylvania, the petitioner purchased a first class ticket from Philadelphia to Atlanta, Georgia, by way of Augusta, in the State of Georgia, for which he paid \$21.50. On this ticket he made his journey as far as Augusta, Georgia.

At Augusta he was required by those in charge of the train, and against his protest, to go into a compartment, or half car, of the defendant, in a train composed in the order named, of an engine, tender, mail car, baggage and express car, compartment above named, and a passenger car which was not a compartment car. The car in the rear was for white passengers and was numbered 13. The car next in front of it was numbered 30 and was a compartment car with a partition in the middle of the car extending solidly from the floor to the ceiling, dividing the car into two equal compartments, with thirteen seats in each compartment. There was a door in this partition through which persons could pass at will, from one compartment into the other. The rear compartment of the car, on this occasion, was used as a smoking car and was occupied by passengers who were men and who were both white and colored. The front compartment was occupied by colored passengers, men and women, and in this compartment there was a notice on a card posted, in these words: "This car is for colored folks."

The complaint avers that this car, No. 30, into which petitioner was required to go by the train officers of defendant, against his protest, was dirty, poorly appointed, was one half of a smoking car, was constantly filled with tobacco smoke, and was second class in every particular to the coach in which white passengers traveled, No. 13. The answer, in substance, asserts that this compartment into which petitioner was required to go was a car in point of accommodations equal to car No. 13. The issue, therefore, in this proceeding, is whether this compartment car, in which petitioner was required to travel as a passenger, was of the kind he has described in his complaint, in consequence of which he was subjected to undue prejudice or disadvantage, or whether, on the other hand, it was a car, such as he was entitled to travel in upon the ticket he held. There is no claim made by the complaint for damages or reparation of a pecuniary character.

The evidence in this proceeding shows that this train was to run over the main line of the 2 INTER S.

Georgia Railroad from the City of Augusta to Atlanta, a distance of 171 miles, and was one of its chief daily trains on this route, and was the mail train, for it was both a mail and express train. It was a day train and occupied between six and seven hours in the run from Augusta to Atlanta. The two passenger cars, No. 13, and No. 30, respectively, are scoured and cleaned by the same servants of the company at each terminus, after the train has made each journey.

The car No. 13 is a comparatively new car; it was turned out from the workshop in September, 1888, and was placed in service on the 8th day of October following. It has what is called a Baker heater for heating the car, a new and improved invention that has come into use within the last few years, and superior in point of comfort to the ordinary car stove. At opposite ends of this car there are two closets, one designated "For Ladies," the other designated "For Gentlemen." The aisle of this car is covered by a carpet, and the plush with which the seats are upholstered is old gold in color.

The car No. 30 is not an old car except relatively to car No. 13, and a few others that are fresh from the workshops. Its age is not shown by the evidence, but we take this description of it as given by the general manager in his testimony: it was thoroughly renovated in June, 1888, and was placed in service the following month; the aisle of this car is covered with cocoa matting; and the plush with which the seats are covered is crimson in color. This car is heated by an ordinary car stove. There is one closet in each of the compartments of this car; the closet in the compartment set apart for colored people may be used by persons of both sexes; or the closet in the smoking compartment may be used by men from both compartments, leaving the closet in the compartment set apart for colored people to be used by colored women alone. The stove is placed in the corner of the compartment for colored passengers. In making the run from Augusta to Atlanta, the compartment occupied by colored passengers is the compartment used as a smoking room on the previous trip of the train from Atlanta to Augusta; by this, the colored passengers are reversed from one compartment to the other on each trip of the train; the smoking compartment on one trip being the compartment for colored passengers on the next trip.

Although no averment is made in the complaint, that petitioner was put to any discomfort or suffered undue prejudice for want of protection against disorderly conduct in the compartment to which he was assigned, yet, as bearing upon the question whether such compartment was, as averred in his complaint, "dirty, poorly appointed . . . and second class in every particular to the coach in which white passengers rode, No. 13," and whether he suffered any undue prejudice or disadvantage therefrom, and also because it seemed to be in itself a substantive violation of the Statute, the Commission heard evidence, against the objection of the defendant, as to the conduct of the conductor of the train, and passengers from the smoking compartment, as exhibited in the compartment in which petitioner and other pas-

sengers, who were persons of his race, were placed by the officers of the train. From this evidence it appears that two white men, who were passengers in the smoking compartment, came several times into the compartment where petitioner was a passenger, and drank whisky repeatedly out of a tin cup at the water tank, which cup had been placed there by the railroad company for passengers to use in drinking water out of the tank; and that on at least one of these occasions the conductor of the train drank whisky with them. The petitioner protested to the conductor against this, but these two men came into the compartment where petitioner and the other passengers were, and took a drink of whisky about every half hour while the train was running from Augusta to Union Point, a distance of 76 miles. This conduct of the conductor was in violation of the rules of the company and was so known to be by the petitioner. There were several colored women, passengers in the compartment with petitioner, who, according to the evidence, were decent women.

During the journey from Augusta to Atlanta the door between the two compartments was frequently open, arising from persons passing from one compartment into the other, at will, in consequence of which there was much of the time about as much tobacco smoke in one compartment as in the other. The petitioner complained of this to the conductor, but it availed him nothing. The petitioner also complained to the conductor as to the unclean condition of the closet in the compartment in which petitioner was a passenger; and this complaint offended the conductor, and a quarrel took place between them, which is detailed in the evidence.

To negative the idea of unjust discrimination against petitioner, or of undue prejudice or disadvantage, evidence was introduced by the defendant that on this same line of its road on each of its parlor cars a smoking room existed with only a door between it and the body of the car, which, in this respect was similar to the door between the smoking room, and the compartment in which petitioner and the colored people were required to ride in the train on its main line; but the evidence shows that colored persons do not travel in these parlor cars. There was also evidence that the defendant always requires the compartment, in which the colored people travel, and in which petitioner traveled in this instance on its main line, to be placed in front, and next to the mail car so as to prevent tobacco smoke from getting into this compartment from the smoking room. There was also evidence that on some of its branch roads the defendant used compartment cars entirely for passengers, the white people occupying one compartment of a car and the colored people the other, while a portion of the baggage car was used as a smoking car.

The evidence shows that there is largely more travel of white passengers over defendant's line than there is of colored persons. Still, the travel of colored passengers over its line is very considerable. The defendant resorts to the method of a compartment of a car for colored passengers on the grounds of economy, because it usually furnishes sufficient space

for them; but whenever they travel in sufficient numbers defendant furnishes them an entire car. The defendant also relies upon the decision of the Honorable Railroad Commission of the State of Georgia, made in the case of *Gaines v. Defendant* within the last year, as to the character and condition of cars it furnishes for colored passengers. The defendant sells none but first class tickets on this passenger train over its main line.

Evidence was offered as to the accommodations on branch lines in defendant's system, assailing its methods in respect to these; but as these were short state roads, and the evidence did not show that they were engaged in interstate commerce, and they were not mentioned in the complaint, we could not consider such evidence as having any bearing upon this complaint, which relates to what these accommodations were at a particular time and upon a train named in the complaint upon a different line.

The foregoing embodies in substance the material evidence in this proceeding.

The Commission has carefully considered all the evidence adduced in this proceeding, as well as the arguments of counsel, and in compliance with the Statute now states its findings of fact, which are:

First. That in the month of January, in the year 1889, at the City of Augusta, in the State of Georgia, the petitioner, William H. Heard, was then and there subjected to undue prejudice and disadvantage by the defendant, the Georgia Railroad Company, being then and there a common carrier of passengers for hire, and as such engaged in interstate traffic, in violation of the Act to Regulate Commerce, approved February 4, 1887, in this, that said William H. Heard being then and there the holder of a first class ticket, for which he had paid value received, and which entitled him to travel as a passenger engaged in interstate travel on defendant's train in a car having first class accommodations and comforts over defendant's line from the said City of Augusta to the said City of Atlanta, in the State of Georgia, was then and there required by the defendant, against his protest, to travel, as such passenger in a car inferior in comforts and accommodations to what he was entitled to have had under and by virtue of his ticket purchased and held by him as aforesaid.

Second. That in the month of January, in the year 1889, on its main line between the Cities of Augusta and Atlanta, in the State of Georgia, the said defendant being then and there a common carrier of persons for hire and engaged in interstate traffic, as aforesaid, did then and there, in disregard of its duty as a common carrier engaged in interstate commerce, unlawfully suffer the said William H. Heard, a passenger in one of its cars, together with other persons of his race, namely, colored persons, men and women, to be subjected to undue prejudice and disadvantage in this: that the defendant did then and there permit other passengers from a smoking compartment on its said train to intrude themselves into the adjoining compartment in which said William H. Heard was a passenger, and the other persons of his race were passengers, and to be guilty of disorderly conduct in then and there repeatedly

drinking whisky out of a certain tin cup placed at the tank in said last named compartment by defendant for said William H. Heard, and said other persons of his race, to use as passengers in drinking water out of said tank, all of which was against the protest of said William H. Heard and in violation of the Act to Regulate Commerce approved February 4, 1887.

Third. That it is a lawful duty which the defendant owes to the traveling public in carrying out its rule of furnishing separate cars to white and colored passengers on its line, engaged in interstate travel, to make them equal in comforts, accommodation, and equipment, without any discrimination where the same price is charged.

Fourth. That it is a lawful duty which the defendant owes to the traveling public over its line engaged in interstate travel, that its train officers should protect all such passengers without regard to race, color or sex, against undue prejudice and disadvantage from disorderly conduct on the part of other passengers or persons.

The views held by the Commission in this proceeding, upon which its findings of facts are made as above set forth, may now be properly stated. The Commission is aware that there are occasionally embarrassments and difficulties arising to carriers in the transportation of persons of different race and social peculiarities and characteristics. These have been brought before us and have been duly considered in this and in two other cases. These embarrassments and difficulties, considerable as they may sometimes be found, are not more so than others that have been occasionally developed in the solution of transportation problems, and should be met by carriers in a spirit of fair, reasonable and proper adjustment. The law, federal and state, will not tolerate the doctrine any more in the transportation of persons than of property, that one class is to be favored by the carrier over another. This is as true of the statutes of the State of Georgia as it is of the Act to Regulate Commerce, for in section 4586 of the Code of Georgia we find the following provision: "All common carriers of passengers for hire in this State shall furnish like and equal accommodations to all persons without distinction of race, color, or previous condition." The duty of the carrier, therefore, in this respect, is nowhere open to controversy.

When a complaint of the petitioner against the defendant, in many respects similar to this, was before the Interstate Commerce Commission, 1 Inters. Com. Rep. 719, 1 I. C. C. Rep. p. 428, we found upon the facts before us that the defendant had unjustly discriminated against him; and in that case, on the 15th day of February, 1888, the Commission made the following order:

"Now it is ordered and adjudged that the defendant, the Georgia Railroad Company, do cease and desist from subjecting colored passengers to undue and unreasonable prejudice and disadvantage in violation of the third section of the Act to Regulate Commerce, and that so long as its rule separating passengers is maintained, its duty is to furnish for all passengers paying the same fare, cars in all respects equal and provided with the same com-

forts, accommodations and protection for travelers.

"And it is further ordered that a notice embodying this order be forthwith sent to the defendant corporation, together with a copy of the report and opinion of the Commission, in conformity with the provisions of the 15th section of the Act to Regulate Commerce."

The language of that order appeared to us to be plain and explicit. It appears from the testimony of its general manager, in this case, that the defendant "earnestly intends and endeavors to comply with the Law and to furnish equal and like accommodations to white and colored passengers." That in this it has failed in this instance, as appears from the evidence in this proceeding, is no reason why it may not and should not the more promptly now comply with the Law.

Where a compartment of a car is used on one trip as a smoking car by persons who chew tobacco and smoke and expectorate tobacco juice on the floor, and saturate the seats, wall and ceiling with the odors and fumes of tobacco, the cleaning and scouring of that car at the terminus, and then turning it over to passengers to travel in on the next trip of the car, it may be the next day, who hold first class tickets, cannot be said to furnish these passengers the accommodations and comforts to which they are entitled on such tickets and for which they have paid their money. There is no place to which the saying of John Wesley that "Cleanliness is indeed next to godliness," is, perhaps more justly applicable for substantial comfort, than a passenger car in which persons are obliged to travel.

If, however, this compartment car was reversed on every different trip, so that the same compartment was always used as a smoking room, still the adjoining compartment, separated only by a door, necessarily open much of the time and in this way filling the other compartment frequently with the fumes and odors of tobacco smoke, would prevent it from being a first class car in point of accommodations and comforts, into which a traveler should be forced, holding a first class ticket. There are many persons to whom the fumes of tobacco are peculiarly sickening. The difference between enduring these for a few minutes in a hotel lobby or on the street in the open air, and having to sit under the influence of them for hours, in a long journey on a car in a railroad train, is very marked. There are also many persons who in traveling on cars are unavoidably subject to nauseous sensations like seasickness. Such sensations would be very greatly aggravated by the odors and fumes of tobacco. In England, by a very recent statute, all railway carriers are required to furnish a separate smoking room or compartment on all their passenger trains for every class of passengers to whom they sell tickets; and in America it is the usual custom of railway carriers to have smoking rooms or compartments on their trains separated from the body of the cars in which the general public is traveling. Such an arrangement properly carried out and enforced by just regulations is necessary to the comfort of the traveling public. Whether the smoking compartment arrangements of the defendant in its parlor cars are

such as to cause discomfort to the passengers in the body of those cars, there is no evidence—and these we have not investigated because they are not involved in this complaint; and therefore we make no report and express no opinion in regard to them. The evidence shows that colored persons do not travel in these parlor cars. They are cars of exceptional accommodations and higher fares are charged for travel in them than in ordinary passenger cars.

Without regard to the question of their cleanliness, the closet arrangements in car 30 are not what they should be. There should be one closet in that car distinctly designated for the use of women only; and the other should be designated for the use of men alone. In this respect this car is shown to be a very inferior car compared to car 13. There is positive evidence that on the occasion to which this complaint relates the closet in the compartment in which petitioner was required to travel was in an unclean condition; and opposed to this is only the general statement of the general manager that the rule of the company at each terminus was to have the cars cleaned and scoured by the same servants and that this was done. Positive and specific testimony as to the condition of the car at the particular time mentioned and maintaining under oath what, it is alleged, was stated to the conductor by the witness concerning its condition at the time to which this complaint relates, must, of course, as evidence, outweigh any mere general statement of the general manager that the rules of the company required the cars to be cleaned and scoured at each terminus by the same servants, and that this was done, without stating that the manager knew it was done and how it was done in this particular instance. There is no evidence that the general manager saw the car that day or that he knew of his own knowledge its condition on this journey.

The evidence shows that as a rule there are largely more white passengers than colored passengers who travel on defendant's train, though the travel of colored people is very considerable. For this reason the defendant has a compartment car, being about half the car, usually for colored passengers, and when they are in sufficient numbers gives them an entire car. The defendant justified this method of doing its business on economic grounds and says that it is influenced solely by these considerations in making this arrangement. If, in doing this, the compartment of the car, or the car, as the case may be, is equal in safety of construction, comforts and accommodations, and the protection afforded to passengers to what is found in other cars in which white women and men travel on the same train, all holding first class tickets, for which the same price is paid, then the Law will not be violated. But the carrier must see to it that the comforts, accommodations, and protection afforded in each instance, are substantially equal, or the Law will be violated. One compartment or half of a passenger car should not be a smoking car while the other compartment or half of that car is used for passengers holding first class tickets. The heating arrangements, whatever they may be, should be so arranged as to be substantially as comfortable in one car

as in another where passengers pay the same fare.

The 15th section of the Act to Regulate Commerce makes it the duty of the Interstate Commerce Commission in every investigation in which "it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this Act, or of any other law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation or to make reparation for the injury so found to have been done, or both, within a reasonable time to be specified by the Commission." We have held that this required us to report and act upon a violation of the Statute discovered by evidence before us in an investigation, although it had not been the subject of complaint in the petition. (See *Smith's Case*, 1 Inters. Com. Rep. 611, 1 I. C. C. Rep. 209).

The mandate of the Statute requires us to take notice of a violation of it not mentioned in the complaint, but developed in the evidence before us, and to correct it. The matter that we here refer to, now, is that protection against undue prejudice or disadvantage which this Statute requires the carrier to extend to all passengers alike on its trains as against the conduct of disorderly persons, and the failure to do which subjects them to undue prejudice and disadvantage.

The equality of comforts and accommodations which the Law guarantees to passengers and requires the carrier to afford alike to all who pay the same fares, would amount to little if the carrier should neglect to perform the still more important duty, equally required by the Statute, of extending to every passenger, without regard to the amount of fare paid, the safeguard of its equal protection against all disorderly conduct from other passengers and from all persons whatsoever. Regulations of the company looking to this end are commendable, but they amount to nothing unless enforced. The conductor is captain in command of the train, and the chief representative of the railway company present; and to him every passenger has the right to look for this protection, and it is a duty required of him and of the railway company by the Law that he should afford it. In the State of Georgia, conductors have police powers and authority on their trains. (Code of Georgia, § 4586). But without regard to the special provision of that statute, the duties of this officer in protecting passengers from disorderly conduct, under his general powers as conductor, by the common law have been repeatedly considered and defined by the courts of this country.

A leading case on this subject is that of the *Pittsburgh, Fort Wayne & Chicago Railway Company v. Hinds*, 53 Pa. 512. There a number of unruly persons forced themselves into the car in which the plaintiff, who was a

woman, was a passenger; and in the course of a fight among them, one of them was thrown upon the plaintiff with such violence that her arm was seriously injured. The Supreme Court of Pennsylvania said, the negligence of the company or its officers in charge of the train was the gist of the action; and while it was not the duty of railroad companies to furnish their trains with a police force, they were bound to furnish men enough for the ordinary demands of transportation; and that if the conductor did not do all he could with the force he had upon the train, it was negligence. The court further said, in such cases the conductor should stop the train if necessary, and call to his assistance all its servants, and as many of the passengers as were willing to lend a helping hand; and that until he had done this and had put forth all the means at his disposal, he had no right to abandon the conflict. To keep his train moving and busy himself in collecting fares in one car whilst a fight was going on in another car, was, as the court said, to fall short of his duty. He should not have been content with ordering the thing to be done. He should himself have led the way. And the court adds: "He should have stopped the train and hewed a passage through the intrusive mass until he had expelled the rioters, or had demonstrated by an earnest experiment that the undertaking was impossible."

Another is the case of the *Pittsburgh & Connellsville Railroad Company v. Pillow*, 76 Pa. 513. The facts were, that, in a fight upon a car among some drunken men, the conductor did not exert himself to suppress it as he should have done, and the plaintiff, a passenger who was not concerned in it, lost an eye. A verdict against the company was sustained. And the Supreme Court of Pennsylvania say: "We cannot perceive the force of the argument of the counsel for the plaintiff in error, wherein he endeavors to raise a distinction between accidents arising from negligence in equipment or management of the train and those arising from the conduct of passengers upon it. If the employes of the train had no control over the passengers this argument would be sound. But they have such a power and they are just as responsible for its proper exercise as they are for the running of the train."

A case also of unusual interest in which these questions are fully considered and the authorities reviewed at length on common-law grounds, is that of the *New Orleans, St. Louis & Chicago Railroad Company v. Burk*, 53 Miss. 200. The facts in that case were that several drunken and disorderly men on a train at night, repeatedly insulted a fellow passenger, who did not resent their insults, and peaceably did all in his power to avoid them; and they then made a combined attack upon him, the conductor of the train being present when these acts occurred, and he protested against them, but made no determined effort to quell the disorder. When the fight began, and while it was raging the conductor fled to the platform, carrying his lantern with him, leaving the combatants in darkness, and the assaulted passenger to his fate. The passenger assailed, defended himself as best he could, and in doing so retreated to the platform where he found the conductor,

who carried him to another car on the train, and for safety secreted him. In the fight one of his assailants fired a pistol at him, and he knocked down two of them with a hatchet but escaped without serious personal injury. Some of them afterwards hunted for him through the train to renew the fight, but could not find him. He sued the company for damages, and there was a verdict in his favor against the company for six thousand dollars, which was sustained. The Supreme Court of Mississippi, reviewing the authorities, say: "If it be asked then what principle it is that imposes upon a railroad company the duty of preserving good order on its trains and makes it liable for all injuries sustained by reason of a failure to discharge this duty, we answer that it springs out of the obligation resting upon it to use every power with which it is invested to transport the passenger safely to his destination. . . . If two or three burly blackguards boarding the train of the defendant railroad at the Louisiana line, should ride through the State, insulting and beating every man, woman and child who entered the cars, can there be any doubt of the authority or duty of the officers in charge to use their utmost power to prevent the outrage? . . . We conclude then that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power when called upon so to do in a proper case by the other passengers; that a failure to discharge this duty stands to some extent upon the same footing as the omission to perform any other official duty, and upon the maxim *respondet superior* renders the corporation liable."

To the same effect see 6 Blatchf. 158; 34 Conn. page 534.

The sound rules of law laid down by these eminent courts, asserting as they do established principles of the common law as to the powers and duties of conductors and carriers, when taken in connection with the provisions of the Act to Regulate Commerce, which forbid unjust discrimination, or undue prejudice or disadvantage to any person or persons while being transported as passengers, are of vital importance to all railway carriers engaged in interstate commerce and the conductors of their passenger trains, and give such passengers rights to equal protection against disorderly conduct which cannot be overlooked. In these respects they are every day law on every passenger train in this country engaged in interstate commerce. They cannot be enforced with a steady hand in one car and disregarded in another car on the same train. They must be so enforced as to protect the weak, the humble, and the ignorant, equally with those of intelligence and commanding influence. None are beneath the requirements of their protection, and none who violate them can be permitted to be above their power.

A position of such power, authority, trust and responsibility as that of conductor of a passenger train, is no place to be filled by a man who is unequal to the task of firmly and fairly enforcing the regulations provided by the railway company and the law of the land for the equal comfort, accommodation and protection

of passengers on the train. When this powerful officer fails to protect some passengers on a train from acts of disorderly conduct on the part of intruders, which come under his observation, or which are brought to his notice, thereby permitting them to be subjected to undue prejudice and disadvantage, while at the same time he extends the protection of the law to the other passengers on the train against like disorderly conduct, it is a violation of the Statute on the part of the company. If he stands by, passive, and permits intruders to go into a car, not their own, and drink whisky repeatedly out of a tin cup at the water tank, provided by the company for the use of passengers in drinking water from that tank in that car, all this in the presence of men and women who are passengers in the car, and against the protest of a passenger in that car, and not only this, but himself indulges in drinking whisky with them, this is not alone "a mere breach of discipline of the known rules and regulations of the company by the conductor." If, as here, it subjects the passengers in that car to an undue prejudice and disadvantage against which other passengers on that train are protected, it is also a violation of the rights of passengers in that car, as secured to them by the law of the land. In performing the duty of protecting all passengers equally and alike from disorderly conduct on the part of other passengers and persons, as the conductor treats passengers, so the railway company treats them, because he is the appointed agent of the company to perform that duty, and is there, amongst his other official duties, for that purpose. The like equal protection should have been afforded by defendant to petitioner and the passengers in car 30, against disorderly conduct on the part of other passengers, as was extended to passengers in car 13.

The order of the Commission is, that notice forthwith issue to the defendant, the Georgia Railroad Company, to cease and desist without any further delay from subjecting petitioner and other persons of his race and color to undue prejudice and disadvantage, when engaged in interstate travel, by failing and refusing to furnish to them passenger cars of equal comfort and accommodation to those furnished to passengers of the white race engaged in interstate travel over its line, where the same fares are charged each; and further notifying the said defendant that it must cease and desist without any further delay from failing to furnish the equal protection required by law to petitioner and persons of his race and color, when engaged in interstate travel as passengers upon its passenger trains, the same as it furnishes to passengers who are of the white race, against disorderly conduct on the part of other passengers, and of all persons whatsoever; and it is further ordered by the Commission that with said notice a duly certified copy of this report and opinion of the Commission be forthwith furnished to the said defendant, the Georgia Railroad Company.

Putnam P. BISHOP

v.

H. R. DUVAL, Receiver of The Florida Railway & Navigation Company.

(No. 155.)

James A. HARRIS

v.

H. R. DUVAL, Receiver of The Florida Railway & Navigation Company *et al.* carriers.

(No. 156.)

When, pending a proceeding begun to test the reasonableness of rates, the rates are reduced and made satisfactory to the complainants, the Commission will not consider the question whether the rates before reduction were or were not excessive;—that question having by the reduction made become purely abstract and speculative.

The question whether rates paid ought to be refunded having been presented to a judicial tribunal, where it is now pending, the Commission will not take cognizance of it.

(Filed May —, 1889.)

SEE complaints *ante*, 302, and answers *ante*, 312.

MEMORANDUM.

By the Commission:

These two cases present the same legal questions and they were heard together.

Complaint was made that the rates charged on fruits transported from the Town of Citra, in Florida, to northern markets were excessive. While the cases were pending the rates were reduced by the respondent parties, and we do not understand that any complaint is now made of them. The question, therefore, whether they were excessive as they were at the time of the commencement of these proceedings has become purely abstract and speculative.

Complainants, however, desire to be heard upon that question, and to have a decision upon it, upon the ground that otherwise the respondents may at any time restore the old rates. In that respect, however, the condition of affairs is not different from what it would have been had these proceedings not have been commenced. A carrier always has the power to put up rates, but the fact that it has the power scarcely affords sufficient reason for the institution of proceedings to determine whether other rates than those now existing would be sustainable.

The Commission must assume that the rates in this case have been reduced in good faith, and that the carriers expect to abide by them as now established. There is nothing in the proceedings before us to indicate the contrary.

In the petitions, prayer was made that the respondents be ordered to refund sums previously paid in excess of what was claimed to be reasonable. It appears, however, that claim to a refunding has been made in the court which appointed the receiver, who is the sole defendant in the first entitled case, and the principal defendant in the other case. The court has therefore cognizance of that question, and the complainants by filing their claims in court have elected that tribunal to pass upon them. *Under the circumstances, therefore, the complaints will stand dismissed.*

KENTUCKY COURT OF APPEALS.

GREEN & BARREN RIVER NAV. CO.,

Appt.,

v.

CHESAPEAKE, OHIO & SOUTHWEST-
ERN R. CO

(---Ky.---)

1. **A State Legislature may authorize the building of a bridge** or other structure tending to obstruct the navigation of a navigable river which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation.
2. **The Green & Barren River Navigation Company**, by the Kentucky Act of March 9, 1868, leasing it to the "Green & Barren River line of navigation and their tributaries, together with the grounds, houses, waterworks, rents, profits, tools, machinery, implements and appurtenances, and all the franchises thereunto belonging or appertaining," acquired only the improvements belonging to the State in its corporate capacity, as distinguished from what was subject to public use under common right, and did not acquire any exclusive right of navigation; therefore it has no right of action against a railroad company for the obstruction of navigation by repairing a bridge, where this was done under a license which was valid against the public, and the improvements included in the lease were not injured or interfered with.
3. **The obstruction of navigation by the repairing of a bridge** over a river in replacing a draw span, which bridge is

maintained under lawful authority, creates no right of action in favor of parties entitled to navigate the river, if the repairs are made in such a manner as not unreasonably to obstruct the navigation, although it was possible to have opened the draw and constructed the new one upon the edge of the river, thus avoiding all obstructions to navigation, but which would have involved unreasonable delay and expense.

(December 11, 1888.)

A PPEAL by plaintiff, from a judgment of the Louisville Law and Equity Court (Harris, J.), in favor of the defendant in an action for damages for obstructing Green River. *Affirmed.*

The facts as found are stated in the opinion. *Messrs. Wright & McElroy and Alex. P. Humphrey* for appellant.

Messrs. John Mason Brown and George M. Davie for appellee.

Holt, J., delivered the opinion of the court:

The Legislature of Kentucky chartered the Memphis, Paducah & Northern Railroad Company on March 25, 1878. It also incorporated the Chesapeake, Ohio & Southwestern Railroad Company on January 19, 1882. The last named corporation was at the time of its creation the owner of so much of the first named road as had then been constructed from Memphis, Tenn., to Paducah, Ky.; and its charter conferred upon it certain powers and privileges that had been granted to the Memphis, Paducah & Northern Railroad Company.

The charter provision of the last named corporation, which was, by reference to it in the appellee's charter, made a part of it, and which is material to the proper consideration of the questions now presented, is as follows: "Sec. 19. The board may provide for the construction of telegraph lines, workshops, warehouses,

NOTE.—*Navigable waters; power of Congress to regulate commerce.* The power of Congress to regulate commerce comprehends the control, for that purpose and to the extent necessary, of all the navigable waters of the United States which are accessible from another State than that in which they lie. *Gilman v. Phila.* 70 U. S. 3 Wall. 713 (18 L. ed. 96). The paramount power of regulating bridges over the navigable waters of the United States—as the Ohio River—is in Congress and free from the interference of the States. *Newport & C. Bridge Co. v. U. S.* 105 U. S. 470 (26 L. ed. 1143). The power of Congress to build a bridge, or authorize a bridge to be built, across water dividing two States, is altogether independent of the consent and concurrence of the state governments. *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9. Congress can authorize a private corporation to occupy navigable waters and construct a bridge across the same, for purposes of interstate commerce, without consent of any State. *Decker v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 434, 30 Fed. Rep. 723; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9. The Ohio is a navigable stream and subject to the commercial power of Congress; and if the Act of a State authorized the creation of an obstruction, it would be no justification. *Pa. v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518 (14 L. ed. 249). The Act of Congress, approved June 16, 1886, authorizing the construction of a bridge across Staten Island Sound,

known as "Arthur Kill," is within the power of Congress to regulate commerce, and is valid. *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. Rep. 9. When Congress declares a bridge across a navigable river an unlawful structure, no state legislation can make it lawful. *Cardwell v. American River Bridge Co.* 113 U. S. 205 (28 L. ed. 959).

Congress may legalize a bridge constructed over navigable waters. Congress can legalize a bridge over a navigable river under the power to regulate commerce. *Gray v. Chicago, I. & N. R. Co.* ("The Clinton Bridge") 77 U. S. 10 Wall. 454 (19 L. ed. 969). It may declare that, upon a certain fact being established, a bridge over a navigable river shall be deemed a lawful structure, and employ the Secretary of War as an agent to ascertain that fact. It thereby abdicates none of its authority. *Miller v. Mayor of N. Y.* 109 U. S. 385 (27 L. ed. 971). An Act of Congress to legalize a bridge across a navigable river, passed pending a suit to remove the bridge as a nuisance, gives the rule of decision for the court at the final hearing. *Gray v. Chicago, I. & N. R. Co.* ("The Clinton Bridge") 77 U. S. 10 Wall. 454 (19 L. ed. 969). An Act of Congress declaring a bridge over the Ohio River a lawful structure supercedes a previous decree of the court declaring it an obstruction to navigation and directing its removal. *Pa. v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421 (15 L. ed. 435). Where Congress gave a license to erect and maintain a bridge across the

bridges (so as not unreasonably to obstruct the navigation of any navigable stream) and other buildings and erections, and for conducting them, and such other operations as may be necessary and convenient to the most efficient operation of the railroad of the company for the common carriage of freights and passengers."

Prior to 1883 the appellee's road had, in conformity to its charter, been extended from Paducah northward to Louisville; and as a part of this extension, and under its legislative grant, the company had erected across the Green River, at Rockport in this State, a bridge, with a revolving or draw span, so as to admit of the passage of boats and other craft navigating the river. In November, 1883, it became necessary to replace this draw span with a new and more improved one; and to this end the appellee caused notice to be published that it would close the channel of the river under the span from December 5 to about December 31, 1883. It also had notice of its intention to do so, served upon the appellant, the Green & Barren River Navigation Company, a lessee from the State under an Act approved March 9, 1868, of the locks, dams and other improvements erected by it upon Green and Barren Rivers, and the owner of a line of steamboats plying upon these waters between Bowling Green, in this State, and Evansville, Ind.

There is no complaint of want of proper notice. Accordingly the railroad company, over the protest of the navigation company, closed the draw span by the erection of false work under it, and it thus remained until January 22, 1884, a period of forty-seven days. No unnecessary time was consumed, however, in the erection of the work, and during fifteen of the forty-seven days navigation was prevented

upon the appellant's line by ice in the Ohio River.

The lower court in its finding of facts found that the obstruction of navigation might have been altogether avoided by throwing open the draw span, and erecting the false work along the river bank, upon the edge of which the draw pier stood. Doubtless this would have been possible; but it would not only not have served the railroad, but have been an unusual mode of erecting such structures, requiring more time for its completion, and involving 50 per cent, or at least a much greater, cost. While the navigation was thus obstructed the navigation company continued the operation of its line, save when prevented by ice, by running one of its boats upon the upper and the other upon the lower end of it, and by transferring its passengers and freight from one boat to the other over the deck of a barge anchored under the bridge. It brought this action to recover damages consequent upon the obstruction. The lower court found that it caused one of the appellant's boats to remain idle and partially manned at Rockport during the closing of the span, at an expense of \$1,585.25.

We fail to understand why this was either a necessary or a reasonable result. The bridge was not far from the middle point upon its line of navigation. It seems to us that one boat could have been constantly plying between the bridge and one end of the line, and the other between the bridge and the other end, the two meeting at the bridge, thus avoiding the detention of one boat at the bridge while the other went from it to the other end of the line and returned. As it was a finding of fact, however, we will regard it as well founded. The judge below also found that a reasonable rent of the

Ohio, the bridge company, by accepting its provisions, became subject to the reservation of power in Congress to withdraw the license and to direct necessary alteration of the bridge. *Newport & C. Bridge Co. v. U. S.* 105 U. S. 470 (26 L. ed. 1143).

Erection of bridge not necessarily a nuisance. Every bridge over a river is not necessarily a nuisance. (Circuit court decision affirmed on equal division.) *Milnor v. N. J. R. R. & Transp. Co.* 70 U. S. 3 Wall. 721 (46 L. ed. 799). The obstruction to navigation must be plainly a nuisance, before it can be removed by decree. *Mississippi & M. R. Co. v. Ward.* 67 U. S. 2 Black, 485 (17 L. ed. 311). Temporary inconvenience to private parties, in common with the public in general, occasioned by the exercise of a right conferred by law for the benefit of the public, gives them no right to damages. *It is damnum absque injuria.* *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280 (30 L. ed. 393). If the erection was for a public purpose, and produced a public benefit, and was in a reasonable situation, and a reasonable space was left for the passage of vessels, then it was not an unreasonable obstruction. *Mississippi & M. R. Co. v. Ward.* 67 U. S. 2 Black, 485 (17 L. ed. 311). The distance of 160 feet between the piers of the bridge across the Missouri River at Kansas City, required by the Act of Congress of July 25, 1886, is obtained by measuring along a line between the piers, drawn perpendicularly to their faces and the current of the river. *Hannibal & St. J. R. Co. v. Mo. River Packet Co.* 125 U. S. 260 (31 L. ed. 731); *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. Rep. 755.

Removal of cause to federal court. A suit by the State against a railroad company, to procure the removal of a railroad bridge across a navigable river, in which the defendant invokes the protection of Congress, is a case arising under the Laws of the United States, and is removable into the federal court. The state court was entirely without jurisdiction to proceed after the presentation of the petition and bond for removal. *New Orleans, M. & T. R. Co. v. Miss.* 102 U. S. 135 (26 L. ed. 96).

Jurisdiction of United States Courts. The compact between Virginia and Kentucky, providing that the navigation of the Ohio should be free, was sanctioned by Congress, and is obligatory, and can be enforced by the supreme court. *Pa. v. Wheeling & B. Bridge Co.* 54 U. S. 13 How. 518 (14 L. ed. 249). In the exercise of its original jurisdiction, the supreme court may, on complaint by a State of the erection of a bridge, refer the case to a master to take proof. *Pa. v. Wheeling & B. Bridge Co.* 50 U. S. 9 How. 647 (13 L. ed. 294). In a suit brought in a federal court, where jurisdiction depends on citizenship of the parties, for the abatement of a bridge across a navigable river which is the boundary of the judicial district, relief cannot be granted unless the part of the bridge which is on that side of the middle of the river is in itself a serious obstruction to navigation. The court has no greater authority than a court of the State in which it is sitting. *Miss. & M. R. Co. v. Ward.* 67 U. S. 2 Black, 485 (17 L. ed. 311). As to whether or not the circuit court has the power to restrain the erection of a bridge across the Hudson River, this court is equally divided in opinion. *Silliman v. Hudson River Bridge Co.* 66 U. S. 1 Black, 582 (17 L. ed. 81).

Bridges constructed under state authority. The States within which navigable streams lie may authorize the construction of bridges over them until Congress intervenes and supersedes their authority. Congress may so intervene, so far as is necessary to secure free navigation. *Cardwell v. Am. River Bridge Co.* 113 U. S. 205 (28 L. ed. 959); *Gilman v. Phila.* 70 U. S. 3 Wall. 713 (18 L. ed. 96); *Escanaba & L. M. Transp. Co. v. Chicago.* 107 U. S. 678 (27 L. ed. 442); *Willson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 (7 L. ed. 412). The power to authorize the building of bridges over navigable streams within the State is not to be found in the Federal Constitution. It has not been taken from the States. *Gilman v. Phila.* 70 U. S. 3 Wall. 713 (18 L. ed. 96). Except as against the action of Congress, the power of a State is plenary over the form and character of a bridge, irrespective of its effect up-

barge, etc., was \$1,551, thus fixing the entire damage at something over \$3,000; but he dismissed the claim, upon the ground that the legislative grant to the railroad company to make the improvement was valid, and that it in doing so had kept within its terms.

The Green and Barren Rivers are navigable streams, and entirely within the boundary of this State. They are public highways by nature or of common right. They exist by common law, and the public can only be deprived of their free use by legislation. Although they are national as well as state highways, and besides serving the purposes of internal commerce also facilitate commerce between the States, yet it is well settled that in the absence of legislation under that clause of the Constitution of the United States giving to Congress the power to regulate commerce between the States, a State has plenary power over a navigable stream altogether within its borders. In such a case, until Congress intervenes, the Legislature of the State is sovereign. It may, as to such a stream, and in the absence of national legislation, enact a law which incidentally may have a material influence upon commerce between the States. Such a river is not outside of state jurisdiction so long as Congress does not interfere. The mere grant of the power to the National Legislature to regulate commerce between the States is not *per se* an inhibition upon state legislation as to a navigable river entirely within its boundary. It is quite proper that it should in such a case regulate its internal commerce as a part of its internal police.

The Supreme Court of the United States, speaking upon this subject in the case of *Hamilton v. Vicksburg Railroad Company*, 119 U. S. 280 [30 L. ed. 393], said: "As has often been

said by this court, bridges are merely connecting links of turnpikes, streets and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases the local authority can best determine which of the two modes of transportation shall be favored, and how far either should be made subservient to the other."

We regard it as now settled beyond question that a State Legislature may at least authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river, which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation. *Willson v. Black Bird Creek Marsh Co.* 27 U. S. 2 Pet. 245 [7 L. ed. 412]; *Cardwell v. American River Bridge Co.* 113 U. S. 205 [28 L. ed. 959]; *Northern Transp. Co. v. Chicago*, 99 U. S. 635 [25 L. ed. 336]; *Hamilton v. Vicksburg R. Co. supra*. In fact, many of the cases hold that the obstruction may go to the extent of entirely destroying the navigation of the stream.

The appellant contends, however, that it stands in a different attitude from the general public as to the right of the State to obstruct Green River, or to authorize it to be done by the building or repairing of a bridge. It insists that the Legislature had no right, after making, and during the continuance of, the thirty years' lease to it, to pass any law repealing or abridg-

ing navigation. *Hamilton v. Vicksburg, S. & P. R. Co.* 119 U. S. 280 [30 L. ed. 393]. An Act of Congress, admitting a State, which provides that a river shall be a common highway and forever free, does not affect the power of the State in respect to bridges over it. *Hamilton v. Vicksburg, S. & P. R. Co. supra*. The erection of a bridge over the Willamette River at Portland is not a violation of the Admission Act of Oregon. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1 [31 L. ed. 629]. A bridge constructed over a navigable river, in accordance with the legislation of both the State and Federal Governments, must be deemed a lawful structure, however much it may interfere with the public right of navigation. *Miller v. Mayor of N. Y.* 109 U. S. 385 [27 L. ed. 971]. Under the Rhode Island Act authorizing the construction of a bridge over a river, in such place and manner as commissioners might determine, they could erect a bridge high above the river, and extending beyond the bank to an avenue, there establishing an abutment. *Sullivan v. Webster*, 5 New Eng. Rep. 331, R. I. Index BB. 33. The Statutes of New York authorize boards of supervisors, upon the application of one town legally, to require a stream forming the boundary between two towns to be bridged at the joint expense of said towns, and compelling each town to raise money to pay its share of the expense by an issue of bonds. *Kirkwood v. Newburg*, 45 Hun, 323, 12 N. Y. S. R. 420. Where a bridge was originally constructed, and has for a number of years been maintained, by two adjoining towns, upon a highway running along the line between the towns, it is the duty of both towns to keep it in repair; and both are liable for injuries sustained by reason of its being out of repair. *Getty v. Hamlin*, 46 Hun, 1, 11 N. Y. S. R. 96.

Railroad bridges over navigable streams. Where a railroad company has been granted the right to build a bridge over a navigable stream, the proper and necessary repair of such bridge without negligence cannot subject the company to liability for damages caused thereby; and injuries suffered by the driving of piling in the making of such repairs,

by a person rafting the logs on the stream, is *damnum absque injuria*. *Central Trust Co. v. Wabash etc. R. Co.* 32 Fed. Rep. 566. A railroad company chartered in another State may be obliged, by the condition of a state statute which recognizes it as a corporation of that State, to construct and maintain a drawbridge in the channel of a river which is crossed by the company's road, on the line between two States. *New Orleans etc. R. Co. v. Miss.* 112 U. S. 12 [28 L. ed. 619]. If by the Act of the Government subsequent to the building of the bridge, or by any other means not within the control of the company erecting the bridge, the currents were so radically changed as to materially obstruct the navigation and make the passage of the draw dangerous, it would have been incumbent on the bridge company to change the piers in conformity to the new condition of things; but otherwise if the change in the current to the draw by the excavation was slight, yet failure to exercise proper skill will constitute such negligence, though ever so much care is used in its erection. The failure to build the bridge in the manner prescribed by law is negligence *per se*. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. Rep. 755. Where, before a bridge over a navigable stream, authorized under a general Act, was built, a canal was ordered by the Government to be constructed, it became the duty of the bridge company to plan and build the bridge with reference to the canal through which the principal traffic of the river would pass; but the company was only required to use reasonable diligence and skill in forming and executing its plans, and was not required to foresee and absolutely anticipate the effect upon the current of the river of a factor not yet in existence; and if the piers of the bridge were made parallel, as far as possible, with the currents of the river and the necessities of the canal, with the result that the passage of the draw is reasonably safe, negligence cannot be imputed to the company. *St. Louis & St. P. Packet Co. v. Keokuk & H. Bridge Co.* 31 Fed. Rep. 755.

ing the privileges conferred by it, because to do so would impair the obligation of the contract; and that the State cannot obstruct its navigable streams, or authorize it to be done, if Congress has legislated as to it under the commerce clause, or if to do so would violate a contract made by the State with an individual or a corporation. It becomes necessary, therefore, to ascertain what rights the appellant did in fact acquire by its lease.

The rights of the parties to this controversy are not to be determined by the relative importance of river or railroad transportation to the commerce of the country. We have no right to compare benefits, or contrast injuries. Whether one, and, if so, which one, is to be subservient to the other is a question addressed to the Legislature, and not to the judiciary. Prior to March 9, 1868, the State had improved the navigation of Green and Barren Rivers by means of locks and dams, and tolls were charged for their use. The money thus realized proved inadequate to maintain and operate the improvements, and the enterprise was a losing one to the State. The Legislature, by an Act of the date last named, incorporated the appellant, and, in the language of the second section of the Act, leased to it the "Green & Barren River line of navigation, and their tributaries, together with the grounds, houses, waterworks, rents, profits, tools, machinery, implements and appurtenances, and all the franchises thereunto belonging or appertaining."

The Act requires the company to keep "the line of navigation" in repair, and to permit all water craft to navigate the rivers upon the payment of certain rates of toll prescribed by it. The constitutionality of this Act, and the validity of the lease based upon it, were maintained by this court in the two cases of *McKeynolds v. Smallhouse*, 8 Bush, 447; and *Sinking Fund Comrs. v. Green Navigation Company*, 79 Ky. 73.

What, then, was the extent of the property right thus acquired by the appellant? Manifestly it did not confer upon it an exclusive right of navigation. It was not a lease of the rivers themselves. The company did not during the term of the lease acquire such a right in them as it would have obtained under a lease of a canal or turnpike. The public had a natural right to use them before the State improved them. They were not the subjects of private ownership. The company acquired no exclusive right of fishing in them, or using the water for motive or irrigating purposes. What, then, was intended by the expression "line of navigation," as used in the Act? The history of the matter, and the existing circumstances, will serve to explain it.

The rivers themselves were navigable streams, open to public use by common right. The State had, however, erected locks and dams, and other subsidiary improvements. Tolls were being charged for their use, by the State, when the lease was made. These improvements belonged to it, and not to the public by any common right. They constitute its line of navigation; and it leased what belonged to it in its corporate capacity, as distinguished from

what was subject to public use under common right. Properly speaking, these improvements were all the State had to lease; and although the grant should be construed strictly, yet a fair interpretation of the Act of the Legislature confines its operation to the property of the State. The fourth section requires the company "to use due diligence in keeping up said line of navigation in good repair." These words certainly refer to the improvements only, and aid us in reaching a conclusion as to what was meant by the words, "the line of navigation."

The company acquired no peculiar right in the navigation of these rivers under its lease. As to it the appellant occupied the same attitude as the general public; and as none of the improvements have been injured or interfered with, and as the license to bridge the river was valid against the public, it results that the appellant cannot complain if the appellee in repairing its bridge has kept within the grant. It is not a case of two interfering franchises, because the contract between the State and the navigation company invested the latter with the exclusive proprietorship, during the lease, of the improvements only, and not the navigation of the river.

This court, in effect, so held in the case of *Green Navigation Company v. Palmer*, 83 Ky. 646, and it is unnecessary to consider the question of the power of the State to barter away the control of its navigable streams, which is a part of its internal police power, because it has not attempted to do so in this instance. It is reasonable to suppose that the parties so understood the contract. If the bridge had not been constructed when the lease was made, then the acquiescence of the appellant in its construction under legislative grant, and the knowledge that it would necessarily need repair, show how it regarded the contract. Upon the other hand, if it had already been constructed, then the company knew that its repair and renewal would follow as a duty to the traveling public, and as necessary to its convenience and safety; and it is unreasonable to suppose that the parties intended to enter into a contract forbidding such repair.

The work was done at a season of the year when it was likely to interfere with navigation the least. Ample notice was given that it would be done, and it was done as expeditiously as possible. In fact it is not claimed that there was any unreasonable delay, or that the obstruction continued longer than was necessary. It is plain that nothing was done negligently or wantonly, but that the appellee acted in good faith, and with proper precaution. While it was possible to have opened the draw and constructed the new one upon the edge of the river, and thus have avoided all obstruction to navigation, yet the railroad company was not required to take an unusual course in constructing its improvement, and one which would involve unreasonable delay and expense. It was done in such a manner as "not unreasonably to obstruct the navigation;" and the appellee is entitled to the protection of the rule of *damnum absque injuria*.

Judgment affirmed.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, *ex rel.* RAILROAD & WAREHOUSE COMMISSION of the State of Minnesota,

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO.

(....Minn....)

***The Railroad & Warehouse Commission of this State has no authority to prescribe rates for transportation by common carriers in another State. It cannot fix the rates for carriage between two points within this State, over a route extending across a neighboring State. Such power is vested exclusively in Congress.**

(March 18, 1889.)

MANDAMUS to compel respondent to comply with an order of the Railroad & Warehouse Commission, prescribing rates for the transportation of freight. *Writ quashed.*

The facts sufficiently appear in the opinion. *Mr. Moses E. Clapp, Atty-Gen.,* for respondent.

Mr. J. H. Howe, for respondent:

The Constitution of the United States gives Congress exclusive power to regulate commerce among the several States. This right of Congress has been expressly recognized by the supreme court of this State.

Foster v. Blue Earth Co. 7 Minn. 140.

This power has been exercised by Congress by the passage of the Act, entitled "An Act to Regulate Commerce," approved on the 4th day of February, 1887.

The words of this Act must be applied to the carriage of the respondent, described in the pleadings.

See *Lord v. Goodall Steamship Co.* 102 U. S. 541 (26 L. ed. 224); *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Pacific Coast Steamship Co. v. Cal. R. R. Comrs.* 9 Sawy. 253; *New Orleans Cotton Exchange v. Cincinnati, N. O. & T. P. R. Co. ante*, 289; *Business Men's Assn. v. Chicago, St. P. M. & O. R. Co. ante*, 41.

As illustrating how far the Supreme Court of the United States has gone in defining "commerce between the States" as used in the constitutional provision on that subject, see—

The Daniel Ball v. U. S. 77 U. S. 10 Wall. 557 (19 L. ed. 999); *Hall v. DeCuir*, 95 U. S.

*Head note by DICKINSON, J.

485 (24 L. ed. 547). See also *Mobile County v. Kimball*, 102 U. S. 691 (26 L. ed. 238).

Dickinson, J., delivered the opinion of the court:

This is a proceeding by mandamus to compel this respondent to comply with an order of the Railroad & Warehouse Commission of this State, prescribing rates for the transportation of freight over the respondent's line of road from the City of Duluth to the City of Mankato, both of which are within this State. The only question now presented for decision is as to the jurisdiction of our Railroad & Warehouse Commission to make this order, in view of the circumstances to which we now refer.

The line of railroad operated by the respondent, and over which its business of transportation between the cities above named is carried on, is as follows: that part of the line within the City of Duluth, and which extends to the boundary line between Minnesota and Wisconsin, is owned by the Superior Short Line Railway Company of Minnesota, a corporation of this State. Connecting with this at the boundary line, and extending into the Village of Superior in Wisconsin, is a road owned by the Superior Short Line Railway Company, incorporated under the laws of the latter State. Connecting with this, at the Village of Superior, commences the railroad of this respondent, which runs from thence to the City of Hudson, in Wisconsin, a distance of 148 miles. At that point it crosses the boundary line into Minnesota and from that point, by way of St. Paul, the line runs within this State 105 miles to Mankato, and beyond. The two short line railways above mentioned are operated by this respondent as a part of its line of road, and we attach no importance to the fact that they are owned by other corporations. So far as it concerns the question here involved, the entire line from Duluth to Mankato is to be deemed as under the control of this respondent, and as though the whole were a part of its own line of road.

By section 8 of article 1 of the Constitution of the United States, Congress is empowered "To regulate commerce with foreign nations, and among the several States." The transportation of property by a common carrier, including the rates to be charged therefor, is embraced within the meaning of the word "commerce" as here used. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 [6 L. ed. 23]; *Case of State Freight Tax*, 82 U. S. 15 Wall. 232 [21 L. ed. 146]; *Lord v. Goodall Steamship Co.* 102 U. S. 541

Injunction; jurisdiction of federal courts.

The federal courts have jurisdiction of a suit against state railroad commissioners, to restrain the enforcement of their rates, under an unconstitutional statute; such suit not being in effect against the State and hence not within the Eleventh Amendment of the Federal Constitution. *Chicago & N. W. R. Co. v. Dey, ante*, 325, 1 L. R. A. 744, reviewing *Osborn v. Bank of U. S.* 22 U. S. 9 Wheat. 859 (6 L. ed. 232); *Davis v. Gray*, 83 U. S. 16 Wall. 203 (21 L. ed. 447); *Re Ayers*, 123 U. S. 443 (31 L. ed. 216); *La. v. Jumel*, 107 U. S. 711 (27 L. ed. 448); *Antoni v. Greenhow*, 107 U. S. 769 (27 L. ed. 468); *Hagood v. Southern*, 117 U. S. 52 (29 L. ed. 805).

As to jurisdiction of state commissioners, see *Sternberger v. Cape Fear & Y. V. R. Co. ante*, 426.

NOTE.—*Unfriendly legislation; discriminating against foreign railroads invalid.*

State legislation which deprives owners of a railroad line within the State of all compensation from their business, cannot be upheld on the ground that the company is a foreign corporation. Nor can it be upheld on the ground that the railroad affected thereby is an interstate road, and its deficiency of revenue may be made up by receipts from interstate commerce or by traffic in other States; or on the ground that a future increase of business may render the prescribed rates remunerative. *Chicago & N. W. R. Co. v. Dey, ante*, 325, 1 L. R. A. 744.

[26 L. ed. 224]; *Wabash, St. L. & P. R. Co. v. Ill.* 118 U. S. 557 [30 L. ed. 244]; *Phila. & S. Steamship Co. v. Pa.* 122 U. S. 326 [30 L. ed. 1200]; *Fargo v. Mich.* 121 U. S. 230 [30 L. ed. 888]; *Carton v. Ill. Cent. R. Co.* 59 Iowa, 148.

Since the decision in *Wabash Railroad Company v. Illinois*, 118 U. S. 557 [30 L. ed. 244], it must be regarded as settled, whatever doubts may have been previously entertained, that the regulation as by prescribing rates, of such transportation as is to be deemed interstate as distinguished from wholly domestic carriage, is exclusively given to Congress.

The only question upon which there can be any doubt is whether the transportation to which this order of the commission relates is to be deemed commerce or transportation between different States, within the meaning of the constitutional provision above quoted, or as being in its nature merely domestic commerce or transportation to be governed wholly by our state laws, and over which Congress has no control.

The order prescribing rates, and to enforce the observance of which is the object of this proceeding, applies to the entire route from Duluth to Mankato, a large part of which—indeed the greater part of which—lies beyond the boundaries of our State, and within the territory of another sovereignty. These rates are for the continuous carriage of freight over the entire route, including the transit of 148 miles through the State of Wisconsin. The order is as applicable to that part of the line as to that which is within our own State, and can only be sustained upon the theory that the Railroad & Warehouse Commission of the State of Minnesota has authority to determine what charges may be made for the transportation of freight by a common carrier through the State of Wisconsin, provided only that the carrier receives the property within this State and is to carry it through the foreign State to a destination within our own borders.

In view of the above decisions of the Supreme Court of the United States, that the transportation of freight by a common carrier apart from considerations of contract concerning the property as between the shipper and the consignee, is a subject of "commerce" to which the Constitution applies, it is not a matter of controlling importance that the consignor and consignee, or place of shipment and destination, be within the same State, if the transportation is through a foreign State.

Assuming that the Constitution places within the exclusive control of Congress the subject of transportation among the several States, let us suppose that a shipment is made from Duluth to Winona—both cities being within our State, but upon the borders of Wisconsin—by a route wholly within the latter State, excepting the inconsiderable distance of the depot grounds in those cities from the state line. Can it be said that this carriage of perhaps 200 miles through the State of Wisconsin, and of a mile or two within our own borders, is domestic transportation and commerce as distinguished from that which under the Constitution is to be deemed as being "among the several States?"

The Constitution, as interpreted by the court whose decisions upon this subject are final, has 2 INTER S.

placed under the exclusive regulation of Congress the subject of transportation among the States, so far, among other things, as relates to the matter of charges, in order that it may be protected from conflicting and adversely discriminating state legislation. See authorities above cited.

Is not a case such as we have supposed, or the case now before us, transportation among the States, within this purpose of the Constitution, as really as would be a shipment and transportation of goods from New York, Chicago or Milwaukee to Minnesota, as to which unquestionably under the decisions above cited, Congress, and not the several States, would have the power to regulate?

We are unable to state any principle which supports the relator's claim of jurisdiction to determine what charges may be made for the transportation of freight through the State of Wisconsin. Whether the result would have been different if the order had prescribed rates only with respect to so much of the route as is within our own State, we do not decide. The mere fact that Duluth and Mankato are both in this State and that a part of the line of road of this respondent is also here and operated under our law, cannot authorize our state authorities to regulate the operations of the 148 miles of road which is wholly within the State of Wisconsin, and which there exists and is managed of course under the laws of that State, subject to such limitations as the National Constitution may impose.

The order in question applies to all freight transported over this route from Duluth to Mankato. But it appears that in the usual course of business the respondent receives freight at the docks in Duluth, destined for the several points on its road, both in Wisconsin and in this State, which had been received there from vessels navigating the great lakes, and which, as is to be inferred, must be classed as interstate commerce in any meaning of that term. Of course as to such transportation our commission has not authority to prescribe rates under the decisions above cited.

There might perhaps be distinguished from this case the case of a Minnesota carrier engaged only in carrying between points within this State, but whose route incidentally at some point, and for an inconsiderable distance, should cross the line of the State. Whether or not the transportation in such a case might be deemed to be substantially domestic and not embracing an important element of foreign transit we do not decide. This is not such a case. This line within Wisconsin to which this order is applicable was operated, not merely for transportation between points in Minnesota, but was doing the ordinary business of a common carrier within the State of Wisconsin.

The question under consideration has not come before the Supreme Court of the United States in the form here presented; but it seems to us that that court has so determined the construction and effect of the commerce clause in the Constitution that, following its decisions, as we are bound to do in such cases, the result already indicated cannot be avoided. We need not again refer to the many decisions, some of which have been cited, which leave no doubt that transportation is commerce within the

meaning of the Constitution, and that the authority of Congress is exclusive as respects the regulation of rates for interstate commerce.

In *Lord v. Goodall Steamship Company*, 102 U. S. 541 [26 L. ed. 234], the question presented for decision was whether Congress had the power to regulate the liability (to the owners of goods lost in the course of transportation) of the owners of vessels engaged only in transportation between different ports in the same State (California), the voyage between such ports being in part upon the high seas, and out of the limits of the State. The court recognized the fact that Congress had no power to thus interfere with the exclusively internal commerce of a State; and that the law of Congress (restricting the common-law liability of carriers) could be sustained, in its application to this case, only in case the transportation in question should be deemed to be within the clause of the Constitution empowering Congress "to regulate commerce with foreign nations and among the several States." It was decided that such transportation was included in "commerce with foreign nations," a matter of "external concern" as respected the State of California, and subject to the regulating power of Congress.

If such transportation from San Francisco to San Diego in the same State was "foreign" commerce (transportation) within the meaning of the Constitution, because the voyage was for the most part upon the high seas, the common highway of nations, is not the transportation from Duluth to Mankato, by a route which for the most part is wholly within the territory of Wisconsin, commerce (transportation) "among the several States?" Has not the State of Wisconsin at least as much interest and as large a jurisdiction concerning the transit of goods by carrier across its territory as have the nations of the world, including our own, in the voyage merely from port to port in the State of California? How can the one be deemed foreign and the other exclusively internal, as respects the State of Minnesota? We are unable to make any distinction, and it seems to us that our decision must be controlled by that above cited.

Pacific Coast Steamship Company v. California Railroad Commissioners, 9 Sawy. 253, was like that last cited, except that the question related to the power of the state authorities of California to regulate rates of transportation upon steam vessels between various ports in that State. That authority was denied for the reason that it was not domestic commerce,

the vessels in the course of the voyage going out to sea more than a league from land. Field, *J.*, wrote the opinion of the circuit court.

A case closely analogous to that under consideration was very recently decided by the Supreme Court of South Carolina, in *Sternberger v. Cape Fear & Yadkin Valley Railroad Company*, ante, 426, 7 S. E. Rep. 836.

The defendant was charged with violating the statute of that State which forbids a higher charge for a shorter than for a longer carriage. The property had been shipped from Charleston to Tatum—both places being within that State. The course of transit from Charleston was, first over two railroads wholly within the State; then to a point in North Carolina over a road operated in both States; then for some distance within North Carolina, over a road wholly within that State; then it was received in North Carolina by the defendant road which was operated in both States, and transported to its destination at Tatum. The charge exacted for the entire distance was \$4.40, while the freight to a point six miles farther would have been only \$4. It was held that the Railroad Commission of South Carolina had no jurisdiction to fix rates for such transportation; nor does the decision seem to rest entirely upon the fact that one of the roads in this route was wholly in North Carolina. That fact as we think should not have affected the result.

The Interstate Commerce Commission has recently (November, 1888) ruled upon the question here presented, holding that commerce between points in the same State, but which in being carried from one place to the other passes through another State—is interstate commerce, subject to congressional regulation. *N. O. Cotton Exchange v. Cincinnati etc. R. Co.* ante, 289.

We are aware that the Supreme Court of Pennsylvania has held to the contrary. See *Lehigh Valley R. Co. v. Com.* ante, 226, and *Com. v. New York, L. E. & W. R. Co.* referred to in Id. 227.

If those cases were wholly analogous to that before us, that court has not regarded the decision of the court of last resort in such cases, in *Lord v. Goodall Steamship Co. supra*, as having the effect which we think must be accorded to it.

Our conclusion is that the commission had no jurisdiction to prescribe rates for transportation through the State of Wisconsin, and *the writ must be quashed.*

Ordered accordingly.

THE INTERSTATE COMMERCE COMMISSION.

R. H. WHITLOCK

v.

BALTIMORE & O. R. CO. *et al.*

(No. 198.)

ABSTRACT of complaint for relief from misconstruction of the classification of box shoos. Filed May 20, 1889.

Complainant alleges unjust discrimination in construing classification sheets so as to take box shoos out of the sixth class, the same as lumber, and put them into another class as "box

stuff", thereby increasing the rate four cents per hundred pounds, making it the same as though not bundled; that box shoos in bundles pack closer, and weigh more to the cubic foot of the space occupied than ordinary lumber, or staves in bundles or shoos; that the word *stuff* should mean box boards not in bundles; and that such classification of his bundles or shoos is unjust and injurious to his business, and he therefore prays for relief, etc.

(Verified May 15, 1889.)

SAN BERNARDINO BOARD OF
TRADE

v.

ATCHISON, T. & S. F. R. CO. *et al.*

(No. 199.)

ABSTRACT of complaint for unjust discrimination in freight rates. Filed May 20, 1889.

Complainant alleges that it is a corporation organized under the laws of California; that the above named defendant, together with the Atlantic & Pac. R. Co., Burlington & Missouri R. R. Co., California Cent. R. Co., Chicago, Kan. & Neb. R. Co., Missouri Pac. R. Co., and the St. Louis & San Francisco R. Co., have issued, and are operating under, schedules of joint rates from the Missouri River, St. Louis, Chicago, Cincinnati, Detroit and New York to

Los Angeles, Cal. That San Bernardino is a station on the California Cent. R. Co., and is a less distance than Los Angeles from each of said shipping points, in the same direction and over the same lines.

[Here follows a schedule of merchandise with the respective rates from the respective shipping points to the respective stations Los Angeles and San Bernardino, showing that charges to the latter place are always higher than to the former.]

Complainant further alleges that the maintenance of such high rates for the shorter haul seriously impairs and lessens the traffic and commerce of San Bernardino, and therefore prays for relief, etc.

(Verified May 11, 1889.)

Messrs. Harris & Gregg attorneys for petitioner.

FLORIDA SUPREME COURT.

[The following case is so nearly related to Interstate Commerce and covers so many questions of so much importance in the recent discussions upon the subject, and withal so ably considered, that it seems to be quite appropriate here. Ed.]

PENSACOLA & ATLANTIC R. CO.,

Appt.,

v.

STATE OF FLORIDA.

(SIX CASES.)

(....Fla.....)

*1. **The enforcement of a tariff** of freight and passenger rates which will not pay the expenses of operating a railroad,—*held*, upon the pleadings, to show an abuse of the discretion given to railroad commissioners by the statute authorizing them to prescribe reasonable and just rates of freight and passenger

*Head notes by RANEY, Ch. J.

NOTE.—*Railroads; authority of Legislature over freights and fares.*

Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters, or unless what is done amounts to a regulation of foreign or interstate commerce. *Dow v. Beidelman*, 125 U. S. 630 (31 L. ed. 841); *Stone v. Farmers L. & T. Co.* "R. R. Commission Cases" 116 U. S. 307 (29 L. ed. 636); *Chicago B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24 L. ed. 94); *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179 (24 L. ed. 99); *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180 (24 L. ed. 99); *Ruggles v. Ill.* 108 U. S. 536 (27 L. ed. 812); *Ill. Cent. R. Co. v. Ill.* 108 U. S. 541 (27 L. ed. 818).

The regulation of matters of this kind, says the court, is legislative in its character, not judicial. "Express Cases," *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.* 117 U. S. 1 (29 L. ed. 791); *Del. L. & W. R. Co. v. Central Stock Yard & T. Co.* 9 Cent. Rep. 113, 43 N. J. Eq. 81.

The power of a State to limit railroad charges for transportation can only be bargained away, if at all, by words of positive grant or their equivalent. *Stone v. Farmers L. & T. Co. supra*.

The Legislature has reserved, in the general Act for the formation of railroad companies, the right to regulate the question of freights. *Laws 1850, chap. 140, § 28, subd. 9.* *Killmer v. N. Y. Cent. & H. R. R. Co.* 1 Cent. Rep. 525, 100 N. Y. 395.

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transportation, and to amount to a taking of the railroad company's property without just compensation.

2. **The effect of the provision of the Railroad Commission Statute**, that the schedules of rates fixed by the commissioners shall, in any action brought in the courts of this State against a railroad company, be deemed and taken as sufficient evidence that the rates fixed therein are just and reasonable rates for the transportation of passengers and freights and cars, is not to make such schedules conclusive as against judicial inquiry, but is to provide a new mode of proving the reasonableness and just character of the rates fixed by the commissioners, and make the schedules competent and adequate evidence of the correctness of the action of the commissioners in the absence of countervailing

General statutes fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not deny to the railroad companies the equal protection of the laws, or deprive them of their property without due process of law, within the meaning of the 14th Amendment. *Stone v. Farmers L. & T. Co. supra*.

A power of government which actually exists is not lost by nonuser. *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 (24 L. ed. 94).

The Legislature, in the exercise of its power of regulating freights and fares, may classify the railroads according to the length of their lines, if the same rule is applied to all roads of the same class. *Dow v. Beidelman*, 125 U. S. 630 (31 L. ed. 841).

Arkansas Act, Feb. 27, 1885, prohibiting greater charge by carrier for transportation of freight than specified in the bill of lading, and imposing a penalty for refusal to deliver on payment or tender of charges as shown in such bill, is not special legislation, or a regulation upon interstate commerce, but is within the police power of the State. *Little Rock & Ft. S. R. Co. v. Hanniford*, 1 Inters. Com. Rep. 580, 49 Ark. 291.

Regulation by railroad commission.

Railroad switching charges may be regulated by a commission appointed under a State Act by virtue of its police powers; and this does not make an unlawful interference with commerce, although the

proof that they have exceeded their powers, or abused their discretion and invaded some right of the railroad company.

3. **Where a tariff of freight and passenger rates has been established by the railroad commissioners and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners; but the tariffs as fixed by the commissioners must, in so far as the courts are concerned, be left to the test of experiment.**
4. **The courts have no power to make freight or passenger tariffs.**
5. **The courts will not interfere or grant any relief to a railroad company upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety.**

(May 1, 1889.)

A PPEALS by defendant, from judgments of the Circuit Courts of Gadsden and Jackson Counties, in favor of plaintiff in actions brought by the State to recover penalties alleged to have been incurred under the Railroad Commission Acts. *Reversed.*

The facts are stated in the opinion.

Mr. W. A. Blount for appellant.
The Attorney-General for the State.

Raney, Ch. J., delivered the opinion of the court:

There are before us, on appeal from judgments of the circuit court, several actions in-

cars switched contain freight for transportation between States. *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. Rep. 849.

The charter of a company is not a contract the obligation of which is impaired by the Mississippi Statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination, and enforce certain police regulations affecting railroad companies doing business in that State. *Stone v. Farmers L. & T. Co.* ("R. R. Commission Cases") 116 U. S. 307 (29 L. ed. 630).

State officers in appropriating and assessing the expenses of the board of railroad commissioners act in a quasi judicial character; and their action is reviewable on certiorari by a company aggrieved thereby. *People v. Chapin*, 42 Hun, 239.

An Act requiring railroads to pay the expenses of a railroad commission is part of subsequent charters; and successive assessments for this purpose, in annual tax Acts, were only a provision to carry out this existing law. *Columbia & G. R. Co. v. Gibbs*, 24 S. C. 60.

Courts cannot administer railroad affairs.

Courts cannot carry into effect the decisions of the railroad commissioners. Neither the Attorney-General nor the courts can enforce their order. *People v. N. Y. L. E. & W. R. Co.* 6 Cent. Rep. 39, 104 N. Y. 58; *People v. Rome, W. & O. R. Co.* 4 Cent. Rep. 197, 103 N. Y. 95.

2 INTER 5.

stituted by the State against the appellant, to recover penalties under the statute approved June 7, 1887, and commonly known as the Railroad Commission Act. The cases from Gadsden County, in the Second Circuit, were brought last July, and the penalty adjudged in each of them is \$2,500; that from Jackson County was commenced last April, and the penalty denounced in it is \$2,000. Upon the conclusion of the argument made before us at the present term, we announced that the decision of these cases would, in view of the public interests involved, be disposed of at an early day.

The pleadings are similar in substance. The declaration in one of the Gadsden County cases, which we take as a type of all, alleges that the railroad company is a body corporate organized under a special statute of this State, approved March 4, 1881 (chap. 3334), and operating a railroad from Pensacola to River Junction, both of which points are in the State, and that on a certain day in April of the year 1888, it did "willfully charge, collect and demand and receive" of a person, naming him, for transporting him as a passenger from River Junction to Marianna, another point on the road, a distance of twenty-six miles, the sum of \$1.25, and that this sum was more than three cents per mile, the rate prescribed by the railroad commissioners, and that the sum so collected was more than a fair and reasonable rate of toll or compensation for the transportation of the passenger; and that eighty cents, the sum which the company was allowed by the above rate prescribed by the commissioners (and a special rule as to amounts ending in other figure than 5 or 0) to charge, collect and receive, was a just and reasonable rate of compensation; and that by thus willfully collecting and receiving the stated excess over and above what it was allowed by the commissioners' rules to charge, collect and receive, the railroad company became and was guilty of extortion,

It is beyond the powers and functions of the courts to hold practically under their control the administration of railroad affairs as to freight and other business. *Chouteau v. Union R. & T. Co.* 4 West. Rep. 397, 22 Mo. App. 286.

Power of court over controversies.

In the absence of legislative regulation, courts must decide for the company, when controversies arise, what is reasonable. *Dow v. Beidelman*, 125 U. S. 630 (31 L. ed. 841).

If the classification operates uniformly, the court cannot decide whether it was the best that could have been made. *Ibid.*

A railroad extending through several States is an entirety within each and is subject to the jurisdiction of courts in either State in an action to prevent discriminations in rates of freight. *Providence Coal Co. v. Providence & W. R. Co.* 2 New Eng. Rep. 507, 15 R. I. 303.

Remedy against discriminating charges.

The remedy against a railroad company for charging discriminating freights, where there is no adequate remedy at law, is by injunction. *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 830, 43 Ohio St. 571.

A court of equity, to enforce statutes against discrimination, must be fully satisfied that its orders will not likewise work a discrimination. *Chou-*

and of a violation of the rules and regulations prescribed and published by the commissioners, by which rules and regulations the commissioners made, among others, a schedule or tariff of just and reasonable rates for the transportation of passengers on appellant's railroad.

It is also alleged that the commissioners gave notice to the principal officer of the railroad company of this violation, and directed the company to make reparation to the passenger for the injury and wrong so done him, by refunding to him the excess of forty-five cents, within thirty days, as prescribed by the statute; but it failed and refused to do so, and thereby forfeited to the State and incurred a penalty of \$5,000.

To this declaration the railroad company interposed four pleas, and the State demurred to them as insufficient in law. The demurrer having been overruled, and the company not electing to plead over, judgment was entered, the Circuit Judge fixing the penalty at the amount indicated above.

Section 13 of article 16 of the Constitution of this State is as follows: The Legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures.

Whether or not there is in this section a grant of any power which the Legislature did not have before, it is unnecessary for us to decide. There is, however, upon the face of it an apparent purpose to correct abuses. It shows that the convention in adopting and the people in ratifying the section were impressed with a

belief that there existed a necessity for the enactment of laws correcting abuses, preventing unjust discriminations and excessive charges by common carriers in transporting persons and property, and that confidence in the sufficiency of the common-law remedies as agencies by which the individual citizen could find protection against or relief as to these evils had failed.

As to the necessity for the command thus made by the people to the law-making power, the judicial department is concluded by the existence of the section.

To effect the end proposed by the Constitution, the first Legislature assembled under it enacted the Railroad Commission Law, which was approved June 7, 1887, it being chapter 3746 of our statutes.

This statute provides for the appointment of three commissioners and (§ 5) that they shall "make and fix reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof," and just and reasonable regulations as to charges for the necessary handling and delivery of freights at any and all points and for preventing discrimination in the transportation of freight and passengers, and reasonable and just rates of charges for the use of railroad cars carrying freight and passengers on said railroads, no matter by whom owned or carried; and just and reasonable rules and regulations to be observed by said railroad companies on said railroads, to prevent the giving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers.

It also confers power upon the commissioners to designate and fix by rules and regula-

teau v. Union R. & T. Co. 4 West. Rep. 397, 22 Mo. App. 286.

Where a suit was brought against a railroad company on account of alleged overcharges beyond a reasonable rate, but the declaration did not allege either that no rates had been fixed for the defendant's road or that the charges were beyond the rates so fixed, it was demurrable. *Sorrell v. Central R. Co.* 75 Ga. 509.

Discriminations; what are.

At common law the rule is that carriers shall not exercise any unjust discrimination in rates of toll. They are held to do exact and even-handed justice to everybody doing business with them. *Scotfield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 823, 43 Ohio St. 571; *Indianapolis, D. & S. R. Co. v. Ervin*, 6 West. Rep. 103, 118 Ill. 250.

Discrimination in freights, if fair and reasonable, founded on grounds consistent with public interests, is allowable. *Scotfield v. Lake Shore & M. S. R. Co. supra*.

To charge one a rate less than the regular fixed rate is not discrimination. To charge one a higher rate than the lowest rate given to anyone else, under certain circumstances, is discrimination. *McNees v. Mo. Pac. R. Co.* 4 West. Rep. 875, 22 Mo. App. 224.

An agreement by a railroad company to carry for one at a cheaper rate than for another is void. *Scotfield v. Lake Shore & M. S. R. Co. supra*.

Rates should be so relatively reasonable as to protect communities and business against unjust dis-

crimination. *Boards of Trade Union v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 608.

An advantage given by a railroad, in establishing its charges on different branches on its road, to competing towns on the main line, must not be unreasonable. *Raymond v. Chicago, M. & St. P. R. Co.* 1 Inters. Com. Rep. 627.

Massachusetts Public Statutes, chapter 112, § 191, do not require a carrier allowing an expressman to keep a stand at its depot to furnish equal facilities to all persons. *Old Colony R. Co. v. Tripp*, 6 New Eng. Rep. 367, 147 Mass. 35; *Com. v. Carey*, 6 New Eng. Rep. 371, 147 Mass. 40, note.

Trade centers are not entitled to more favorable rates than smaller towns for which they are distributing centers. *Martin v. Chicago, B. & Q. R. Co. ante*, 32.

The fact that, under impartial arrangement of rates between large and small towns, one large distributing center has an advantage over a competing distributing center, does not show undue preference. *Ibid*.

That refusal to give a through rate, as for one shipment, operates prejudicially to a town desiring the privilege does not make the refusal an unjust discrimination when the carrier applies the same rule to all towns. *Crews v. Richmond & D. R. Co.* 1 Inters. Com. Rep. 703.

Under Illinois Statutes (2 Starr & C. p. 1962, § 3), it is not incumbent to prove a personal discrimination and a personal injury, as between individuals of a class; but the offense is made out by proof of a discrimination as between localities. *Ill. Cent. R. Co. v. People*, 10 West. Rep. 582, 121 Ill. 304.

tions the difference in the rates of freight and passenger transportation for longer or shorter hauls, and to ascertain what shall be the limits of longer and shorter distances.

There is in the above section also a provision to the effect that nothing in the Act shall abridge or control the rates for freight which comes from or goes beyond the State and for which freight less than local rates for carrying the same is charged.

By the 6th section the commissioners are authorized and required to make for each railroad corporation a schedule "of just and reasonable" rates of charges for the transportation of passengers and freights and cars, and "Said schedule shall in any suit brought against any such railroad corporation wherein is involved the charges of any such corporations for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates fixed therein are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads."

The commissioners are required to publish these schedules, and the railroad companies to post them in a manner stated; and any such schedule purporting to be printed and published shall be received and held in all suits as *prima facie* the schedule of said commissioners without further proof than its production with a certificate from the commission of its being a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that it has been duly published as required by law, stating the name of the newspaper, the date and place of publication.

This section also enacts that the commissioners shall, from time to time, and as often as circumstances may require, change and revise the schedules.

Sections 7 to 13 inclusive provide for a protest by the railroad company against the enforcement of any and all "rates of freight and passenger tariffs, or other rules and regulations" made by the commissioners, and a hearing and decision thereon by them, and for an appeal from the decision to a Board of Revisers, consisting of the Comptroller, Secretary of State, Commissioner of Agriculture, Attorney-General and the Treasurer of the State, and a hearing and decision by such board. Section 14 gives the same right of protest to any individual, corporation, firm or partnership.

Section 5 enacts, *inter alia*, that if any railroad corporation, organized under the laws of this State and doing business therein, "shall willfully charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description," it shall be "deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereafter provided."

Section 17 provides that if any railroad company doing business in this State, by its agent or employes shall be guilty of a violation of the rules and regulations prescribed by the commissioners, and if after due notice of such

violation given to the principal office thereof, ample and full recompense for the wrong and injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than \$100, nor more than \$5,000, to be fixed by the presiding judge.

This action is to be in the name of the State, and to be instituted by the commissioners through the Attorney-General or a state attorney, and in the county where the wrong was perpetrated.

Under section 19 all fines collected under the Act are to be paid to the county treasurer for county school purposes; and the rules of evidence in all cases under the Act are the same as in civil actions, "except as hereinbefore provided."

There are other features of the statute, but it is not necessary to set them out now. They give a personal remedy, in addition to those provided by the common law, to individuals wronged by a violation upon the part of a railroad company of any rule or regulation of the commissioners, and relate to matters of detail not necessary to an understanding of the statute in so far as either its general purpose or its effect in the case before us is concerned.

The question of the extent of the power of the Legislature in the regulation of the charges of common carriers for carrying persons and property is not settled or defined.

The doctrine of the case of *Munn v. Illinois*, 94 U. S. 113 [24 L. ed. 77], it being one of the so called *Granger Cases* reported in that volume, is as follows:

Where one devotes his property to a use which the public have an interest in, he in effect grants to the public an interest in such use; and the property, during such use, ceases to be a subject of mere private right, and the owner must, to the extent of that use, submit to be controlled by the public for the common good so long as he maintains such use. The devotion of it to the public use takes from him the right to make arbitrary or excessive charges for its use by the public, and he must be content with a reasonable compensation. In the absence of legislative regulation what is a reasonable compensation is under the common law a matter to be determined by the courts; but this may be changed by statute, and the Legislature may exercise it by prescribing the maximum rates of charges to be made by common carriers, ferries, hackmen, bakers, wharfingers and others of like avocations, and has often done so.

The cases upon which the controlling opinion in the *Munn Case* is based recognize the right of the owner of the property applied to public use, to a reasonable compensation, and so does that opinion; yet, admitting that the Legislature may abuse its power, that opinion says that "for protection against abuses by the Legislature the people must resort to the polls, and not to the courts."

In *Chicago Railroad Company v. Iowa*, 94 U. S. 155 [24 L. ed. 94], another of the *Granger Cases*, it is held that railroad companies are carriers for hire; that they are incorporated as such and given extraordinary powers in order

that they may the better serve the public in that capacity, and they are therefore engaged in a public employment affecting the public interest, and,* under the doctrine of *Munn v. Illinois*, subject to legislative control as to their rates of fare and freight, unless protected by their charters. "This railroad company," says the opinion, p. 161 [95], "has in the transaction of its business the same rights and is subject to the same control as private individuals under the same circumstances. It must carry when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. But when the Legislature steps in and prescribes a maximum of charges it operates upon this corporation the same as it does upon individuals engaged in a similar business." It is also said that, in the absence of a contract to the contrary in the charter, the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

In *Stone v. Farmers Loan & Trust Company*, 116 U. S. 307, 325 [29 L. ed. 636, 642], it is said: It is settled (in that court) that a State may limit railroad transportation charges within its territory unless restrained by some contract in the charter, or unless the regulation amounts to one of foreign or interstate commerce. In this opinion, after stating that the charter of the Baltimore & Ohio Railroad Company gives authority "to carry persons and property," it is remarked:

"This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position as a natural person would occupy if engaged in the same or a like business. . . . The natural person would be subject to legislative control as to the amount of his charges. So must the corporation be."

Immediately following the above we find this very suggestive paragraph in the opinion: "From what has thus been said it is not to be inferred that the power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides that in all trials of cases brought for a violation of any tariff of charges as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

This language is, unquestionably, greatly in restraint of that given above as used in the former or *Granger Cases*, the purport of which, considered in the abstract, was that whatever the wrong done, the judiciary was powerless,

and the resort to the polls at the periods prescribed by law the only remedy.

Of course in many cases ruin might be effected or the injury consummated, to at least a great extent, before the people could be appealed to against the "power to destroy," or "confiscation," or "taking of property for public use without just compensation or due process of law." The language of the preceding paragraph would never have been used but in response to a conviction that some of the expressions of the former cases had gone too far.

If there be anything in the fact that *Stone v. Farmers Loan & Trust Company* differs from the several *Granger Railroad Cases* in that the Mississippi Statute delegated the power to make rates to commissioners, the same is the fact in the case before us. In the *Granger Cases* the Legislature fixed the rates.

There is in the *Munn Case*, p. 125 [84], language tending towards the above paragraph from the *Stone Case*, it being there said in reply to the argument that the Illinois legislation was repugnant to the 14th Amendment, that "Down to the 14th Amendment it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all."

About the same idea is more briefly expressed in the last paragraph, on page 335 [646] in the *Stone Case*.

The extent to which this power of regulation by the Legislature may be carried in the absence from a railroad company's charter of a contract expressly authorizing it to charge up to a certain limit is a serious question, and one which we cannot evade in this case.

The third plea of the railroad company is that it could not pay the expenses of operating its road by charging for transportation of persons and things—the rates fixed for it by the railroad commissioners, or by charging less rates than those charged by it to the passenger named.

The demurrer of the State admits the averments of this plea to be true.

The admission of the demurrer is that if the company had adopted the rates of transportation of passengers and freight, or had charged less than it charged the passenger, it could not have paid its operating expenses.

The legal proposition asserted by the circuit court in sustaining the demurrer to this plea is that the State may, through the instrumentality of the commissioners, prescribe and may enforce through the courts, passenger and freight tariffs which do not pay the railroad company the expenses of operating its road; that the judgment or discretion of the commissioners is conclusive as to the reasonableness of the rates, as against the interference of the courts or any other power except it may be the Legislature.

This judgment involves, of course, the conclusion that a rate of charges which is not sufficient to pay the actual necessary and reasonable expenses of operating the appellant's road is a reasonable rate, and neither a taking of its property without due process of law or without just compensation, nor anything else inti-

mated by the paragraph from the *Stone Case* as being unauthorized. It is a plain declaration that the company must, as against any judicial relief, carry without reward if the commissioners merely say so in a rule promulgated according to the forms of the statute.

The language of *Chief Justice* Waite, given above, speaking for a majority of the court in the *Granger Cases*, has been appealed to, to sustain this conclusion. There is nothing in the facts of any of these cases which makes it an adjudication of the conclusion contended for. There was in the *Munn Case* no issue or pretense that the warehouse charges prescribed by the Illinois Statute were unremunerative; the real question was whether or not the warehouse property, as used, was subject to legislative regulation as to what should be a reasonable compensation.

In *Chicago Railroad Company v. Iowa*, *supra*, the representation made by the bill was that prior to the Iowa Statute, prescribing rates, the lessee company had fixed its charges with a view to furnishing the greatest facilities for transportation at the lowest rates compatible with the duty of keeping the road in good condition, defraying the expenses of operation, paying interest on the indebtedness, and earning reasonable dividends for stockholders; and that the earnings had been barely adequate under careful and economical management for these purposes, and that these ends could not be attained if the company should be compelled to conform to the statutory rates. If the bill had presented a case to the effect only that the statutory rates would not enable the company to defray the expenses of operation, including keeping the road in good condition, it would have approximated the issue now under consideration.

In *Peik v. Chicago Railroad Company*, 94 U. S. 164 [24 L. ed. 97], mortgage bondholders alleged that the company's tariffs, in force before the passage of the Wisconsin Statute limiting passenger and freight charges, did not provide sufficient income "to pay interest on its debt, the legal rate of interest allowed by the laws of the State to its stockholders and expenses," and that the enforcement of the statute impaired the obligation of the contract between the bondholders and the company, and violated the prohibition in the State Constitution against taking private property without just compensation.

In *Lawrence v. Chicago Railroad Company*, same page, the bill was by stockholders, but substantially the same; and in the opinion in these two cases it is said, page 176 [98]:

"In *Munn v. Illinois*, and *Chicago Railroad Company v. Iowa*, we have just decided that the State may limit the amount of charges by railroad companies for fares and freights, unless restrained by some contract in the charter, even though their income may have been pledged as security for the payment of obligations incurred upon the faith of the charter. So far this case is disposed of by those decisions."

In *Chicago Railroad Company v. Ackley*, 94 U. S. 179 [24 L. ed. 99], the action was by the company to recover for freight actually carried, a compensation greater than the maximum rate fixed by the Wisconsin Statute, and upon the ground that the amount sought to be

recovered was no more than a reasonable rate; and it was held that as between the company and the freighter there was a statutory limitation for transportation "actually performed." "If," says the opinion, "the company should refuse to carry at the prices fixed, and an attempt should be made to forfeit its charter, other questions might arise which it will be time enough to consider when presented; but for the goods actually carried the limit of the recovery is that prescribed by the statute."

The company, having actually carried the freight, could not claim more than the statutory rate; but it is plain that the court felt that if it had refused to carry at such rate, other questions might arise. It does not appear that the company had even given notice to the shipper that it would claim more than the statutory rate for the carrying to be done by it.

The enunciations of an opinion are not binding as authority, except as to the points presented by the facts of the case for adjudication. There is in none of the *Granger Cases* any fact suggesting that the rates resisted were unremunerative. The same is true of *Tilley v. Savannah Railroad Company*, 4 Woods, 427.

It is only as to the facts presented by the record that an opinion speaks authoritatively; none other are in the judicial mind. We are still not remitted solely to this doctrine and a critical view of the facts of the *Granger Cases* to ascertain the meaning of the majority of the court for whom the late Chief Justice was speaking in them.

In the paragraph quoted from the *Stone Case* that venerated Judge clearly limits the effect of the broader language used on the former occasion, and his limiting words are repeated after his death, nearly in full, in the opinion in the case of *Dow v. Beidelman*, 125 U. S. 689 [31 L. ed. 843]. These words show and were, we think, intended to show that there was a limit to regulation, even if it be that those used in the *Munn Case* in relation to the 14th Amendment were not so intended.

In *Georgiu R. & B. Company v. Smith*, 128 U. S. 174 [32 L. ed. 377], decided last October, Field, J., speaking for the entire court, says that the adjudications of that court are that the power of the State Legislature to regulate railroad fares within the limits of the State is subject to the limitation that the carriage is not required without reward or upon conditions amounting to taking property for public use without just compensation, or that what is done does not amount to a regulation of foreign or interstate commerce.

We do not think the *Granger Cases* to be authority for the proposition that the Legislature, acting even for itself, and not through commissioners, is omnipotent as against everyone but the people in the matter of regulating rates, except to the extent that they may control profits. They seem to hold that the Legislature may itself go this far as to profits, even confining the language of the opinions to the facts, in one or more of the several cases. There is, under the plea mentioned, no question before us as to what the profits shall be.

Admitting for the purposes of this case that between the line just above a compensatory rate and one defining excessive charges, or extortion, the discretion of the Legislature may

be conclusive as against judicial interference; or even admitting that in the exercise of a legislative discretion the law-making power may itself prescribe for common carriers rates that will not compensate, and that the courts cannot prevent the enforcement of them,—we yet do not think that any such power exclusive of judicial inquiry has been given, if it could have been, to the railroad commissioners by our statute. Of course no such power was given to the Mississippi commissioners; it could be shown “in defense” that their rates were unjust, and were, therefore, subject to both judicial and of course legislative supervision or control as to their reasonableness, as is clear from the statement of facts in the *Stone Case*, 116 U. S. 314 [29 L. ed. 640].

The grant to the appellant company of the “power . . . to make, build, maintain, equip, use and operate a railroad” between the points designated, particularly when considered in connection with another provision of its Charter Act, to the effect that it shall not charge more than five cents per mile for passenger transportation, and making the exaction of a greater sum by any officer or agent of the company a misdemeanor (§§ 1, 8, chap. 3335), gave it authority to charge a reasonable sum for the carriage of persons and property.

The duty of a railroad company to carry and charge only reasonable compensation are incidents of its occupation as a common carrier. The authority to carry implies authority to charge a reasonable compensation for the carriage. *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180 [24 L. ed. 99]; *Stone v. Farmers L. & T. Co.* 116 U. S. 329 [29 L. ed. 643].

To earn money is a purpose and legitimate object of a railroad company. Though a public highway and subject to public control as such in many respects, yet it differs from the ordinary public highway in the feature of being private property. A railroad and its equipment represent the private capital invested in them, and the income from the operation of the same is looked to and relied upon for the expense of at least the maintenance and operation. This is the ordinary rule, and in view of the particular pleadings now under consideration is the one applicable here.

To require of a railroad company which has been incorporated and given power to construct and operate a railroad, and charge reasonable rates for the transportation of persons and property, and has already constructed its road, that it shall carry persons and property at rates of charges not sufficient to pay the expenses of operating the road is, as a matter of fact, to compel it to carry without reward, and to take the use of its property without just compensation.

The same would be equally true of a natural person who might be authorized to operate a railroad, and upon whom, after he had built and equipped his road, the law-making or other power should enforce such terms of business.

A railroad is of no value except in the use of it; kept in idleness, it is a source of expense and subject of decay. Operated without remuneration its ruin is hastened, and a constant accumulation of indebtedness becomes an in-

separable incident to its ownership, unless means from independent sources are applied to the cost of its maintenance and operation; and if this is done the enforced consumption of such means is in its character of the same effect upon the owner.

It is the duty of a common carrier to receive and carry whatever is properly offered to it for carriage. As to freights, it is an insurer, and its liability, unless limited by special agreement, extends to all losses not occasioned by the act of God or the public enemy. For injuries occurring to passengers from the unsafe condition of the roadbed, or from insufficient or defective equipment or unskillful and negligent management, the company is responsible in damages. The safety of human life and the good of every public interest require of them the soundest condition, the fullest equipment and most skillful and careful operation; and it is the province of the courts to enforce, when properly called upon, the law which imposes these entirely proper and indispensable demands.

A railroad which cannot earn enough to pay its operating expenses because it is not permitted by the State to charge rates sufficient for such purpose, must as a natural result of such state regulation become a nuisance and a menace to human life.

Assuming that a railroad company can be compelled to operate its road, the result follows (if its rates of charges be fixed, against its will, at less than the cost of operation) that its property is used for the benefit of the public without reward or just compensation. If it can be compelled to operate for a little less than the expenses of doing so, so can it for much less. This principle is made more onerous, but not more unjust, by the greater degree to which the exercise of the power may be carried. These propositions, as matters of fact, seem to us entirely true. If the rates prescribed by the State or a commission will not pay operating expenses, and the company is thereby compelled to stop its operations, the company is deprived of the use of its property and it is, in effect, rendered valueless.

In *Pumpelly v. Green Bay Canal Company*, 80 U. S. 13 Wall. 166 [20 L. ed. 557], it was held that by “the general law of European nations and the common law of England it was a qualification of the rights of eminent domain that compensation should be made for private property taken or sacrificed for public use; and the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control. It is not necessary that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution; the backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes author-

izing it for the public benefit, is such a taking as by the constitutional provision demands compensation.

An injury resulting directly to a railroad company from the action of railroad commissioners as to it is, we think, easily and clearly distinguishable from indirect and consequential damage resulting from public improvements. *Northern Transp. Co. v. Chicago*, 99 U. S. 635 [35 L. ed. 336].

Railroads are not in themselves, or necessarily, public nuisances, and detrimental to the public morals, public health, or public safety. While their operation in many, if not all, respects, calls for the exercise of special skill and eminent care, and they are to be so used as not unnecessarily to injure another, as is all private property, and their use may, to a certain extent, be regulated, they cannot, nor can their ordinary use, reasonably be declared to be prejudicial to the general welfare. It belongs, of course, to the legislative department to exert what is known as the police powers of the State, and to determine primarily what measures are appropriate or necessary for the protection of the morals, the health or the safety of the public: but, says the Supreme Court of the United States, in *Mugler v. Kansas*, 123 U. S. 661 [31 L. ed. 210], it does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are of necessity limits beyond which legislation cannot rightfully go.

"The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority.

"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

In this case it was held that the destruction, through the exercise of the police power, and without allowing compensation, of the property used in violation of law in maintaining a public nuisance, is not taking of property for public use, and does not deprive the owner of it without due process of law: and that a State has the constitutional power to declare that any place kept and maintained for the illegal manufacture and sale of intoxicating liquors shall be deemed a common nuisance, and be abated.

It is said in the opinion that we cannot shut out of view the fact, within the knowledge of all, that the public health, public morals and public safety may be endangered by the general use of intoxicating drinks, nor the fact, established by statistics accessible to everyone, that the idleness, disorder, pauperism and crime existing in the country are in some degree at least traceable to this evil.

Certainly railroads cannot be classed with intoxicating liquors, or with property used in their manufacture and sale, as subjects of the

police power—to the extent of being liable to be taken or destroyed, or their use prohibited, without compensation as dangerous to the health, morals or safety of the public. The police power rests "upon the fundamental principle that everyone shall so use his own as not to wrong or injure another"—123 U. S. 667 [31 L. ed. 212]—and there is not in a railroad, kept in good condition and operated properly, anything offensive to this maxim.

A statute which should propose to make all railroad property existing at the time of its enactment a nuisance, if its ordinary use as such should be continued after a certain future day, and prohibit its use after such day without providing compensation for the loss sustained from the prohibition of such use, would we think, upon the doctrine of *Mugler v. Kansas*, be unconstitutional. The limit to the exercise of the police power, says Judge Cooley, must be this: "The regulations must have reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; and they must not, under the pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers." Cooley, Const. Lim. 5th ed. * 577; *People v. Jackson & M. Plank Road Co.* 9 Mich. 285; *Pingry v. Washburn*, 1 Aiken, 264.

Neither in our Railroad Commission Law nor in the constitutional provision upon which it is based is there anything which of itself declares or implies such a prohibition, or contemplates the making of one by the commissioners; yet if the enforcement of the rates prescribed by the commissioners would have this effect upon the railroad in question, we think, considering the particular pleadings now under discussion, it would be, as against the railroad company, an infraction of the provision of our Declaration of Rights (§ 12), that no person shall be deprived of his property without due process of law, nor shall private property be taken without just compensation.

The railroad commissioners have prescribed a passenger rate of three cents per mile as a reasonable and just rate for the appellant company. In the case before us the company has charged at the rate of $4\frac{1}{2}$ cents, or, in other words, have charged about 50 per cent more than the commission rate. Upon the pleadings the State contends that the commissioners' rate is reasonable and just, and that of the railroad company unreasonable and unjust; yet it admits that the railroad would not have earned expenses of operation if it had carried at the schedule of passengers and property rates fixed by the commission, or by charging at a less rate than that which the passenger in this case was required to pay.

What the commission rates for carrying property are we are not advised. We only know then that the commissioners have prescribed such rates generally as, the State admits, will not pay the operating expenses; and these include a passenger rate of three cents. The legal problem involved in these facts is whether the action of the commission is to be regarded as conclusively lawful, and within the limits of their powers, or as beyond them and infringing the constitutional rights of the company.

We have found no case which holds that a railroad company can be compelled to carry at unremunerative rates.

In *Chicago Railway Company v. Dey* [*ante*, 325, 1 L. R. A. 744, 35 Fed. Rep. 866], 13 Railway Age, 500, decided by Judge Brewer of the United States Circuit Court (see also *Chicago, B. & Q. R. Co. v. Dey*, 5 R. & Corp. Law Journal, 203), it was held that where the rates prescribed will not pay some compensation, the courts may give protection against their enforcement. Some rule, he says, must exist, fixed and definite, to control the action of the courts; for a chancellor is not at liberty to substitute his discretion as to reasonableness of rates for that of the Legislature. The Legislature has the discretion, and the general rule is that where any officer has discretion, his acts within the limits of that discretion are not subject to review by the courts. Decisions of the supreme court, he says, seem to forbid such a limit to the power of the Legislature as that its lowest rates must allow a profit equal to the lowest current rate of interest (say 3 per cent); and the right of judicial interference exists only where the schedule of rates established will fail to secure the owners some compensation or income from their investment; and when some compensation is allowed by the rates, the question becomes one of legislative policy.

In *Dow v. Beidelman*, 125 U. S. 680 [31 L. ed. 841], the evidence showed that under the maximum passenger tariff of three cents, prescribed by the Arkansas Statute, the net income of the road, with its existing traffic, would pay less than $1\frac{1}{2}$ per cent on the original cost of the road, and only a little more than 2 per cent on the amount of the bonded debt, without any proof, however, of the cost of the bonded debt, or the amount of the capital stock, or of the price paid for the road; and this was held not to be a taking of the property without due process of law, and that the court had no means, under the facts, of determining, if it could under any circumstances, that the rate of mileage was unreasonable.

Though in the case of *State v. Chicago Railroad Company*, 38 Minn. 281, it was held that the determination of the commissioners as to what are equal and reasonable fares and rates is conclusive, and that in proceedings by mandamus to compel compliance with the rates recommended and published by them, no issue can be raised, or inquiry had on that question, still that was not a case involving the entire rates, but only the rate on one article, and there was no contention that the entire tariffs as prescribed by the commissioners would not pay operating expenses.

The fact that the tariff on simply one or several articles may be unremunerative is not ground for an assumption that the tariffs are so as a whole, nor reason to our minds for judicial interference in behalf of the railroad company.

Whether under a general law for the incorporation of railroads, like ours, where there is practically no restriction upon the number of railroads that may be built and operated, the construction of additional roads in a section of the State already amply supplied with such

transportation facilities, would present a case in which the exaction of prohibitory or otherwise onerous rates may be prevented, though it result in an impossibility for some or all of the roads to make expenses, we need not say; no such case is before us.

When it is said by the Interstate Commerce Commissioners, in *New Orleans Cotton Exchange v. Cincinnati Railroad Company* [*ante*, 289], decided November 26, 1888, that "Where there are more roads than the business, at fair rates, will remunerate, they must rely upon future earnings for the return of investments and profits," we do not understand them to have meant that such roads must rely on the future for expenses also. The road there in question was making more than its expenses, but not enough to pay these and interest or fixed charges. In view of the undeveloped state of the law, each case must be decided upon its facts as it arises.

Confining ourselves to the case made by the pleadings, where only one railroad is shown to traverse the territory in question, and on the one hand the commissioners say the company must not charge more than 3 cents, although it will compel a loss of money, and the company says it cannot pay operating expenses at the rates of freight and passenger charges prescribed by the commissioners, or without charging $4\frac{1}{2}$ cents per mile, our opinion is that the action of the commissioners in prohibiting the larger rate is a palpable abuse of their discretion and a trespass upon the rights of the company, and one which, if enforced with the freight rates prescribed, would amount in law and in fact to taking the property of the company without just compensation. It is not a reasonable rate, considered either with reference to the interests of the people or those of the railroad company, or both.

If the enforcement of these rates is persisted in it must end in the dilapidation of the road and imperil the lives and property of the people, and finally destroy an avenue of transportation which conveys persons in from, say, seven to nine hours, and at a cost of, say, \$7.25 (estimating the rate at $4\frac{1}{2}$ cents per mile), over a distance of 161 miles, while, before, it would have taken several days to travel through the same territory by the ordinary roads, at far greater expense, or, in the particular case before us, carrying a passenger twenty-six miles in less than an hour and a half for \$1.25 when, before construction of the road, the only means of conveyance was private conveyance or a hack line, at the slow speed and personal inconvenience incident to such primitive mode of travel, including the passage of a river on an ordinary ferry.

It would be idle to say that we cannot take judicial notice of the ordinary modes of conveyance formerly existing in this section of the country, or that the only means of railroad travel from the western portion of West Florida to the middle and eastern portions of the State were through the adjoining States of Alabama and Georgia.

Whether or not as a matter of fact, the rates prescribed by the railroad commission will, including also its earnings from all sources of commerce beyond the control of such commis-

sioners, pay its operating expenses, is something on which we are not called upon to express an opinion.

What we say is based simply upon the admission made by the demurrer to the third plea. Upon an issue being joined on this plea, every source of income of the railroad company can be inquired into, and the necessity and reasonableness of every expense investigated and settled. It is not, as a matter of fact, to be presumed, outside the admissions of this demurrer, that the commissioners would impose upon this railroad a rate of three cents under the circumstances indicated by the plea, if they thought, considering also the rates of freight adopted by them, that the company could not pay its operating expenses without charging at the passenger rate it has charged in this case.

Under the statute the burden will be upon the company to make out a *prima facie* case sustaining its plea before the State will be called upon to introduce any evidence; and if this be done by the company, the State must then, through the instrumentality of its commissioners and any other proper means, establish the justice of the action of the commissioners in fixing the schedule of passenger and freight rates, against the arraignment which the company has made of them in its third plea.

Although what we have said assumes that the Legislature either cannot or has not, by the statute, shut out all judicial inquiry as to whether the commissioners by their action may deprive a common carrier of any constitutional right, or have exceeded the powers given them, yet it is proper to say a few words on the subject.

"Sufficient," as defined by Webster, means "adequate to suffice; equal to the end proposed; competent." Whether in view of this definition the word *sufficient*, as used in the statute, can be held to mean conclusive, may be a subject of debate if we look simply at the language just quoted from the statute.

In prescribing the powers of the commissioners the statute has authorized and required them to make "reasonable and just" rates of freight and passenger tariffs, and to make schedules "of just and reasonable" rates.

Another section of the statute enacts that if a railroad company shall willfully charge more than "a fair and reasonable rate of toll or compensation for the transportation of passengers or freight," it shall be deemed guilty of extortion.

It is apparent throughout the Act, as is shown by extracts from it in the first pages of this opinion, that the purpose of the Legislature was to secure nothing but reasonable and just rates; and in this the statute is in harmony with the Constitution. The purpose of the provision making the schedules evidence was not to define the powers of the commissioners; it was to make or declare a rule of evidence, and relieve the State or person suing a railroad company, under the Act, from the burden of proving all the facts and details which would otherwise be necessary to entitle the plaintiff to a recovery in the absence of evidence in behalf of the company.

All facts and details as to rates lie more peculiarly in the knowledge of the railroad company, and it is entirely reasonable that it

should be visited with the burden of overthrowing the correctness of any rates established by a commission by the introduction of such facts and circumstances. The purpose of this provision being, then, a means adopted, not to secure reasonable and just rates, but to relieve the plaintiff from a more onerous rule of evidence, we think that sufficient does not mean "conclusive."

Again, the harshness of the rule that a schedule shall be conclusive, would itself tend against such construction, where there is any doubt. To authorize and require a ministerial body to make reasonable and just rates, and yet provide that proof of its action thereunder shall be conclusive evidence that their action was proper, and, no matter what the circumstances, that they could not be inquired into or questioned, would be very extraordinary legislation.

The questionable character of any such legislation favors, of itself, a different construction. *Chicago & A. R. Co. v. People*, 67 Ill. 11.

In our opinion the effect of the provision was to provide a new mode of proving the reasonableness and just character of the rates, and make such proof competent and adequate evidence of the correctness of the action of the commissioners, in the absence of countervailing proof that they have exceeded their powers or clearly abused their discretion and invaded some right of the railroad company. There is nothing in *Georgia Railroad Company v. Smith*, 70 Ga. 694, inconsistent with this view.

It is argued that the State has granted to the appellant company more than 3,000,000 acres of lands, to say nothing as to lands inuring to it from the general government, and that this large grant of land was the security upon which appellant reposed, together with future earnings, when it constructed a railroad through a country with only eight inhabitants to the square mile.

It is true, that by one section of the Charter Act of this company, the State granted to it, "to aid in the construction of the road, the alternate sections of lands lying within six miles of and on each side of the road, granted by the United States to this State by the Act of September 28, 1850," commonly known as the Swamp Land Act; and by another section it granted to the company, "in consideration of the benefits that will accrue to the State from the construction of such railroad," 20,000 acres per mile, for each mile the company may grade, cross-tie and iron, the lands to be of those granted to the State by said Act of Congress, and lying "nearest the line of said railroad and extensions, and not otherwise granted."

There is nothing in the pleading of this case to indicate what quantity of land, if any, has been actually received by the company under either of these grants; nor upon this demurrer, or the entire pleadings, can we assume that the rates have been fixed by the commission with regard to the reception by the company of any land under such grants.

It would, in view of the pleadings and the consequently limited attention given the subject in argument, be entirely gratuitous for us to say anything as to what part the land grant can properly play in the matter of fixing

rates. Upon issues properly made up, in fact upon an issue joined on this plea, if it be that the land or any of it actually received by this company is applicable to expenses of operation, or would otherwise go to a reduction of rates to be charged the people, on passenger or freight transportation, it can be shown in support of such rates, should it become necessary to do so.

The same may be said as to the lands granted to the State by the Act of Congress of May 17, 1856, which the 16th section of the company's Charter Act provides the company shall have.

The demurrer of the State, in so far it is applicable to the third plea, should have been overruled.

II. The fourth plea sets up a series of facts, which are claimed to constitute a defense to the action, and are alleged to have been presented to the commissioners and the board of revisers as reasons against the enforcement of their rates. They are:

(a.) The railroad was completed in April, 1883, when the company began to operate it, and is 161 miles long. Its construction and equipment cost \$3,345,080. That the commissioners' rates are very much less than those heretofore charged by the company, and the company has failed to realize from the operation of its road, upon the latter charges, enough to meet the necessary expenses of the operation and ownership of the road, and the operation of the road from April, 1883, has been prudent, economical and judicious, and with an eye single to the increase of income and decrease of expenditures.

(b.) That from April, 1883, to June 30, 1887 (4½ years), the gross earnings exceeded the bare expenses of operation (including taxes) only by \$52,662.50, or thirty-six and sixteen seventeen hundredths of one per cent per annum upon the actual cost of the road and its equipment; and the cost of the actual and necessary repairs and current employment largely exceeded said ostensible excess of \$52,662.50.

(c.) For the year ending June 30, 1887, the excess of the operating expenses (not including taxes) over the income from all sources, was \$4,234.52. The taxes were \$17,069.15, and with said excess aggregate \$21,303.67.

(d.) For the period from June 30, 1887, to March 1, 1888 (and thereafter in like proportion) the excess of the operating expenses of the road over income from all sources has been \$15,834.87.

(e.) That West Florida, through which the road runs, has only eight inhabitants to the square mile. That along the entire route from Pensacola, a city of 12,000 or 15,000 inhabitants, to River Junction, there are but two towns exceeding 1,000 inhabitants, and but three which exceed 250 inhabitants. The main staple for shipment is lumber, for the transportation of which numerous streams vie with the company at a rate much cheaper than it can afford.

(f.) That the rates of freight and passage over the line of the road from points off to points on, and from points on to points off, are fixed and determined by competition upon a basis much lower than those fixed by the commissioners, and cannot be increased by the defendant.

(g.) That at the beginning of the partial operation of the road, viz., from August 5, 1883, to February 1, 1885, the local rates were follows:

Agents—1st class rates 4½ cents per mile.
Agents—2d class rates 3½ cents per mile.
Conductors—1st class rates 5 cents per mile.
Conductors—2d class rates 4 cents per mile.
Round trip rate 7 cents per mile.

During the existence of these rates nearly 90 per cent of the passengers traveled on the 3½ cent rate. The above rates were found to be entirely unremunerative, and the 3½ and 4 cents rates were abolished on February 1, 1885. That this change did not result, and has not resulted, in the decrease in the number of local passengers, but immediately upon such change the gross income from the transportation of such passengers, which had prior thereto been not only unremunerative, but practically of unvarying amount, increased fifteen per cent for the ensuing year, which increase has been maintained with uniformity since that time.

(h.) That at the beginning of the completed operation of the road, defendant established rates of local freight at a rate deemed by it to be remunerative, which continued in force till January 1, 1885, when, to induce transportation, defendant reduced the rates upon the commodities constituting more than three fourths of the freight, to a point much below the former rates, although above the rates fixed by the commissioners; but this reduction did not cause, and has not caused, any increase in the quantity of freight transported, or in the gross income therefrom, but the income decreased, and has remained less than it was before the reduction.

There are also assertions in the plea to the effect that "in all human probability" the deficits indicated in the first four paragraphs of the plea will continue for some years to come, as the completion of roads having a shorter distance to operate between desirable points to be reached over defendant's road must and will prevent, in a large measure, any increase of through business or through business rates; and that the sparseness of the population and the meagreness of the products to be shipped by rail through the country through which the road runs prevents, and will prevent, any increase in the value of the local business which might otherwise result from a reduced rate; and that a reduction of rates to those prescribed by the commissioners would compel defendant to forego any possibility of earning any interest on its investment or any income from the operation of the road, and to continue the operation of it at an irretrievable loss, and render the line valueless for purposes of either operation or sale. These assertions are, however, rather the expression of opinions and apprehensions than facts admitted by the demurrer.

An admission by the State, or even by the commissioners, of the facts stated in this plea, is not an admission that the rates prescribed by the latter would not be remunerative. As was said by Judge Woods in the *Tilley Case*, a reduction of rates is not always followed by a reduction of income, either gross or net. It can soon be settled which is right—the railroad company's officers or the railroad commission—

in their view of the effect of the latter's tariff rates, by allowing the tariff to go into operation. 4 Woods, 452.

A different management from that now controlling the appellant company might agree with the railroad commissioners and adopt the tariff proposed by them, and yet another management might put in force rates distinct from either. The railroad commissioners must be presumed by the courts to understand railroad business, and to have in careful keeping the real interests of the railroads. The intricacy of the subject of tariff and freight rates, the importance of the interests involved, and the difficulty of courts dealing efficiently with the matter in ordinary suits, even considering merely the time that would be consumed, has led to the establishment and maintenance of commissioners at the expense of the people. Their mission is to do justice as between the people and the railroad companies; they are not expected or presumed to place any restrictions upon a railroad, except those clearly necessary to effect the purposes of the Constitution and the legislation under it. *Georgia R. Co. v. Smith*, 70 Ga. 694.

Where a tariff has been fixed by a commission it must be tested by experiment, unless it is shown or appears upon its face to be destructive of the railroad's interests. Neither the courts nor the railroad company can substitute its judgment for that of the commission where there is room for difference of intelligent opinion. A different rule from this would install a presumption that the commission neither knew their duty nor desired to do it. Like all officers, they will be presumed to know and do their duty until the contrary is shown.

Under circumstances which admit of no difference of opinion, or when it is admitted upon the record, as in the case of the third plea considered above, that the commission rates are unremunerative, their enforcement becomes a wrong, for which there may be no remedy but in the courts; but where there is room for honest judgment as to whether or not such rates will prove remunerative, the judiciary should not interfere. *Avery v. Fox*, 1 Abb. U. S. 246.

When the above case of *Chicago Railroad Company v. Dey* came again before Judge Brewer last February, upon supplemental bill, the facts as presented by the new pleading showed that the effect of the tariff of rates fixed by the commissioners was doubtful, with a seeming probability, however, of their proving compensatory, and the amount of business to be effected was small; he held that the result should be left to the test of experience, and refused a preliminary injunction, and dissolved the restraining order previously made. 5 R. & Corp. L. J. 203.

This is not a good plea.

III. The first plea is that the rate charged for the transportation of the passengers was a reasonable, and the second plea, that the one fixed by the commission was less than a reasonable, rate.

These pleas speak not as to the unreasonableness of the tariffs prescribed by the commissioners, considered as an entirety, but simply as to the passenger rate.

The case of *State v. Chicago Railroad Company*, *supra*, decided by the Supreme Court of Minnesota, is somewhat in point as applicable to these pleas.

As between the railroad company and a passenger, or the former and the State, we do not think that the company can question before the courts a particular tariff, on the simple ground that it is in its judgment unreasonable, or can invoke the interference of the court as against the judgment of the commissioners that it is unreasonable. The courts have no power to make freight and passenger tariffs.

In *Chicago Railroad Company v. Dey*, 5 R. & Corp. L. J. 203, Judge Brewer, in speaking of his former decision in the same case, says (p. 204): in the injunction which was issued there was no assumption of power to prescribe rates, and no pretense of interfering with the commissioners in the discharge of any duties imposed on them by the statute.

In view of the conclusions announced as to the third plea, the judgment in each of the cases mentioned in the first paragraph of this opinion must be reversed, and a new trial granted. Judgments will be entered accordingly.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

WESTERN UNION TELEGRAPH CO.

v.

The MAYOR etc. OF NEW YORK, Jacob Hess *et al.*, Composing Board of Electrical Control.

(....Fed. Rep.....)

1. **State legislation compelling electric wires in the streets of a city to be placed under the surface of the streets**, although such streets, being letter carrier routes, are all post roads, is an exercise of police power, and is not an unlawful attempt to regulate commerce or an invasion of the rights of a

telegraph company as a business agency of the general government under the Act of Congress of July 24, 1866 (U. S. Rev. Stat. title 65), to operate its lines on "any post road of the United States."

2. **The privilege of a telegraph company, which is a business agency of the general government, to maintain its wires along the structure of an elevated railroad in the streets of a city**, such railroad being an independent post road of the United States, cannot be destroyed by state legislation.

3. **A statute confirming a contract between commissioners for placing electric wires underground, and a subway company, to lay subways for such wires**, is none the less an exercise of police power because it gives to such company special

NOTE.—Police power of State, in the regulation of the use of private property, see *State v. Marshall*, 1 L. R. A. 51.

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privileges but no exclusive privileges or franchises.

4. **So long as public officers confine themselves to such duties** as are confided to them by law, the court will not interfere to see whether they are acting wisely or judiciously.

April 12, 1889.)

SUIT in equity to enjoin the municipal authorities of the City of New York from interfering with plaintiff's telegraph wires and from compelling them to be put underground. *Injunction granted as to part only of the wires.*

The case is fully stated in the opinion.

Messrs. John F. Dillon, Wager Swayne, George H. Fearons and Rush Taggart, for complainant:

The court has full jurisdiction to entertain this bill and to grant full relief.

N. O. M. & T. R. Co. v. Miss. 102 U. S. 135, 139 (26 L. ed. 96, 97); *Southern Pac. R. v. Cal.* 118 U. S. 109, 112 (30 L. ed. 103, 104).

The complainant has acquired and now holds vested property rights in the streets of the City of New York.

Telegraph poles set in the ground, and the wires and insulators attached thereto, are real property; they become appurtenant to and form a part of the realty, and are to be treated as such by the court.

Am. U. Teleg. Co. v. Middletown, 80 N. Y. 408; *N. Y. O. & W. R. Co. v. W. U. Teleg. Co.* 36 Hun, 205.

Railway companies, telegraph companies, electric light companies and all other companies formed under the laws giving the Legislature a right of alteration and repeal of their charters, acquiring property under such legislation may have their property rights regulated by subsequent legislation; but these regulations are always subject to the same constitutional restrictions and limitations that apply to the property of private individuals.

Wood, Railway Law, p. 2; *Burlington & M. R. R. Co. v. Spearman*, 12 Iowa, 112; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & J. R. Co.* 85 Mich. 265; *People v. O'Brien*, 111 N. Y. 41; *East St. Louis C. R. Co. v. East St. Louis U. R. Co.* 108 Ill. 265; *Phila. & G. F. Pass. R. Co's App.* 102 Pa. 123; *Central Bridge Corp. v. Lovell*, 4 Gray, 474.

The effect of the legislation sought to be enforced by the defendants against the complainant is to compel the complainant to relinquish its easements in the streets of the City of New York without any compensation therefor, and is invalid.

See *Leleup v. Port of Mobile*, ante, 134, 127 U. S. 640 (32 L. ed. 311); *Cooley*, Const. "Lim. 4th ed. 719. See also *Tiedeman*, Police Power, § 191; *Ill. Cent. R. Co. v. Bloomington*, 76 Ill. 447; *People v. Jackson & M. Pl. Road Co.* 9 Mich. 307; *Com. v. Essex Co.* 13 Gray, 239; *Washington Bridge Co. v. State*, 18 Conn. 53.

This relinquishment is not on behalf of the public, but is for the benefit of the Consolidated Electrical & Subway Company, which is a mere private corporation.

See *Lake Shore & M. S. R. Co. v. Chicago & W. L. R. Co.* 97 Ill. 522.

It is such legislation as creates a monopoly, or grants an exclusive privilege or franchise by a local Act, and is therefore unconstitutional and void.

See opinions of *Judge Allen*, in *People v. Squire*, 1 N. Y. S. R. 634; and *Judge Freedman*, in *N. Y. Electric Lines Company v. Crimmins*, MS. Op. N. Y. Sup. Ct. Sp. Term, Nov. 4, 1886.

The court will look to the practical effect of the contract and legislation.

Astor v. N. Y. Arcade R. Co. 22 N. Y. S. R. 1. See *Johnston v. Spicer*, 9 Cent. Rep. 563, 107 N. Y. 187.

The police power can never justify the transfer of private property to a stranger without the owner's consent; and the power claimed by the board of electrical control under this statute is nothing short of a power to transfer the earnings and property rights of the complainant to the subway company without the complainant's consent.

See *Langdon v. Mayor of N. Y.* 93 N. Y. 129, 151; *Re Deering*, 93 N. Y. 361; *Re Jacobs*, 98 N. Y. 98; *N. O. Gaslight Co. v. La. Light & H. Co.* 115 U. S. 650, 662 (29 L. ed. 516, 521).

The effect of the acceptance of the provisions of the Act of 1866 was to make the complainant an agent of the United States, in respect to the transmission of government messages of all sorts; and also it is an instrumentality of interstate commerce. Under this twofold aspect it is entitled to certain rights as against the operation of even the police power of the States.

See *W. U. Teleg. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067); *W. U. Teleg. Co. v. Atty Gen. of Mass.* 125 U. S. 530 (31 L. ed. 790).

Messrs. Platt & Bowers, Henry R. Beekman, and David J. Dean, for defendants:

Every federal decision giving effect to the rights of telegraph companies under the Act of 1866 or under the provisions of the Constitution as to commerce has carefully protected the rights of the States in their ownership of property and their power to make their own police regulations.

See *Pensacola Teleg. Co. v. W. U. Teleg. Co.* 96 U. S. 1 (24 L. ed. 708); *W. U. Teleg. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067); *W. U. Teleg. Co. v. Atty-Gen. of Mass.* 125 U. S. 530 (31 L. ed. 790); *Ratterman v. W. U. Teleg. Co.* 127 U. S. 411 (32 L. ed. 229); *Leleup v. Port of Mobile*, ante, 134, 127 U. S. 640 (32 L. ed. 311).

The Acts of the Legislature of the State of New York, chap. 499 of the Laws of 1885 and chap. 716 of the Laws of 1887, are reasonable police regulations.

Kidd v. Pearson, ante, 232, 128 U. S. 1 (32 L. ed. 346); *U. S. v. Dewitt*, 76 U. S. 9 Wall. 41 (19 L. ed. 593); *Slaughter House Cases*, 83 U. S. 16 Wall. 62 (21 L. ed. 404).

It is the established law of the land that the police power regulations which do not interfere with the exercise of the control of Congress over foreign and domestic commerce appertain to the States and will be enforced and sustained in the federal court.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 203 (6 L. ed. 23); *N. Y. City v. Miln*, 36 U. S. 11 Pet. 102, 139 (9 L. ed. 648). See *U. S. v. Cruik-*

shank, 92 U. S. 542 (23 L. ed. 588); *Presser v. Ill.* 116 U. S. 266 (29 L. ed. 619); *Mugler v. Kan.* 123 U. S. 623 (31 L. ed. 205).

For definitions of the police power—

See Tiedeman, *Police Power*, p. 1. See also *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Cooley*, Const. Lim. 572; *State v. Yeses*, 47 Maine, 189.

The deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated police powers.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470 (24 L. ed. 529); *Patterson v. Ky.* 97 U. S. 501 (24 L. ed. 1115); *Webber v. Va.* 103 U. S. 314 (26 L. ed. 565); *Thomson v. Union Pac. R. Co.* 76 U. S. 9 Wall. 579 (19 L. ed. 792); *First Nat. Bank v. Ky.* 76 U. S. 9 Wall. 362 (19 L. ed. 703); *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 (21 L. ed. 787).

For examples of cases analogous and similar to the present police regulation, see—

5 Op. Atty-Gen. 554; *U. S. v. Hart*, 1 Pet. C. C. 390; *Mutual U. Teleg. Co. v. Chicago*, 16 Fed. Rep. 309; *Atchison, T. & S. F. R. Co. v. Shaft*, 33 Kan. 521, 19 Am. & Eng. R. Cas. 529; *Clark v. Boston & M. R. Co.* (N. H.) 5 New Eng. Rep. 48, 31 Am. & Eng. R. Cas. 548; *Smith v. Boston & M. R. Co.* 63 N. H. 25; *Munn v. Ill.* 94 U. S. 113 (24 L. ed. 77); *License Cases*, 46 U. S. 5 How. 583 (12 L. ed. 256).

A State has a right, as a measure of police protection, to require the discontinuance of any manufacture or traffic.

Boston Beer Co. v. Mass. 97 U. S. 25 (24 L. ed. 989); *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 (32 L. ed. 585); *Hewett v. Western Union Teleg. Co.* 4 Mackey, 437.

The complainant has acquired no vested rights in the streets of the City of New York.

In the first place, there is no proof in the case that any of its poles have stood for twenty years; in the next place, they are there by mere license, being placed in the streets under no claim of right or title, but in pursuance of the privileges conferred by the Act of 1848.

See *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108; *Flora v. Carbean*, 38 N. Y. 111; *Wiseman v. Luksinger*, 84 N. Y. 31; *White v. Spencer*, 14 N. Y. 247; *Burbank v. Fay*, 65 N. Y. 57; *Blanchard v. W. U. Teleg. Co.* 60 N. Y. 510.

There can be no ownership of property in this State that is not subject to police regulation.

People v. Squire, 10 Cent. Rep. 437, 107 N. Y. 593, 604-606; *Mugler v. Kan.* 123 U. S. 664 (31 L. ed. 211).

The Acts of the Legislature of the State of New York in question have been considered by the courts of this State and held constitutional.

People v. Squire, 10 Cent. Rep. 437, 107 N. Y. 593; *Brown v. N. Y.* 63 N. Y. 244.

Wallace, J., delivered the following opinion:

This case presents the general question whether certain acts of the municipal authorities of the City of New York, respecting matters of grave local concern, done or about to be done pursuant to powers devolved upon them by the Legislature of the State, are such

an invasion of the paramount authority of the National Government as to render them unwarranted.

The mere statement of this proposition shows that the complainant has properly invoked the jurisdiction of this court, and has a right to rely upon its interposition by injunction if the acts of the defendants are thus unwarranted, are injurious to the complainant, and are of a nature remediable by courts of equity.

Telegraph companies that have accepted the restrictions and obligations of the law of Congress of July 24, 1866 (title 65, U. S. Rev. Stat.) become as to government business agencies of the general government, and are given the privilege to "construct, maintain and operate" lines of telegraph over and along any post road of the United States, but not so as to interfere with "the ordinary travel" on such roads.

All the streets of the City of New York are post roads, because they are letter-carrier routes, and all railroads are post roads. Rev. Stat. § 3964.

The complainant accepted the provisions of this law of Congress in 1867.

A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself. Telegraph companies are subject to the regulating power of Congress in respect to their foreign and interstate commerce, and this power resides exclusively in Congress.

The complainant has long been engaged in interstate and foreign commerce. In the course of its operations the complainant has lawfully erected its poles and strung its wires in and along many of the streets of New York City, which, as has been stated, are post roads of the United States; and it has also put up and now maintains over and along other streets a number of wires upon the structures of the Manhattan Railway Company, an elevated railway of the city, also a post road, pursuant to a lease from the railway company.

The defendants, assuming to proceed by the sanction and mandate of certain Acts of the State Legislature, have compelled the complainant to remove its poles and wires from some of the streets, and have notified it to remove them from other streets, and to remove its wires from the structures of the elevated railway; and they propose, if the complainant fails to comply with these requirements, to remove the poles and wires themselves.

Under these circumstances, the complainant asks this court to examine the authority under which this destruction of its property is threatened, and determine whether there is any justification in law for acts which apparently invade its privilege to maintain and operate its lines upon the post roads of the United States, interfere with its operations as a government agent, and interrupt and impede the discharge of its functions as an instrument of interstate and foreign commerce.

It is not open to discussion that the complainant is protected by the national authority against any encroachment under state authority upon the rights and immunities expressly granted to it by the Act of Congress, or which it enjoys in its dual capacity as an agent of the

general government and an instrument of interstate and foreign commerce.

Speaking of the privilege conferred upon telegraph companies by the Act of Congress, the Supreme Court of the United States in *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 1, 11 [24 L. ed. 708, 711], used this language: "It gives no foreign corporation the right to enter upon private property without the consent of the owner and erect necessary structures for its business; but it does provide that whenever the consent of the owner is obtained no state legislation shall prevent the occupation of post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges."

Indeed, the language of one of the very latest opinions of that court upon the question of the power of the State to interfere with the right of a telegraph company to maintain and operate its lines along a post road applies to the specific facts of this case, and, if literally interpreted, would control the present decision. The question before the court was as to the power of a State to tax the real and personal property, within the State, of a telegraph company which had accepted the provisions of the Act of Congress; but the court, while holding that the privilege granted did not exempt the telegraph company from such taxation, said:

"While the State could not interfere by any specific statute to prevent a corporation from placing its lines along a post road, or stop the use of them after they were placed there, nevertheless, the company receiving the benefit of the laws of the State for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person would be." *W. U. Teleg. Co. v. Atty. Gen. of Mass.*, 125 U. S. 530, 548 [31 L. ed. 790, 793].

Concerning the immunity of the complainant as an agent of the general government for the transaction of government business from an unwarranted interference through state legislation with its operations, the doctrine first enunciated in *McCulloch v. Maryland*, 17 U. S. 4 Wheat. 316 [4 L. ed. 579], and reiterated in subsequent adjudications whenever the question has arisen, is familiar that the States have no power by taxation or otherwise to retard, impede, burden or in any manner control the agencies of the Federal Government, and they are exempted from the effect of state legislation, so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government.

Respecting the position of the complainant as an instrument of interstate and foreign commerce, it suffices to quote the language of the supreme court in one of the more recent cases in which the question was considered:

"Notwithstanding what is there said (in previous judgments) this court holds now, and has never consciously held otherwise, that a statute of the State intended to regulate, or to tax, or to impose any other restriction upon, the transmission of persons or property or telegraph messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void, even as to that

part of such transmission which may be within the State." *Wabash, St. L. & P. R. Co. v. Ill.*, 118 U. S. 557 [30 L. ed. 244].

Nevertheless, persons and corporations enjoying grants and privileges from the United States, exercising federal agencies and engaged in interstate commerce, are not beyond the operation of the laws of the State in which they reside or carry on their business; and it is only when these laws incapacitate or unreasonably impede them in the exercise of their federal privileges or duties, and transcend the powers which each State possesses over its purely domestic affairs, whether of police or internal commerce, that they invade the national jurisdiction.

This doctrine is well expressed in the words of the supreme court in *Patterson v. Kentucky*, 97 U. S. 501, 504 [24 L. ed. 1115, 1116], as follows:

"By the settled doctrines of this court the police power extends at least to the protection of the lives, the health and the property of the community against the injurious exercise by any citizen of his own rights. State legislation, strictly and legitimately for police purposes, does not in the sense of the Constitution, necessarily intrench upon any authority which has been confided, expressly or by implication, to the National Government."

The statutes which the defendants are proceeding to enforce unquestionably belong in the category of police regulations, the power to establish which has been left to the individual states. But statutes of this class may sometimes trench upon the federal jurisdiction; and when their provisions extend beyond a just regulation of rights for the public good and unreasonably abridge or burden the privileges which the national authority conserves, they cease to be operative. The State, when providing by legislation for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government. *Mugler v. Kan.* 123 U. S. 623, 663 [31 L. ed. 205, 211].

In *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 462 [30 L. ed. 241], the supreme court says: "In all cases of this kind it has been repeatedly held that when a question is raised whether the state statute is a just exercise of state power, or is intended by roundabout means to invade the domain of federal authority, this court will look into the operation and effect of the statute to discern its purpose." And again the court says (page 464):

"For while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that where such powers are so exercised as to come within the domain of federal authority, as defined by the Constitution, the latter must prevail."

Applying these principles, it is now to be considered whether the statutes in question or the acts of the defendants under them can be defended under the state power of police regu-

lation, or whether what is proposed to be done exceeds in any respect the boundaries of legitimate regulation and encroaches upon the rights of the complainant founded upon the law of Congress or incidental to the nature of its commerce.

By chapter 534 of the Laws of 1884 it was enacted, in effect, that all electric wires and cables in any city having a population of 500,000 or over should be placed under the surface of the streets, and the persons controlling the same should, by a specified date, have the same removed from the surface; and the local governments of such cities were authorized to remove such wires and cables wherever found above ground in case the owner failed to comply with the provisions of the Act.

By chapter 499 of the Laws of 1885 a board of commissioners of electrical subways was created for such cities, and charged with the duty of enforcing the provisions of the previous Act; and power was conferred upon them to devise and make ready a general plan of under-ground conduits, and to compel all companies operating electric wires to use the subways so prepared. They were also empowered to allow the wires to remain above ground when compatible with the public interest.

In April, 1887, the Commissioners for the City of New York entered into a contract with the Consolidated Telegraph & Electric Subway Company to lay subways in the City of New York for use of all the electrical companies, when furnished with plans and specifications therefor by the commissioners. This contract authorized the subway company to charge a rental for the use of the subways, and contained provisions reserving such control in the commissioners over them as were calculated to secure to all companies desiring to use them reasonable facilities and protection. It contained a provision by which all companies occupying space in the subways were to own their own conductors and have the full management and control thereof, subject to the rights of all other occupants and to such reasonable rules and regulations as should be made by the commissioners. It also contained a stipulation that the commissioners would use all lawful means to compel all companies to place their conductors in the subways and pay a fair rental for the use.

By chapter 716 of the Laws of 1887 the Legislature ratified and confirmed the contract made between the commissioners and the subway corporation, and the Act provided that if at any time the agreement should be found inoperative or ineffectual for the accomplishment of its just purposes the commissioners were empowered to make such new or different contracts with the same or other parties as might be reasonably necessary.

The Act also contained a provision authorizing an application to be made to the courts for a mandamus whenever it appears that the subway corporation or the commissioners have failed to furnish just and equal facilities to any company operating electrical conductors upon just and reasonable terms. By sections 3 and 4 it declared as follows:

"Section 3. Whenever, in the opinion of the board hereinbefore constituted, in any street or locality of said city a sufficient construction of
2 INTER S.

conduits or subways underground shall be made ready under the provisions of this Act, reference being had to the general direction and vicinity of the electrical conductors then in use overhead, the said board shall notify the owners or operators of the electrical conductors above ground in such street or locality to make such electrical connections in said street, or through other streets, localities or parts of the city, with such under-ground conduits or subways, so specified, as shall be determined by the said board, and to remove poles, wires or other electrical conductors above ground, and their supporting fixtures or other devices, from said street and locality within ninety days after notice to such effect shall be given. This provision is made a police regulation in and for the City of New York; and in case the several owners or operators of such wires and the owners of such poles, fixtures or devices shall not cause them to be removed from such street or locality as required by such notice, it shall be the duty of the commissioner of public works of said city to cause the same to be removed forthwith by the bureau of incumbrances, upon the written order of the mayor of said city to that effect.

"Section 4. It shall be unlawful, after the passage of this Act, for any corporation or individual to take up the pavements of the streets of said city or to excavate in any of said streets, for the purpose of laying under ground any electrical conductors, unless a permit, in writing, therefor shall have been first obtained from the said board or its predecessors; and, except with such permission, no electrical conductors, poles or other fixtures, or devices therefor, nor any wires shall hereafter be continued, constructed, erected or maintained or strung above ground in any part of said city. The said board of electrical control may establish, and from time to time may alter, add to or amend all proper and necessary rules, regulations and provisions for the manner of use and management of the electrical conductors, and of the conduits or subways therefor, constructed or contemplated under the provisions of this Act, or of any Act herein mentioned."

It was said of the Acts of 1884 and 1885, by the court of appeals (*People v. Squire*, 107 N. Y. 593, 10 Cent. Rep. 437) that they sprung out of a great evil, which in recent times has grown up and afflicted large cities by the multiplication of rival and competing companies, organized for the purposes of distributing light, heat, water, the transportation of freight and passengers, and facilitating communication between distant points, and which require in their enterprises the occupation of, not only the surface and air above the streets, but indefinite space under ground. This evil had become so great that every large city was covered with a network of cables and wires attached to poles, houses, buildings and elevated structures, bringing danger, inconvenience and annoyance to the public.

The necessity for a remedy for these public annoyances had long been felt, and it finally culminated in the enactment of the several statutes referred to. These statutes were obviously intended to restrain and control, as far as practicable, the evils alluded to, by requir-

ing all such wires to be placed under ground in such cities, and be subject to the control and supervision of local officers who could reconcile and harmonize the claims of conflicting companies and obviate in some degree the evils which had grown to be almost if not quite intolerable to the public.

The Act of 1887, by validating the contract between the commissioners and subway company, in effect incorporated the terms of that contract into its provisions. But the statute is none the less an exercise of the police power, and within the competency of the Legislature, because of the special privileges given to the subway company.

It has been urged that in effect this statute confiscates property rights of the complainant and other companies owning electric wires, by depriving them of their easements for the benefit of the subway company, and, therefore, cannot be sustained as an exercise of police power. But in the *Slaughter House Cases*, 83 U. S. 16 Wall. 36 [21 L. ed. 394], the supreme court upheld a statute far more obnoxious to these objections than the present Act. In that case the statute under consideration was one passed by the Legislature of Louisiana, granting to a corporation created by it the exclusive right for twenty-five years to have and maintain slaughter houses, landings and yards for inclosing cattle intended for sale or slaughter within certain parishes of that State, including the City of New Orleans, prohibiting all other persons from building, keeping or having slaughter houses, landings or yards for cattle intended for sale or slaughter, requiring that all cattle intended for sale or slaughter should be brought to the yards and slaughter houses of the corporation, and authorizing the corporation to exact certain fees for each animal slaughtered. This Act was sustained as a police regulation by the court.

It has also been objected to the Act of 1887, that it contravenes section 16 of article III. of the State Constitution, prohibiting the Legislature from passing any local bill granting to any corporation any exclusive privilege, immunity or franchise. Without intending to intimate that such a question is properly to be considered by this court in the present case, it is proper to say that the objection seems to be without substance.

There is nothing in the contract with the subway company which precludes the commissioners from building subways, or entering into contracts with other companies for building them, similar to the one made with the subway company. The contract only extends to such subways as the commissioners shall direct the subway company to build; and it provides in express terms that nothing in it shall be construed as granting to the subway company any exclusive privileges or franchise.

The question, then, is whether or not these statutes unreasonably abridge or burden privileges and immunities which the complainant derives from the general government. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and these statutes are to be judged by the extent of the powers which they confer, and treated as police regulations only to the extent to which their operations can be

justified by the police power of the State. Undoubtedly in carrying them into effect the complainant will be subjected to great expense, the temporary interruption of its business, and possibly to permanent inconvenience and loss in conducting its business. But, after all, the question is merely one of the reasonableness of the regulation, and whether the losses and inconveniences to which the complainants may be subjected are not such as may justly be exacted of every citizen or property owner for the common good.

It is a settled principle, "growing out of the nature of well ordered society, that every holder of property, however absolute or unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Com. v. Alger*, 7 Cush. 53.

This liability is quite irrespective of the source or character of his title. Thus, the owner of a patent for an invention, property which is created and only exists by force of the statutes of the United States, can only enjoy his property "subject to the complete and salutary power, with which the States have never parted, of so defining and regulating the sale and use of property within their respective limits as to afford protection to the many against the injurious conduct of the few." *Patterson v. Ky.* 97 U. S. 501 [24 L. ed. 1115].

The subordination of the property rights of the owner to the just exercise of the police power of the State is as complete as it is to the taxing power of the State which requires him to contribute his proportion of the burden of taxation. Indeed, the two powers of regulation are co-ordinate and coextensive, and the limitations upon one may well be ascertained by the limitations upon the other.

As is said by the court in *Kidd v. Pearson*, 128 U. S. 1 [32 L. ed. 346, and *ante*, 232]: "The police power of the State is as broad and plenary as is the taxing power; and property within the State is subject to the operation of the former so long as it is within the regulating restrictions of the latter."

And in a very recent adjudication it has been stated that the property within the State, of a telegraph company, privileged under the law of Congress to maintain and operate its lines over the post roads of the United States, is subject to the exercise of these two powers.

In *Western Union Telegraph Company v. Atty-Gen. of Mass.* 125 U. S. 548 [31 L. ed. 793], the court says: "It never could have been intended by the Congress of the United States, in conferring upon a corporation of one State the authority to enter the territory of any other State and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the State to which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

It is not apparent how the regulation proposed impairs in any just sense the privilege granted to the complainant by the law of Congress. The privilege to maintain telegraph wires "over and along" post roads is not to be construed so literally as to exclude regula-

tions by the State respecting location and mode of construction and maintenance, which the public interests demand, but is to be construed so as to give effect to the meaning of Congress, which was to grant an easement that would afford telegraph companies all necessary facilities and which, to that extent, should be beyond the reach of hostile legislation by the States.

Thus interpreted, the grant is no more invaded when the regulation requires the wires to be placed in conduits under ground than it would be if they were required to be placed in conduits along the surface of the streets; and when this becomes necessary for the comfort and safety of the community such a regulation is as legitimate as one would be prescribing that the poles should be of a uniform or designated height, or should be located at given distances apart, or at designated places along the streets. Regulations of an analogous character and entailing nearly as onerous and expensive burdens upon the property owner are those by which railroad companies have been compelled to maintain fences and cattle guards; and in the instances where the competency of such regulations has been considered by the supreme court it seems never to have been suggested that they were an unreasonable interference with the post roads of the United States or the agencies of the Federal Government, or with the power of Congress to regulate commerce. *Mo. Pac. R. Co. v. Humes*, 115 U. S. 512 [29 L. ed. 463]; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26 [32 L. ed. 585], 9 Sup. Ct. Rep. 207.

The legislation in question does not contemplate any regulation which is not practically feasible; but what is prescribed, if judicially enforced, can be complied with by the companies operating electric wires without serious detriment to their instrumentalities. The expense and the temporary or occasional interruptions and inconveniences which are incident to the scheme proposed constitute the extent of their sacrifice for the general comfort and convenience.

Such legislation does not infringe upon the power of Congress to regulate commerce, or upon the exemption of the agencies of the general government from state control.

The reports of the decisions of the supreme court abound with cases illustrating the rule that all local arrangements and regulations respecting highways, railroads, bridges, canals, ferries and wharves within the State, their location, supervision and details of management, though materially affecting commerce, both internal and external, and thereby incidentally operating measurably upon the transaction of interstate commerce, are within the power and jurisdiction of the several States.

When the regulations do not act upon the commerce through the local instruments to be employed after coming within the State, but directly upon business as it comes into the State from without or goes out from within, they are nugatory; otherwise they are valid. The most frequent illustrations are found in the exercise of the taxing power of the State; and the distinction has always been observed, though in many cases the line has seemed obscure, between taxation or regulation of com-

merce itself and of subjects which are merely auxiliary.

So with respect to state legislation which touches the instrumentalities of federal agencies. These agencies are exempt from state control by police regulation, or by the exercise of the taxing power, so far only as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve the government. *First Nat. Bank v. Ky.* 76 U. S. 9 Wall. 353 [19 L. ed. 701]; *Union Pac. R. Co. v. Peniston*, 85 U. S. 18 Wall. 5 [21 L. ed. 787].

What has thus been said of these statutes has been confined to their effect as authorizing the municipal authorities to compel complainant to remove its poles and wires from the streets to the subways. There is serious doubt whether the powers conferred by these statutes are not nugatory, to the extent that they permit the complainant to be deprived of its right to maintain and operate its wires upon the structure of the elevated railway. That railway is an independent post road of the United States, in legal contemplation, carved out of the streets upon which its structures are erected; and state legislation, under whatever power it may be classified, is impotent to destroy the privilege given by the Act of Congress.

The power to remove the wires altogether from these structures, and to refuse to permit them to be kept there under any circumstances, is not regulation, but is equivalent to a complete denial of the privilege. Such a power would seem to be as obnoxious to the federal privilege as that which was attempted to be exercised by the State of Florida, in the statute considered by the supreme court in the case of *Pensacola Teleg. Co. v. W. U. Teleg. Co.* 96 U. S. 1 [24 L. ed. 708].

The effect of that statute was to preclude a telegraph company from constructing and operating its lines along the railroad of the Alabama & Florida Railroad Company, and to that extent the courts held it to be inoperative.

Whether this conclusion is sound or not, inasmuch as the maintenance of the wires of the complainant upon the structures of the railway company is not at present attended with any public inconvenience, and the question is one of sufficient novelty and importance to be considered by the court of last resort, any doubt should be resolved in favor of the complainant for the purpose of its temporary protection.

It is alleged by the complainant that in proceeding to enforce these statutes the defendants are attempting to compel it to place its wires in some of the subways of the subway company, which are insufficient and defective to a degree that will seriously affect the workings of its wires. It is needless to say that the defendants deny this averment.

However the fact may be, the defendants are not acting *mala fide*; and as they are exercising discretionary powers as public officers, which are lawful within the scope of their authority, the exercise of that discretion, in good faith, will not be reviewed by a court of equity, and their determination is conclusive.

The well settled doctrine concerning the exercise of duties by public officers is that so long as they confine themselves to such as are

confided to them by law the court will not interfere to see whether they are acting wisely or judiciously. *Gaines v. Thompson*, 74 U. S. 7 Wall. 347 [19 L. ed. 62]; High, Inj. § 1240; 2 Story, Eq. 13th ed. § 955.

An order will be entered denying an injunction and vacating the stay heretofore granted as re-

spects the removal of the complainant's poles and wires from the streets, and granting an injunction against any interference by the defendants with complainant's use of the structures of the Manhattan Railroad Company for operating and maintaining its lines.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI.

UNITED STATES
v.
GEORGE K. TOZER.

1. **Unjust discrimination** by carrier, how proven.
2. **Unreasonable preference or advantage, or undue or unreasonable prejudice or disadvantage**, involves the question whether the service was rendered under substantially similar circumstances and conditions. More traffic furnished by one than by the other does not render them dissimilar; and it is for the jury to say whether a difference of 12 cts. per 100 pounds between a local rate of a carrier and its proportion of a through rate including another road was unreasonable.

(June 1, 1889.)

ON TRIAL of defendant upon an indictment for violation of Sections two and three of the Interstate Commerce Act.

See same case, on demurrer to the indictment, *ante*, p. 422 and *note*.

Thayer, Dist. J.—Charge to the jury.

Gentlemen of the Jury:—Section two of the Interstate Commerce Act reads as follows:

“If any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, . . . or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered . . . in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons, for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby declared to be unlawful.”

The first count of the indictment is framed under section 2 and charges, in substance, that defendant, as agent of the Missouri Pacific Railway Company, collected and received of the Hayward Grocery Company for the transportation of sugar from Hannibal, Mo., to Hepler, Kansas, more than he charged the Chicago, Burlington & Quincy Railroad Company for a like and contemporaneous service rendered under similar circumstances and conditions.

In arriving at a verdict on this count you must consider and determine the four following questions:

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1st. Was defendant agent of the Missouri Pacific Railway Company at Hannibal, Missouri, June 15 and 17, 1887?

2d. Did he, while acting in the capacity of agent for the Missouri Pacific Railway Company, on June 17, 1887, willfully collect or receive from the Hayward Grocery Company forty-six cents per 100 pounds for the transportation of one barrel of sugar over the line of the Missouri Pacific Railway Company from Hannibal, Missouri, to Hepler, Kansas, or knowingly or willfully suffer or permit any subordinate agent of the road who worked under his direction and supervision to charge and collect such sum for such service?

3d. Did the defendant on June 15, 1887, knowingly and willfully charge or demand of the Chicago, Burlington & Quincy Railroad only thirty-four cents per 100 pounds for the transportation of two barrels of sugar from Hannibal, Missouri, to Hepler, Kansas, or knowingly and willfully suffer or permit a subordinate agent of the Missouri Pacific Railway Company who worked under his supervision and orders to charge the Chicago, Burlington & Quincy Railroad such rate between the points named?

4th. Was the charge so made the Chicago, Burlington & Quincy Railroad for transportation of two barrels of sugar a charge for a service like that rendered the Hayward Grocery Company, and was it also a contemporaneous service, rendered under conditions and circumstances substantially similar to the circumstances and conditions attending the service rendered the Hayward Grocery Company?

If you answer all the above questions in the affirmative, convict on the first count.

If you answer either question in the negative, acquit on the first count.

Section three of the Interstate Commerce Act is as follows: “It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any . . . person, company, firm, corporation, or locality, or any . . . description of traffic, in any respect whatsoever, or to subject any . . . person, firm, company, corporation or locality . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.”

The second and third counts of the indictment are framed under the third section; the second count charging in substance that defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference and advantage over the Hayward Grocery Company in rates on sugar; and the third count charging that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice, by giving the Chicago, Burlington & Quincy Railroad a lower rate on

sugar than was given the Hayward Grocery Company.

In arriving at a verdict on the second and third counts, you will have to consider and determine the same questions, among others, that arise under the first count—that is to say:

1st. Was defendant an agent of the Missouri Pacific Railway Company?

2d. Did he charge the Hayward Grocery Company forty-six cents per 100 pounds for transporting sugar from Hannibal, Mo., to Hepler, Kansas?

3d. Did he charge the Chicago, Burlington & Quincy Railroad Company only thirty-four cents per 100 pounds for transporting sugar from Hannibal, Missouri, to Hepler, Kansas; and

4th. Was the service rendered the Chicago, Burlington & Quincy Railroad a like and contemporaneous service to that rendered the Hayward Grocery Company, and was it rendered in the transportation of a like kind of traffic, under "circumstances and conditions" substantially similar to those attending the service rendered the Hayward Grocery Company?

The second count of the indictment charges that the defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference; and the third count charges that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice and disadvantage; but the court holds, and so instructs you, that if the defendant charged the Hayward Grocery Company a greater rate than it charged the Chicago, Burlington & Quincy Railroad for a "like contemporaneous service" done under "substantially similar circumstances and conditions," then such act was, within the meaning of the law, both an undue and unreasonable preference and advantage given to the Chicago, Burlington & Quincy Railroad, and an undue and unreasonable prejudice or disadvantage to which the Hayward Grocery Company was subjected.

Therefore if you find in the affirmative on all four of the questions that I have proposed and before stated, you must return a verdict of guilty on the second and third counts as well as on the first count.

Now, gentlemen, I presume you will have no difficulty in answering the first three of the questions, as they are simple questions of fact.

The fourth proposition is more difficult, because it involves the inquiry as to what is meant by the Statute when it speaks of "a like and contemporaneous service in the transportation of traffic under substantially similar circumstances and conditions."

It is impossible for me to explain that phrase in a manner that will fit all cases—hence I shall not attempt it.

I will take the precise case that you have to decide and in view of the facts testified to, give you a few directions with respect to the clause in question.

In the first place the service rendered to the Hayward Grocery Company on June 17, 1887, was contemporaneous with that rendered to the Chicago, Burlington & Quincy Railroad on June 15, 1887, within the meaning of the Law.

In the second place the service so rendered for the Hayward Grocery Company was like that alleged to have been rendered to the Chicago,

Burlington & Quincy Railroad within the meaning of the Law, because the same kind of property was carried for each party for the same distance over the same route.

The next question is—Was the service in both cases rendered under substantially similar circumstances and conditions? This is the vital point.

The defendant says the circumstances and conditions were substantially dissimilar because the Chicago, Burlington & Quincy Railroad Company furnished more traffic, or if not more traffic, nearly as much traffic to the Missouri Pacific Railway Company as the Hayward Grocery Company and all other Hannibal shippers combined.

Well, suppose that to be the fact. It did not, under the Law, render the service to the Chicago, Burlington & Quincy Railroad a service rendered under substantially dissimilar circumstances and conditions to that rendered for the Grocery Company, within the meaning of the Interstate Commerce Law, and did not justify a difference in rate.

The fact that one man is a large shipper and another a small shipper does not entitle the carrier to make a difference in the rate, if the property carried in each case is of the same class, and the distance and route is the same.

Defendant next says the circumstances and conditions of the two alleged shipments were substantially dissimilar, because one shipment originated at Hannibal and the other at Chicago and that in the case of the two barrels of sugar the property was being carried through from Chicago to Hepler, on a through rate of fifty-one cents per 100 pounds, agreed upon by and between the Missouri Pacific Railway Company on the one hand and the Chicago, Burlington & Quincy Railroad Company on the other.

This presents a different question, and on this point I instruct you as follows:

If you believe and find, from all the evidence in the case, that the lines of railroad of the Chicago, Burlington & Quincy Railroad Company and of the Missouri Pacific Railway Company form a continuous line of railroad from Chicago, Illinois, to Hepler, Kansas, passing through Hannibal, Missouri, it being an intermediate shipping point, and that the two roads connect at Hannibal and interchange traffic at that point; and if you find that prior to June 15, 1887, the Chicago, Burlington & Quincy and Missouri Pacific Railway Company had agreed upon and established a through rate from Chicago to Hepler on all property shipped from Chicago to Hepler via Hannibal over such continuous line, and that such established through rate on sugar was fifty-one cents per hundred pounds from Chicago to Hepler; and if you find that the two barrels of sugar, on which defendant is alleged to have charged the Chicago, Burlington & Quincy Railroad at the rate of thirty-four cents per 100 pounds for the transportation thereof from Hannibal to Hepler, was sugar that was received by the Chicago, Burlington & Quincy Railroad Company at Chicago to be carried over said continuous line to Hepler for said agreed and established rate of fifty-one cents per cwt.; and that the Chicago, Burlington & Quincy Railroad Company on receipt of said two barrels of sugar, issued to the shipper thereof a bill of

lading, for two barrels of sugar, that has been read in evidence—then the court instructs you that the charge for transportation on said two barrels of sugar from Hannibal to Hepler alleged to have been made by defendant was not a charge for a service rendered the Chicago, Burlington & Quincy Railroad Company under circumstances and conditions substantially similar to the circumstances and conditions attending the service rendered the Hayward Grocery Company, within the meaning of the Interstate Commerce Act, and you should find the defendant not guilty of the charge laid in the first count of the indictment.

Now, gentlemen, in the event that you find, under the last instruction, that the services rendered the Chicago, Burlington & Quincy Railroad Company and the Hayward Grocery Company were not rendered under similar circumstances and conditions, and accordingly acquit under the first count, then a further question arises under the second and third counts which you must consider and determine.

Under the third section of the Act it is made an offense to give one person an undue and unreasonable preference or advantage, or to subject a person to an undue and unreasonable prejudice or disadvantage.

As before remarked the second and third counts are under this section.

It is shown by the testimony that the Missouri Pacific Railway Company's proportion of the alleged through rate from Chicago to Hepler on sugar is thirty-four cents per 100 pounds and that its local rate on sugar from Hannibal to Hepler is forty-six cents per hundred pounds.

Now, conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is

permissible, owing to the different conditions affecting the two shipments—the question that I submit to you under the second and third counts is whether the difference shown in this case between the two rates of twelve cents per 100 pounds—is, under all the circumstances of the case, a reasonable difference or an undue and unreasonable difference not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made.

If you find that the difference in rate of twelve cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant as agent of the Missouri Pacific Railway Company knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment—then you may return a verdict of guilty on the second and third counts, although you acquit on the first count.

If, on the other hand, you find that the difference in the rate now in question is neither undue nor unreasonable, considering all the circumstances and conditions affecting local as compared with through shipments, you will render a verdict of acquittal on the second and third counts.

In determining the last question submitted to you, as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances and reasons adduced by the various witnesses, in justification of the difference shown; and I ask you to consider the same carefully and fairly without any prejudice or bias whatsoever.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF MISSISSIPPI.

J. J. COWAN

v.

F. S. BOND, Receiver.

- 1. Unlawful discrimination** is not established by proof that a rate of freight on cotton from Vicksburg to eastern points is given to one different from that given to another, when it also appears that such rate is only a part of a uniform through rate from a point beyond.
- 2. Sections 2 and 3 of the Act are not violated** by charging a local rate from a more distant point on cotton to Vicksburg, when, after pressing there, it is forwarded to its point of destination at less than Vicksburg rate to such point, the total of such two rates being made to equal the regular rate from such initial point to such destination.

(May Term, 1889.)

The whole case appears in the opinion.

Hill, J.:

This is a petition in the nature of an action at law against F. S. Bond, the defendant, as
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Receiver of the Vicksburg & Meridian R. R. Co., to recover damages which it is alleged petitioner has sustained by reason of the alleged violation of Sections two and three of an Act of Congress approved February 4, 1887, known as the Interstate Commerce Act.

The petition in substance alleges that on the 1st day of September, 1887, petitioner was and from that time has been and still is engaged in the business, occupation and employment, of buying, shipping and selling cotton in bales to cotton mills and manufacturers at different places in different States including Massachusetts, New Hampshire, New Jersey, New York and Rhode Island. That said defendant as receiver, under the orders and decrees of this court, of the Vicksburg & Meridian Railroad Company, a corporation and common carrier, was engaged in operating said railroad and receiving and transporting for hire, over the line of which it is part, freight and cotton in bales in connection with other railroad companies from points in Mississippi, including the City of Vicksburg, to points in other States including those above named, also in transporting from points on the Vicksburg, Shreveport & Pacific Railroad, owned by a company which operates and did operate at the time aforesaid a railroad from Vicksburg

in this State to Shreveport in the State of Louisiana and in connection with said V. & M. R. R.

That between the 1st day of September, 1887, and the 1st day of September, 1888, he bought and delivered to the defendant, as such receiver, for transportation for hire as a common carrier, 9339 bales of cotton, weighing in the aggregate 4,402,635 pounds, which defendant received and agreed to ship and did ship and transport to different points in said States, some to one point and some to another, of which a bill of particulars is filed as part of the petition.

That from the 1st day of September, 1887, to the first day of September, 1888, the firm of W. L. Wells & Co. was engaged in the same business of buying, shipping and selling cotton to points in Eastern States, their business being in all respects the same as petitioner's, and located and doing business at the same place and to all appearances under like conditions, and were his rivals in business; that during the said period said W. L. Wells & Co. bought and shipped over said V. & M. R. R. large numbers of bales of cotton which were to be and were transported in many instances to the same points as that shipped by petitioner as aforesaid. That defendant charged and received from petitioner four cents per hundred pounds during said time more than that charged to said W. L. Wells & Co. from Vicksburg to the same points, contrary to law and just and fair dealing, whereby petitioner was greatly damaged in his business in actual outlay in freights in excess of freights paid defendant by said W. L. Wells & Co. so shipped by him from and to said points during said time. That in consequence of said discrimination in favor of said W. L. Wells & Co., petitioner lost large sales of cotton which said W. L. Wells & Co. were enabled to make to wit: 3000 bales on which he would have realized \$1 per bale, making \$3,000.

That said unlawful discrimination was done in the following manner, that is to say: the said V. S. & P. R. R. Co., a corporation owning and operating a railroad in Louisiana between Shreveport in Louisiana and Vicksburg in Mississippi which connects with the V. & M. R. R. in Mississippi, is and was under the same management as the V. & M. R. R., and is and was part of a system of which the V. & M. R. R. was a part, though said companies were separate as to their property rights; that under said complicated arrangement, which was a secret one and not known to petitioners or advertised to the public, the said W. L. Wells & Co. were given by the defendant a preference and advantage over petitioner in his shipment of cotton to the Eastern States as aforesaid.

That the arrangement aforesaid was such that for the whole period from the first of September, 1887, to the first of September, 1888, petitioner and the whole public were kept in absolute ignorance that such arrangements were possible; that by means of such schemes, subterfuges, pretexts and artifices, the defendant placed the petitioner at a great disadvantage in his business and deprived him of the equality in treatment in shipping cotton as aforesaid to which he was and is entitled by law, and said W. L. Wells & Co. were given undue preference and advantage over him as aforesaid.

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To the charges thus made the defendant has interposed his answer by way of plea, by which he denies the discrimination as charged, and states the fact to be in relation to the matters referred to in the petition, that it was for the shipping of cotton from Delhi, Louisiana, a station on the V. S. & P. R. R. to Boston and other eastern points with the privilege of stopping the cotton at Vicksburg for the purpose of compressing it and under which arrangement Wells & Co. purchased cotton at Delhi and shipped it to themselves at Vicksburg on bills of lading to that point, and when the cotton was compressed and ready for forwarding to destination, the bills of lading from Delhi to Vicksburg were surrendered to the agent of respondent at Vicksburg who canceled them, and in lieu thereof issued other bills of lading from Vicksburg to final destination at rates which, added to the rates already paid from Delhi to Vicksburg, made totals equivalent to the direct through published rates from Delhi to such points of final destination; that such arrangements are now and have been for many years prevalent on all railroads in the cotton growing country, which was and is well known to petitioner and all other cotton shippers, and especially to petitioner who made a similar arrangement with respondent on cotton shipped from Greenville, Miss., over the L. N. O. & T. R. R. to Vicksburg and thence to Boston and other points, and which was made during the said season of which this complaint is made, and was identical with it in all respects save that petitioner's cotton was not compressed at Vicksburg and consequently the rates given him from Vicksburg east were less than those charged to Wells & Co.; that, on all cottons shipped by Wells & Co. direct from Vicksburg eastward, the same rates were charged as those paid by all shippers. The facts so stated in the answer are substantially established by the proof, and the questions to be determined are: Do they constitute a violation of sections 2 and 3 of the Interstate Commerce Act of Congress?

Section 2 reads as follows:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, draw-back or device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects or receives from any other person or persons, for doing for him or them a like contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination which is hereby prohibited and declared to be unlawful."

Section 3 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatever, or to subject any particular company, firm, corporation, or locality, or any particular description of traffic to any undue or

unreasonable prejudice or disadvantage in any respect whatever.

Unfortunately I am left without any decisions of the courts or of the Commission on this direct point, and am left to my own unaided judgment on the question presented.

There is much testimony, and has been much comment by counsel, on the question as to whether or not the rates under the arrangement by which the cotton was shipped from Delhi to Vicksburg and there compressed, the expense of the compressing being paid by the defendant as part of the shipment to enable him to ship a larger number of bales on a car, were posted or otherwise available to the inspection of shippers and the public; this is not an issue raised in this case and can only be inquired into incidentally as affecting the rights of the petitioner. The substantial subject of complaint is that the defendant made an unjust discrimination in the rates charged for the shipment of cotton from Vicksburg to eastern points in favor of Wells & Co. and against petitioner, by which he sustained damage. The uncontradicted fact is that the cotton shipped, of which complaint is made, was shipped from Delhi in Louisiana to points east and was stopped off and compressed at Vicksburg at the uniform and established rates from Delhi to the eastern points. The proof shows that this practice is general and it may be said necessary; that it is the practice in shipping from many other points and was well known to the petitioner, who has availed himself of it, and was known and its advantages received by all the cotton buyers at Vicksburg in relation to cotton purchased at different points on the railroads connecting at Vicksburg, so that the petitioner cannot complain of this arrangement. The petition does not aver that the petitioner designed or intended to ship cotton from Delhi and was prevented from doing so for want of a knowledge that shipments were being made by Wells & Co., under the arrangement stated. Had such been the case, the question as to whether or not this arrangement was included in the rates posted or otherwise made public in the offices at Delhi or in Vicks-

burg would be important, but as no such averment is made, it is unimportant.

I am unable to perceive any difference between the shipment made by petitioner from Greenville and those made by Wells & Co. from Delhi. The Greenville cotton was compressed at Greenville and the Delhi cotton at Vicksburg, but both were embraced in adding the local freight to Vicksburg to the freight from that point, making one freight from the first point of shipment to the point of destination; and I cannot perceive that in either case one obtained any advantage over the other, or that there was any violation of law in either case.

It is pressed in argument, upon the admitted facts, that what is understood by the eastern purchasers to be Vicksburg cotton, that is such cotton as is raised in that vicinity, is superior to other cotton, and that in some instances at least this arrangement is made to induce their eastern purchasers to believe that cotton raised in other localities was raised in the vicinity of Vicksburg, and that this arrangement constitutes a violation of these sections of the Act upon the part of the defendant. This may be a sort of pious fraud upon the part of these local cotton buyers upon their eastern employers, whose agents they are, but certainly cannot be imputed to the defendant or any other common carrier.

To render the discrimination unlawful the preference given to one over another must be contemporaneous and under substantially similar circumstances and conditions. Had petitioner purchased cotton at Delhi for shipment to the eastern points, it would have been the duty of agents at that place to have informed him that he could stop it at Vicksburg and have it compressed and shipped through at published rates. A neglect to do so would have been an unjust discrimination and have entitled petitioner to his action and to a judgment for the damages sustained, but this is not such a case.

I am satisfied, from the pleadings and proof, that the petitioner has not made out a case entitling him to damages. *Therefore the petition must be dismissed; but as the question is a new one, each party will pay his own costs.*

THE INTERSTATE COMMERCE COMMISSION.

Milton L. MYERS, SURVIVOR OF HOS-
TETTER & CO.,

v.

PENNSYLVANIA CO., Operating the Pitts-
burgh, Fort Wayne & Chicago Railway;
Baltimore & Ohio R. Co.; Lake Shore &
Michigan Southern R. Co.; Pittsburgh &
Lake Erie R. Co.; New York Central &
Hudson River R. Co.; Allegheny Valley R.
Co., and Pennsylvania R. Co.

(No. 148.)

1. **A petition to re-open a case that has been decided,** and for a rehearing, should show *prima facie* that some material testimony has been overlooked or misapprehended, or some error in the findings of fact or conclusions of law.

2. **When the application is insufficient** in these respects, and only asks for a re-discussion of the facts and law already considered, with no offer of new evidence that can change the result, the application will be denied.

(Filed June 7, 1889.)

APPPLICATION for a rehearing.
Mr. A. H. Clarke, counsel, for motion.

Memorandum by the Commission:

This is an application by the petitioners for a reopening of the case, and for permission to give further testimony with a view of showing that the decision rendered by the Commission was based upon a misapprehension of the real facts of the case. The decision heretofore made was filed on the 23d day of February, 1889, and was adverse to the petition.

For report see *ante*, 403.

The petition claimed, in substance, that the classification of the article known as Hostetter's Stomach Bitters had been advanced when the Act to Regulate Commerce took effect, and that the rates of transportation under the present classification were unreasonably high. The claim was not based upon any injustice or unreasonableness in the relative classification of the bitters and the relative rates upon analogous articles, or the diminution of production or sales in consequence of the higher rates, but almost wholly upon the fact that prior to the Act to Regulate Commerce the bitters were accorded a lower classification and lower rates.

The report and opinion filed in the case emphasized the fact that prior to the taking effect of the Act to Regulate Commerce the classification and rate under which the bitters were carried were in fact special, and this view is amply supported by the testimony in the case and by the classifications that were in force at the time. The bitters were then carried under a classification designated as follows: "Manufacturer's account; released by shipper," and under that particular designation embraced no analogous article except wine. This fact was left unexplained by the testimony, and is conclusive that the classification was special for this article, and was intended to give it a lower rate.

The petitioners now claim that the Commission gave undue weight to this testimony, and that there are other facts, such as the manner in which the bitters are packed in boxes, and the prepayment of the freight by the petitioners, that furnish just reason for a lower classification of the article, independently of its character and quality, and of the classification and rates for analogous articles.

A re-examination of the facts and of the conclusions reached in the decision rendered fails to satisfy the Commission that the disposition made of the case was erroneous, or that it should be reopened and the petitioners given further hearing. The petitioners are entitled to the same fair consideration and just regard for their rights as producers and shippers as other shippers are entitled to, but are not entitled to any preferential classification or rates. Their goods should be classified with other analogous goods in respect to marketable value, mode of packing for transportation, and risks in the carriage. When this equality is accorded to them they are given all that they can of right demand under the Law. It was shown in the report and opinion filed that they now substantially enjoy this equality. No new facts are offered to be shown that were not before the Commission upon the original hearing. The application is, therefore, in substance, that a different conclusion should be reached upon the same facts.

The statement in the papers accompanying this application that the average rate per ton per mile upon all freight carried by one of the defendant roads is 8.73 mills, and that the rate per ton per mile upon the bitters is considerably in excess of that average, is a circumstance of very slight importance upon the question of the reasonableness of the rate on bitters. Much of the freight carried by that road consists of coal, ore and other heavy products that necessarily have a low classification and a low

rate, and the quantity of articles of that character bears a very large proportion to the general traffic of the road. The rates upon freight of that description furnish no sort of standard for the rate upon goods like those of petitioners. If the goods carried by the road were generally of the character of the petitioners', or nearly similar, there would be force in the argument of an average rate. The value of a car load, of 24,000 pounds, of bitters, according to the testimony in the case, is about \$525. The value of a car load of coal of like weight is less than \$50. Naturally and necessarily, therefore, goods of higher market value, like those of the petitioners take a higher classification and rate, and there is no injustice to the shippers in that circumstance. Transportation charges should be, and usually are, adjusted with a proper degree of reference to the marketable value of the goods carried, and to the amount of revenue required by the carrier to make its business fairly remunerative. If the charges should be reduced, therefore, to any considerable extent, upon goods of higher value and properly included in the higher classes, it would be necessary to increase the charges upon the lower classes, and enhance the cost to consumers of goods perhaps more necessary and generally important to the public. The community at large, therefore, as well as carriers and the producers and shippers of particular articles, are interested in the proper relative classification of freights and the adjustment of rates. The interests of all are entitled to a fair consideration in the distribution of the carrier's charges.

It is probable, from some things that appear in the testimony, that some of the defendant roads would be willing to carry the bitters at a lower rate than the present tariff, or at least that statements by some of the agents of the roads have led the petitioners to so believe. If this is so the roads so inclined can take the responsibility of making such changes in the classification or rate as they may deem just. The intervention of the Commission is not necessary if the carriers themselves are satisfied that a change should justly be made more favorable to the petitioners. The question before the Commission is whether the classification and the rate, upon all the facts of the case, are intrinsically or relatively so unreasonable and unjust that a change ought to be compelled. The Commission is of opinion that such a conclusion is not warranted, and *the application for a rehearing is, therefore, denied.*

NEW ORLEANS COTTON EXCHANGE
v.
CINCINNATI, NEW ORLEANS & TEXAS
PACIFIC R. CO. *et al.*

(No. 195.)

A BSTRACT of complaint and supplemental complaint filed May 4, 1889.

Plaintiff alleges it is a corporation under the laws of Louisiana; that the defendants,—six Railroad Companies, having the same President, General Manager, Comptroller, General Superintendent and General Freight Agent,

controlled by the same interest by single management in Cincinnati, O.,—form a continuous line for the transportation of passengers and property from Shreveport to Louisiana via Vicksburg, etc., to Cincinnati, and by connections with trunk lines to points on the Atlantic Coast and to New Orleans, La.; that said companies, known as the "Queen & Crescent" route, make unjust and unreasonable charges for hauling uncompressed cotton from stations along its lines in the cotton producing country to New Orleans, especially from Meridian, Miss., in violation of the last clause of section 1 of the Act; that they have also violated sections 2 and 3 of said Act.

By the supplemental amended complaint, complainant asks to have four other railroad companies made parties to the complaint.

Abstract of the answer of the Board of Trade of the City of Meridian, Mississippi, to the above complaint, filed June 17, 1889.

The said Board of Trade of the City of Meridian, having intervened and become a party defendant to said petition and obtained leave to answer the petition herein and to show cause why the prayer of the petition ought not to be granted, for answer alleges:

That it is a duly incorporated body under the laws of Mississippi; that the objects of its incorporation and the purpose of its existence are, in brief, the care and protection of the trade and commerce of said city; it is composed of the Merchants, Bankers and Cotton Buyers of said city, and they are organized under said name for the advancement of their trade and of that of the City of Meridian, and it is the duty of respondent to look after and protect the interests of said city, in respect to the buying and selling of cotton and all matters pertaining thereto—including the matter of freights and tariffs of charges for the carriage of cotton by the several lines of railroad touching at Meridian; that it is a prosperous and growing city of 12,000 to 14,000 inhabitants, constantly increasing in population and enlarging its trade; that it owes its size, its growth, its commerce and its prosperity to the Cotton Compress—one of those "interior presses" which the City of New Orleans seeks by this petition to destroy—and to other institutions which followed the compress, and which could not exist without the compress; that the late war was both a convulsion and a revolution to the cotton trade. When it had ended it was no longer possible for the cotton trade to continue in its old channels to Mobile and New Orleans, or under its old rules, and a few years demonstrated this fact by plunging the whole cotton producing community into bankruptcy; that then came the railroads and cotton compress to the rescue of the farmer and the interior merchant; that they could carry cotton to the factories at less expense than had hitherto been incurred under the old system *by doubling the carrying capacity of their cars by the compression of the cotton bales into one half of their original size.*

At once cotton compresses begun to be erected at railroad crossings; banks sprang up to supply the broker, the merchant and the farmer with money. A new system was born and the power of the Cotton Kings of New Orleans and Mobile began to wane.

(Here follows a full description of the old process of marketing cotton; the wasteful and uneconomical ways of handling it on its way from producer to consumer; and an exhaustive argument in favor of compression and market in the small villages and cities near where it is raised.)

Respondent then alleges that the intended and hoped for results of the establishment of the rates asked by this petition are to destroy the interior presses and with them the prosperity of the cities and towns in which they are located, and thus to do a great injury to the adjacent country; that these towns owe their prosperity in the main to the compress; that cotton seeks its ultimate destination, the factory; that there are no cotton factories to amount to anything in New Orleans; admits that New Orleans has considerable amounts of money invested in cotton compresses, warehouses, etc., etc., but denies that it has "many millions" so invested; that the amount invested in compresses and warehouses, etc., in Meridian and other interior towns is much larger in proportion to the importance, size and wealth of these little towns than the amount so invested in New Orleans bears to the importance, size and wealth of that city.

Respondent respectfully reminds the Commission that the tendency of the age—the trend of commerce—is to bring the producer and the manufacturer closer and closer together, to cut out and eliminate the middle men and to cut off every obstacle and every impediment between the farm and factory, and to save every item of expense that lies between the two, and that this tendency—this necessity—is operating to the loss of New Orleans' cotton trade. She is a mere "way station" on one of the routes to the Eastern or foreign factory, and the time has passed when she will be allowed to levy toll upon the goods which pass by her. Cottons destined to Eastern and foreign ports prefer the Brunswick, the Norfolk, the Cincinnati or other eastward route because it can be shipped cheaper by either of those routes—all of them being more direct and quicker. Besides, cottons so shipped avoid the excessive port charges of New Orleans, and the exactions and impositions of her hordes of "associations." Insurance is also less by the more direct routes.

Under this new system, which the petition seeks to destroy, the producer and the manufacturer are brought closer together. This not only acquaints each with the wants of the other, and enables each to aid the other by the interchange of information valuable to both; it also lessens the expense of the exchange of the raw product and the manufactured article. Thus the profits of the producer and the manufacturer are increased—especially the profits of the producer. Commercial centers are established throughout the interior and all the benefits which flow from them are disseminated through the surrounding country.

This petition relates to Meridian and vicinity only; but it is a mere "entering wedge," the object of which is to commit this Commission to the policy which would be indicated by granting the prayer of this petition. That policy pursued to its legitimate end would destroy every flourishing interior town of the Southern States.

Respondent submits that there is nothing in the Act of Congress from which this Commission derives its existence and its authority that forbids the people represented by this respondent from transporting their cottons over any route that may be the cheapest; and that it is no violation of said law for the railroads to carry cottons directly eastward for the same price or for a less price than they charge for transportation southward. The ocean charges greatly affect the rates. The transportation is not "over the same line in the same direction." Even if the wide discretion given to the Commission embraces the right to make the orders herein prayed for, we insist that the "greatest good of the greatest number" demands that the present system be let alone.

Respondent respectfully protests against the granting of the prayer of the petition. But if the Commission should be of the opinion that the charge of \$2.15 per bale on flat cotton from Meridian and adjacent points to New Orleans is unreasonable and should reduce the same, respondent prays that an equal or even a greater reduction be made in the rate on compressed cotton.

George M. COOLEY

v.

ST. LOUIS, KEOKUK & NORTH-
WESTERN RAILROAD CO. *et al.*

(No. 201.)

ABSTRACT of complaint verified May 10, filed June 8, 1889.

The plaintiff in this case alleges that the defendants, five Railroad Companies, are operating on joint rates from St. Louis, Mo., to Los Angeles, Cal.

After stating the rates on different classes of merchandise, the plaintiff complains that he is a hardware merchant, doing business at San Bernardino, and is charged a higher rate from St. Louis to San Bernardino than is charged for the same class of freight from St. Louis to Los Angeles, a shorter distance on the same line.

Complainant prays for an order directing said railroad companies not to charge or receive from him a higher rate of freight for transportation of the classes of freight mentioned from St. Louis to San Bernardino, than from St. Louis to Los Angeles.

Complaint is duly verified.

John LIVINGSTON

v.

NEW YORK, LAKE ERIE & WEST-
ERN R. R. CO. AND WELLS, FARGO
& CO.

(No. 202.)

ABSTRACT of complaint filed June 10, 1889.

The plaintiff alleges the operation by the Erie R. R. Co. of the so-called express business over its lines, under an organization called "The Erie Express Co." for over a year prior to May 16, 1888, when it, as is alleged, sold its
2 INTER S.

express business, etc., to Wells, Fargo & Co., who succeeded to the business, which it still conducts; that for the year ending March 16, 1889, the Wells, Fargo & Co. officers and agents almost daily frank packages over said railroad company's line with the consent and approbation of said company; that said franking is wrong, and contrary to the provisions of the 3rd section of the Act; that said express is, during said year, conveyed and delivered over the said lines, franked by one of its officers, free of charge for postage or otherwise, great numbers of sealed letters upon private business to persons in no way connected, as officers or otherwise, with their said railroad company or express company, thereby violating section 16 of the Postage Laws and Regulations of 1887, as well as section 3 of the Act to Regulate Commerce; that on April 22, 1889, said express company, with the consent and co-operation of the said railroad company, charged and received 40 cents for transportation upon said company's main line from New York to Campville, 230 miles, a ream of writing paper weighing less than 10 pounds, worth \$1.

That said charge was unjust and unreasonable, and was more than said railroad company charged other persons for like contemporaneous service.

It is also alleged that said express company's charges are excessive, unjust and unreasonable to nearly all points, and that the management of the railroad company has combined and conspired with the Wells, Fargo & Co., to so arrange trains, etc., as to compel shippers to send by said express company a large proportion of the most valuable property, at a cost for freight charges, in many cases, more than one half the worth of the goods for carrying the same but a few hundred miles, and that said railroad company, which receives a moiety of such charges, is, and ought to be, responsible for such extortion; that said Wells, Fargo & Co., with the consent and co-operation of said railroad company, have agreed with the other express companies throughout the U. S., to fix and maintain rates for freight charges far in excess of what is just and reasonable, and to subject the people at small stations, or at local and noncompetitive points, to undue and unreasonable prejudice and disadvantage as to the transportation of property. It is also alleged that Wells, Fargo & Co. advertise an express and banking business, and claim to have 2560 offices, to carry property over a mileage of 45,780, of which, 27,666 is by railroad, 3459 by stage, 525 by inland steamer, and 14,130 by ocean steamer; that they transact a large banking business at and in the depot buildings, and through the station agents of said railroad company, as well as at the stations of other roads; that said railway company has no legal right or authority to permit such banking business to be conducted upon its premises or in its depot buildings by its own agents, or otherwise, and that the property, credit and facilities of said railway company should not, and cannot legally thus be leased to a private firm or corporation for banking purposes of the same nature as that carried on by "Adams & Co's" Express & Banking Office in California and elsewhere from 1849 to the time of their failure in that State in 1855,

whereby, as is alleged, the people lost more than two millions of dollars; that the protection of the public requires that said Wells, Fargo & Co's express, so far at least as respects its business upon said railway, to be under the jurisdiction of the Interstate Commerce Commission.

Prayer accordingly.

Verified by the complainant June 7, 1889.

John RELFE

v.

ATCHISON, TOPEKA & SANTA FÉ
R. R. CO. *et al.*

(No. 203).

ABSTRACT of complaint filed June 11, 1889. Complainant alleges that he is a resident of San Diego County, California; that December 17, 1887, then being a resident of Leavenworth, Kan., he delivered to the said railroad company at Leavenworth, household goods of 1590 pounds weight, and ordered them shipped to Prescott, Ar., over the lines of the defendants, prepaying \$20 on the freight, balance of freight charges to follow; that before the arrival of said goods at Prescott he gave instructions to the officers of the defendant, the Atlantic & Pacific R. R. Co., at Prescott Junction, and to the Prescott & Arizona Railroad Co. at Prescott to rebill said goods to San Diego, Cal., which they did, and for which freight charged was \$93.33, which he was obliged to pay; that the through rate to San Diego, was at the time \$1.90 per hundred pounds, and that the rate from Leavenworth to Prescott and from Prescott to San Diego was less; that all the defendant companies named are under one management and control; that after paying about \$6 per hundred pounds for freight, he, upon the advice of the officers of the said lines at San Diego, filed a claim for rebate of such freight charges, and duly presented same, which was rejected.

Complainant alleges unreasonable discriminations against him, and prays rebatement of excess with reasonable attorney's fees, according to section 8 of the Act.

LEHMANN, HIGGINSON & CO.,

v.

TEXAS PACIFIC R. R. CO. *et al.*

(No. 204).

ABSTRACT of complaint filed June 17, 1889.

The complaint alleges that Humboldt, Kan., where complainants reside and do business, is located 117 miles northwest of the Missouri River at Kansas City, Mo., and on the Junction City Branch of the defendant, the Missouri, Kansas & Texas R. Co., and 35 miles north of Parsons, Kan.; that defendants carry sugar in car load lots from New Orleans, to Missouri River points, including Kansas City, at 30 cents per hundred pounds; that they carry similar freight distant to Wichita, Kan., 112 miles west of Humboldt, at 25 cents per 2 INTER S.

hundred pounds, to Oswego, Kan., 50 miles southeast of Humboldt, and to Parsons, 35 miles southeast of Humboldt, at the Missouri River rate of 30 cents per hundred pounds; that defendants refused to accept and transport 3 car loads of sugar for plaintiff from New Orleans to Humboldt for less than 42 cents per hundred pounds, which amount they arrived at by carrying said freight to Parsons at the Missouri River rate of 30 cents and adding thereto the local rate from Parsons to Humboldt at 12 cents, thereby making a discrimination against complainants of 12 cents per hundred pounds, amounting to \$131.24; which amount they ask to have refunded, and that an order to show cause may issue accordingly.

LEHMANN, HIGGINSON & CO.,

v.

SOUTHERN PACIFIC R. CO. *et al.*

(No. 205).

ABSTRACT of complaint filed June 17, 1889. The complainants, wholesale grocers at Humboldt, Kan., allege that the defendants have a continuous line of railroad from the City of San Francisco, Cal., to Humboldt, 117 miles southwest of the Missouri River at Kansas City, Mo., and 35 miles north of Parsons; that the defendants contracted, and did carry freight (sugar) in car load lots from San Francisco to Missouri River points of which Kansas City is the nearest, St. Joseph the farthest, at 65 cents per hundred pounds; that complainants in May, 1889, bought in San Francisco six car loads of sugar to be transported to Humboldt over defendants' line of railway, but that said defendants refused to accept and transport said car loads for less than 85 cents per hundred pounds to Humboldt, on its own lines, 117 miles shorter haul than to Kansas City, which charge he alleges was arrived at by adding the 20 cent rate from Kansas City back to Humboldt.

Complainants pray for an order to show cause why defendants should not transport said sugar to Humboldt at same rates as to Kansas City or Missouri River points, and refund the over charge of \$303.

Major J. P. SANGER,

v.

THE SOUTHERN PACIFIC COMPANY,
Lessee of the Central Pacific R., and the
Union Pacific R. Co.

(No. 196.)

A misapprehension under which a party has paid for one journey in two sections, whereby the cost of the transportation has been made more than it would have been had a through ticket been purchased, may lawfully be corrected by return of the excess, though the carriers were without fault and only charged for each portion of the journey the regular rates.

(Submitted May 31, 1889.—Decided June 24, 1889.)

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

The complainant in this case recites the following as facts: That on or about March 22, 1889, the complainant, who was an Inspector General of the United States Army, was relieved from duty at the Presidio of San Francisco, in the Division of the Pacific, and began preparations to go to headquarters, Department of the Missouri, Fort Leavenworth, Kansas, to which point he had been ordered by the Secretary of War; that he called at the ticket office of the Central Pacific Railroad Company, in San Francisco, and there and then learned from the agent of the company, in response to inquiries, that the fare to Fort Leavenworth was \$60, and to New York, \$90.90, to which points he was obliged to purchase tickets for his family; namely, 2½ tickets to Fort Leavenworth, and one ticket to New York, at a total cost of transportation, according to the figures given by the agent, of \$240.90. That on March 27, he called at the office again and engaged sleeping berths for April 4; that on April 3, he called the third time for the purpose of buying the railroad tickets for his family and paying for the sleeping berths he had engaged; that on examining the transportation requests given him by Colonel Batchelder, depot quartermaster, San Francisco, and on which he was to receive his individual ticket, the ticket agent informed him that he would give him transportation to Ogden and sell him tickets for his family to that point and no farther, but that it would make no difference, as complainant would receive through rates to Fort Leavenworth and New York; that on these representations he purchased 3½ tickets to Ogden at a cost of \$122.50, and paid for his sleeping car to the same point; that on arriving at Ogden he presented his transportation requests for transportation from Ogden to Fort Leavenworth, and after receiving his individual ticket over the Union Pacific Railroad he purchased 2½ tickets by the same road from Ogden to Fort Leavenworth, and one ticket from Ogden to New York, expecting to receive through rates, as represented by the agent of the Central Pacific Railroad Company in San Francisco. These rates the ticket agent of the Union Pacific declined to give, and for the 2½ tickets from Ogden to Fort Leavenworth complainant paid \$100, and for the single ticket from Ogden to New York, he paid \$70.90, which added to what he had already paid for tickets from San Francisco to Ogden, made \$293.40, or \$52.30 in excess of the through rates from San Francisco to Leavenworth and New York, which passengers were paying at that date. Complainant believes this exaction of excess was unjust and unlawful, and asks an order for its return.

Upon the answers filed in the case, the defense is that the complainant is mistaken in his facts; that no such representations were made to him in San Francisco as he claims; that he deliberately purchased transportation to Ogden and that on applying for further transportation from that point, it was the duty of the railroad company in selling the tickets for the remainder of the distance to make the charge precisely as it did in accordance with the regu-

lar rates; that in fact it could not have done otherwise without subjecting the company to liability for unlawful discrimination as between complainant and other parties purchasing tickets for transportation from Ogden east contemporaneously.

The case was submitted for the opinion of the Commission on evidence taken *ex parte*, but with waiver of all technical objections, and with expression of entire willingness to do what under the circumstances should be found to be just and lawful.

After careful examination of the evidence submitted in the case we are entirely satisfied that the agents of the defendant parties in what they have done in this matter have acted in entire good faith and without any intention to defraud the complainant, or to mislead him. We think the probabilities are that complainant misapprehended what was said to him in San Francisco, and that he erroneously drew the conclusion that it would cost him no more to buy the tickets as he did, than to buy them through from San Francisco, without anything having been expressly said to justify it. Nevertheless we are satisfied the complainant has stated the case exactly as he understood it, and that had he known or supposed at the time he procured transportation at San Francisco that unless he then bought through tickets he would be charged an additional sum, the through tickets would have been purchased.

The case, then, is one in which, through misapprehension of the situation complainant has been compelled to pay the sum of \$52.30 more than he would have paid for the same service had he been laboring under no mistake. The exaction of this sum has all the effect of a wrong to him, though no wrong was intended and no one is really in fault. We think under such circumstances it would be entirely proper and right for the defendant carriers to restore to complainant what, because of his misapprehension, he has paid to them over and above the regular through rate. This course will do no wrong to any one else, will work discrimination against no one, and at the same time will leave with the carriers the customary compensation for the service performed.

This intimation of our views will doubtless be sufficient for a disposition of the case. The refunding should be so made that each carrier will retain the exact sum it would have received had through tickets been purchased at San Francisco as the complainant at first proposed.

THE HARVARD COMPANY.

v.

CHICAGO, ROCK ISLAND & PACIFIC
R. CO.

(No. 208.)

ABSTRACT of complaint. Filed June 22, 1889.

The complainant represents itself as a corporation engaged in the manufacture and sale of surgical chairs in the City of Canton, Ohio; shipping the same to the various States and Territories of the U. S., over railroads and waterways subject to the Interstate Commerce

Law, and particularly over the lines of defendant; that each chair is packed, wrapped and crated convenient for shipping and handling, occupying less than three feet square floor space, and less than three feet high, weighing 225 pounds including packings; that such chairs are always shipped at owner's risk of breakage, chafing and other damage, under and by virtue of the release being entered on the original bill of lading, and by reason of the requirement to that effect; that defendant charges unjust and unreasonable rates for transporting said freight, making it double first-class rate while it is shipped and packed in cars with freights of lower grade.

Complainant claims that its said freight should be classified not higher than second class, and freight charges should be not over one third what they now charge; that, since the passage of said Interstate Commerce Act, the said defendant has more than doubled its charge for such transportation without reason or cause.

Complainant prays investigation and relief.
(Duly verified June 20, 1889.)

John LIVINGSTON, Pres't Railway Shareholders' Ass'n,
v.

DELAWARE, LACKAWANNA & WESTERN R. CO. *et al.*

(No. 210.)

COMPLAINT. Filed June 29, 1889.

To the Honorable the Interstate Commerce Commission:

The petition of John Livingston, President of the Railway Shareholders' Association, an organization incorporated under the laws of the State of New York, on November 24, 1883, respectfully shows unto your Honorable Commission as follows:

I. That in the convention of a labor organization known as the Brotherhood of Locomotive Engineers, which assembled at Richmond, in the State of Virginia, on October 17, 1888, and adjourned on November 2, 1888, a "Committee on Thanks" was appointed, which on said last named date, made their report in part as follows:

"Report of Committee on Thanks.

"BELVIDERE HALL, Richmond, Va.,

"November 2, 1888.

"To the Officers and Delegates of the Twenty-fifth Annual Convention Assembled in the City of Richmond:

"We, your Committee on Thanks, most respectfully submit the following report:

"Our thanks are especially due to the following railways for passing delegates and their wives on credentials:

"Delaware, Lackawanna & Western;

"Louisville & Nashville;

"St. Louis Bridge & Tunnel Co.;

"Texas & Pacific;

"New Orleans & Pacific;
"Scioto Valley;
"Newport News & Richmond;
"Denver & Rio Grande;
"Columbus & Cincinnati Midland;
"Cincinnati, Indianapolis, St. Louis & Chicago;
"Lake Erie & Western;
"Central Railroad of Georgia;
"Gulf, Colorado & Santa Fé;
"Montana Union;
"Keokuk & Western;
"Mobile & Ohio;
"Atlanta & West Point;
"Cincinnati, Selma & Mobile;
"Western of Alabama;
"Chesapeake & Ohio;
"Nashville, Chattanooga & St. Louis;
"Vandalia Line;
"Cairo, Vincennes & Chicago;
"Richmond & Allegheny;
"Cleveland, Lorain & Wheeling R'y.;
"Western New York & Pennsylvania;
"New York & New England;
"East Tennessee, Virginia & Georgia;
"Louisville, Evansville & St. Louis;
"Pittsburg & Lake Erie;
"Indianapolis, Decatur & Springfield;
"Shenandoah Valley;
"Georgia R. R. from Augusta to Atlanta;
"Newport News & Mississippi Valley.

"We also return thanks to the following named railways for granting passes for delegates and their wives:

"Chicago, Rock Island & Pacific;
"Union Pacific System;
"Missouri Pacific System;
"Denver, Texas & Gulf;
"Chicago, Milwaukee & St. Paul;
"West Shore Railway;
"Chicago & Grand Trunk; or
"Detroit, Grand Haven & Milwaukee;
"Oregon Railway & Navigation Co.;
"Lehigh Valley R'y;
"Chicago & Alton;
"Chicago & Northwestern R'y;
"Burlington, Cedar Rapids & Northern R'y;
"Michigan Central R'y;
"Grand Rapids & Indiana;
"Lake Shore & Michigan Southern;
"Wisconsin Central;
"Pan Handle;
"Flint & Pere Marquette;
"Ogdensburg & Lake Champlain;
"Atlantic Coast Line;
"Chicago & Atlantic;
"Chicago, St. Paul, Minneapolis & Omaha;
"Illinois Central;
"New York, Pennsylvania & Ohio.

"We thank the Cleveland, Columbus, Cincinnati & Indianapolis, also the Indianapolis & St. Louis R. R., for issuing passes for delegates and their families, also the Canadian Pacific, and to the Cincinnati, New Orleans & Texas Pacific R'y.

"GEORGE W. VROMAN, Div. 88,

"A. J. GUNNELL, Div. 86,

"JAS. McDONOUGH, Div. 206,

"J. D. BRINTNALL, Div. 122,

"WILLIAM BASTIN, Div. 138,

"Com. on Thanks."

II. Your petitioner complains, and, on the above named report as the ground for his belief, alleges that in October and November, 1888, the above mentioned railroad companies issued free transportation over some part or portions of their lines, to a large number of individuals claiming to be delegates to said convention, many of whom were not, at the time, employes of any railroad company, and to their wives, none of whom were railway employes at the time, nor included in any of the classes enumerated in section 22 of the Act to Regulate Commerce, to whom free transportation is authorized; and that such free transportation was used by said so called delegates and their wives in traveling upon said railways, while other persons traveling over the same lines were, at the same time, charged the usual fare; that by conveying, free of charge, and without the payment of any compensation, said so called delegates and their wives over portions of the railroads of said companies they were guilty of such unjust discrimination as is prohibited by the second section of the Act to Regulate Commerce, and gave undue and unreasonable advantage to a particular class of persons, whereby others, compelled to pay fare, and other railroad companies which refused to grant like free transportation, were subjected to such undue or unreasonable prejudice or disadvantage as section 3 of said Act declares to be unlawful.

III. That from February 27, 1888, to January 4, 1889, the members and delegates of the Brotherhood of Locomotive Engineers were sustaining a strike by their brethren (whereby injury to the amount of many millions of dollars was inflicted upon the public and the railroad) upon the Chicago, Burlington & Quincy system by the payment of monthly sums for the support of the strikers. That the acknowledged motive of many of said railroad companies for giving the free transportation above mentioned was to conciliate the Brotherhood of Locomotive Engineers, a secret organization, which, holding its annual sessions in secret, arrogates to itself the power of dictating wages and of extorting such favors by threats of strikes, boycotts, and like methods, which have done much harm to the business and railroad interests of the whole country.

And your petitioner, upon information and belief, avers that a large majority of the railroad companies subject to the jurisdiction of your Honorable Commission desire to be relieved from the importunities and threats which have heretofore coerced them to grant such free transportation, and which they ask shall be declared unlawful.

Wherefore your petitioner prays for an order that the railroad companies hereinabove mentioned do refrain from granting such free transportation as is charged against them; and that the same be adjudged unlawful, or for such other or further order in the premises as to your Commission may seem just and proper.

Dated June 18, 1889.

JOHN LIVINGSTON,
Petitioner, in Person, Camptville, Tioga County,
New York.

(Duly verified.)

2 INTER S.

FREDERICK A. WHITE

v.

MICHIGAN CENTRAL RAILROAD COMPANY and Lake Shore and Michigan Southern Railroad Co.

(No. 200.)

THE PETITION of Frederick A. White, a farmer of Buchanan, Michigan, respectfully shows:

1. The Michigan Central Railroad Company and the Lake Shore and Michigan Southern Railroad Company have elevators for the receipt and storage of wheat at various stations on their roads, the Michigan Central Railroad Company, among other stations, at Buchanan and Dayton in the State of Michigan and the Lake Shore and Michigan Southern Railroad Company, among other stations at Plainfield and New Carlisle and La Porte in Indiana. That at the elevators of the first four of said stations your petitioner has delivered different loads of wheat within the last five years.

2. That the said railroad companies, have, both of them, a custom which is injurious to your petitioner and all other farmers drawing wheat to such elevators, and which your petitioner is advised is illegal and unlawful, which is this:

The companies do not deal with the farmers either in storing or shipping of wheat. They contract with wheat buyers. The wheat buyer agrees with the farmer on the price of his wheat, buys it and gives him a ticket in the nature of an order to the railroad company to receive the wheat.

The company takes the ticket, weighs the wheat and gives the ticket holder its receipt for its weight, which the farmer takes the buyer, and on it gets his pay.

But on each load of wheat which the Michigan Central Railroad Company thus receives it retains five pounds of wheat, and the receipt which it gives shows the weight of the load less such five pounds; it thus takes from the farmer taking the ticket to the station or elevator five pounds of the farmer's wheat on every such load. The custom of the Lake Shore and Michigan Southern Railroad Company is to deduct the odd pounds—not more than ten and not less than five pounds on each load—and gives its receipt for the weight less the amount so detained.

These deductions both these railroad companies have taken on all the loads of wheat which your petitioner has taken to their elevators for the last six years. They insist that they have the right to so deduct from each load of wheat which your petitioner and all other farmers may take to their elevators on their roads, as your petitioner is advised and believes the truth to be.

3. In the fall of 1884 your petitioner delivered to the Michigan Central Railroad Company at its elevator in Dayton, Michigan, forty loads of wheat; in every instance the company deducted five pounds from the actual weight and gave your petitioner the receipt for the weight less such five pounds for each load. The value of the wheat so deducted was about the sum of three and one third dollars.

Your petitioner respectfully requests your Honorable Commission to require of the said companies that they refund and satisfy your petitioner for the value of the wheat so unlawfully retained respectively by each company within the last six years.

He also prays that your said commission require of both said railroad companies that they cease and desist from such practice and custom of converting to their use the wheat of the farmers taken to their elevators and that they give credit and true statements and receipts to the depositors, the farmers who take wheat to their elevators, for the actual weight of the wheat received.

Also that such further order in the premises shall be made as of right shall appear and such as your petitioner is entitled to have under chapter 104 of the Acts of Congress of 1886 and 1887, entitled "An Act to Regulate Commerce."

Frederick A. White.

State of Michigan, }
County of Berrien, } ss.

Frederick A. White, being duly sworn, deposes and says that the above petition by him signed is true to the best of his knowledge, information and belief; this 17th day of May, A. D. 1889.

David Burns,
Notary Public.

Geo. S. Clapp, Niles, Michigan.
[SEAL.] Attorney for petitioner.

Joseph J. WOOD

v.

CENTRAL R. OF GEORGIA. Savannah,
Florida & Western R.

(No. 212.)

A BSTRACT of complaint, filed July 6, 1889.

Complainant alleges that he is a merchant of Columbus, Ga.; that December 6, 1888, he had oranges shipped him from Conway, Fla., and that, not receiving them up to December 27, 1888, he made a claim on defendant; that on January 2, 1889, he received notice that the oranges were at Columbus depot, but that he was not allowed to sort them and make a claim for loss.

Wherefore he prays investigation and relief.
2 INTER S.

Exhibits of correspondence are attached to the complaint and verified.

John A. ROEBLING'S SONS CO.

v.

PENNSYLVANIA R. CO., *et al.*

(No. 211.)

A BSTRACT of complaint, filed July 6, 1889.

Complainant alleges that on June 12, 1889, the petitioner shipped 250 bundles of iron telegraph wire, weighing 46,656 pounds to D. S. Robeson, Superintendent Postal Telegraph & Cable Co. at Attalla, Ala., from Trenton, N. J.; that the shipment was received by the Pennsylvania Railroad Co., and that that Company, —on behalf of itself and the Cumberland Valley Railroad Co., the Shenandoah Valley Railroad Co., the Norfolk & Western Railroad Co., the East Tennessee, Virginia & Georgia Railway Co., and the Alabama Great Southern Co., —demanded payment of 81 cents per hundred pounds freight charges; that the complainant paid such charges under protest claiming that they should not be more than those for fence wire, which were at the time 31 cents per hundred pounds.

Complainant claims that such charges were unjust and unreasonable, and therefore unlawful, and that they subjected the complainant to undue and unreasonable prejudice and disadvantage; that almost the entire list of iron and steel is taken by the same companies at special rates, to wit: 60 per cent of 6th class rates, while the wire in question was classified as 4th class; that there is no practical difference between such telegraph wire and fence wire; that they are put up in similar bundles, and are both galvanized and not subject to rust damage, and that with ordinary inspection it would be impossible for an expert to distinguish between the two; that the Eastern & Western Trunk Line Associations classify them alike, and that when the first named defendant receives telegraph wire for western shipment it transports it at 6th class rates, while charging 4th class rates for southern shipments.

To substantiate the foregoing statement numerous affidavits and exhibits are attached to the complaint.

(Complaint verified July 2, 1889.)

THE INTERSTATE COMMERCE COMMISSION.

EXPORT RATES - INLAND AND OCEAN - HOW THEY SHOULD BE MADE - UNJUST DISCRIMINATION IN INLAND PROPORTION.**THE NEW YORK PRODUCE EXCHANGE**

2.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, The Michigan Central Railroad Company, The Lake Shore & Michigan Southern Railway Company, The Chicago & Grand Trunk Railway Company, The Great Western Railway Company of Canada, The New York, Lake Erie & Western Railroad Company, The Chicago & Atlantic Railway Company, The New York, Pennsylvania & Ohio Railroad Company, The New York, Chicago & St. Louis Railroad Company, The West Shore Railroad Company, The Delaware, Lackawanna & Western Railroad Company, The Grand Trunk Railway Company of Canada, The Pittsburgh, Fort Wayne & Chicago Railway Company, The Pennsylvania Railroad Company, The Pittsburgh, Cincinnati & St. Louis Railway Company, The Wabash Western Railway Company, The Baltimore & Ohio Railroad Company, The Philadelphia & Reading Railroad Company, and The Central Railroad Company of New Jersey.

(No. 130.)

1. From November 4th, 1887, to February 20th, 1888, the **Trunk Lines, so called**, under resolutions of their Association, **made through export rates** of which the inland proportion accepted by them was, at the Port of New York, **often ten cents or more per hundred pounds less on like traffic than the published tariff rates** charged at the same time to the same port.
2. **Held**, That the discrepancy between the proportion of the through rate accepted and the established tariffs for seaboard consignments for the same inland carriage, is not shown to have been justified by any circumstances tending to show that it was just or proper, and that it must therefore be deemed an unjust and unlawful discrimination as against the transportation terminating at that port.
3. **It is essential that any method for making rates should be practicable**, and not afford a cover for discrimination and injustice. The only practicable mode yet devised for making through export rates, as appears by past experience, is to add to the established inland rates from the interior to the seaboard, the current ocean rates.
4. **Under the amendments of March 2, 1889**, to the statute, requiring ten days' previous notice of advances and three days' previous notice of reductions in rates, they cannot be varied from day to

day, or oftener, to meet fluctuations in ocean rates.

5. **Whenever a tariff is established for merchandise billed or intended for export by sea, and ocean rates are not specified**, either because of fluctuations or for any other reason, so that only the charge for inland transportation is definitely fixed, the tariff as filed and made public should show the rate charged by the inland carrier or carriers to the point of export, including all terminal charges and expenses, and should also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate from time to time prevailing, or how otherwise.

(Heard at New York June 13th and 14th, 1888.—
Briefs Submitted July 31st, 1888.—Decision Filed
June 19th, 1889.)

ON complaint, found in full, *ante*, page 13, and answers, also in full, *ante*, pages 28-31, and proofs of the facts which sufficiently appear in the opinion.

Messrs. Foster & Wentworth attorneys for petitioners.

Mr. John D. Kernan counsel for petitioners.

Mr. Frank Loomis for N. Y. C. & H. R. R. Co. and connecting lines.

Mr. George C. Greene for L. S. & M. S. Ry. Co.

Mr. E. W. Meddaugh for Grd. Trk. Ry. Co. of Can. and connecting lines.

Mr. James A. Buchanan for N. Y., L. E. & W. R. Co.

Mr. Samuel E. Williamson for N. Y., C. & St. L. R. R. Co.

Mr. Ashbel Green for the West Shore R. R. Co.

Mr. M. Taylor Pyne for the D., L. & W. R. Co.

Mr. Wayne MacVeagh for Penna. R. R. Co. and connecting lines.

Mr. G. R. Kaercher for Phila. & Reading R. R. Co.

Mr. Robert W. de Forest for Cent. R. R. Co. of N. J.

Messrs. Read & Pettit for Commercial Exchange of Philadelphia.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

On March 8th, 1888, the Commission, having the subject of tariffs on export freight from the United States under consideration, issued the following order:

"Every tariff of rates and charges which a common carrier subject to the provisions of the Act to Regulate Commerce, by itself or jointly with one or more other carriers, whether such carriers are or are not subject to such Act, shall establish for the transportation of grain, flour, meal, meats, provisions, lard, tallow, canned goods, cotton, tobacco, live stock, or other articles of customary export, from any

point within the United States to a seaport thereof, or to any point in or on the boundary of an adjacent country, or to any foreign port or place, is required to be filed with the Commission and shall be made public.

"In all cases where a tariff is established for such merchandise billed or intended for export by sea, and ocean rates are not specified, either because of their fluctuation or for any other reason, so that only the charge for inland transportation is definitely fixed, the tariff as filed and made public shall show the rate charged by the inland carrier or carriers to the point of export, including all terminal charges or expenses, and shall also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate from time to time prevailing, or how otherwise. When the rate is a gross sum for the transportation of freight from a point within the United States to a port or place in a foreign country, the tariff as filed and made public shall in every case show what part of the whole is allowed to the carrier or carriers for inland transportation to the point of export by sea, including all terminal expenses or charges; and if such part is subject to be increased or diminished, contingently or otherwise, or if in any other case the charge for inland transportation is subject to any change or modification in case the property carried is exported, the fact and the manner in which the increase, diminution, or change is to be determined, and the extent thereof, shall be stated.

"Every such tariff of rates and charges shall be published by plainly printing the same in large type of at least the size of ordinary pica, and copies thereof shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station of any carrier making or issuing the same at which any traffic to which it relates is received or delivered.

"This order shall become operative on March 20, 1888."

On April 18th, 1888, the New York Produce Exchange, a corporation existing under the laws of the State of New York and located in the City of New York, composed largely of merchants engaged in foreign and domestic commerce, filed with the Commission its petition, charging therein, on information and belief:

"First. That since about April 4, 1887, the defendants have been railroads and corporations engaged as common carriers in the transportation of property shipped from Chicago and other western points to New York City and other Atlantic points and to European ports, such transportation being made to New York City and other Atlantic points wholly by rail; or to New York City and such other points and European ports partly by rail and partly by water, and such transportation being in all cases under some common control, management or arrangement for continuous carriage between the points aforesaid, so that each of the defendants constituted a part or portion of some through and continuous line of transportation so engaged as aforesaid under an established joint tariff, and is as to the said transportation within the provisions of said Act.

2 INTER S.

That the Trunk Line Association; the Central Traffic Association; the Joint Committee, so called, and all of the fast freight lines operating over one or more of said railroads, are agents of some or all of said railroads, so engaged as aforesaid, and the rates, classifications, rules and regulations which they make and enforce are those of said railroads and are those which regulate and substantially govern and control all such through and continuous transportation between the points aforesaid. That since about April 4th, 1887, the defendants have professed to maintain joint rates and classifications between Chicago and New York for their said continuous lines and routes, as follows:

| | Class. | Rate. |
|---|--------|---------|
| Flour, grain, in carload lots.... | 6 | 25 cts. |
| Flour, grain in less than carload lots..... | 5 | 30 " |
| Provisions, as salted meats, &c., in carload lots | 5 | 30 " |
| Provisions, as salted meats, &c., in less than carload lots | 4 | 35 " |

"That the joint rates for the transportation of like property from a number of western points are based upon the Chicago rate, and are either the Chicago rate or a certain agreed amount or percentage added to or deducted therefrom.

"That the defendants, since April 4th, 1887, in violation of said Act have been guilty of unjust discriminations, in that they have notoriously allowed to a large number of persons special rates, rebates and drawbacks, either given directly or indirectly, by means of such devices as underbilling or underweighing property transported, and have also been in the habit of charging a large number of persons for transportation from Chicago and other western points, taking Chicago rates as aforesaid to New York City, the foregoing schedule rates upon flour, grain, provisions and property covered by classes 4, 5, and 6, when such property was delivered to consignees at New York City for domestic consumption or was subsequently exported, while charging other persons rates much lower and even as low as fifty per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions when the property was delivered to vessels and steamship lines for shipment to foreign ports under through bills of lading, issued by the defendants under common arrangement with such vessels and steamship lines for continuous carriage at joint rates from the point of shipment to Europe; that for example, while charging and receiving 33 and 35 cents per 100 lbs. for transporting goods of class 5 in less than carload lots from Chicago to New York, they at the same time have charged and received but 19 cents for the same transportation of like goods when the same were delivered to steamship companies for export, which charge of 19 cents included a charge of 3 cents per 100 lbs. for lighterage in New York, which the defendants paid out of said 19 cents; that by the first of March last the foregoing unjust discriminations had become notorious and matter of common report, and were carried to such an extent, through the payment of rebates by railroads and steamship companies to some shippers and localities, that the net rates to for-

eign ports were lower than to New York; that on March 8th, 1888, your Honorable Commission issued an order to take effect on March 20th, 1888, requiring the defendants, among others, to prepare and file and publish their rates to the seaboard with the ocean rates, if any given, separately stated; that the defendants have failed and neglected to file and publish rates as required by said order except in a few instances where there has been a partial compliance; that said defendants also fail to state in each bill of lading issued by either of them to foreign ports the inland charge and the ocean charge separately, and thus prevent ascertainment of the actual inland rate.

"Second. That by reason of the difference in their rates for transportation hereinbefore referred to the said defendants since April 4th, 1887, have thereby made and given undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities engaged in the shipment under such through bills of lading, or in the handling and consumption of such goods abroad, and have subjected persons, companies, firms and corporations and consignees in and about the City of New York to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and contemporaneous service under substantially similar conditions and circumstances; that there are no conditions or circumstances relating to or bearing upon the transportation in question that justify any such differences in rates as have existed and do exist between the rates to New York City for export under through bills of lading and the rates upon consignment to New York City; that the complainants insist that the said Act requires that the rates to New York City shall be the same upon the said classes of property whether the same are carried to New York and there delivered to consignees or through New York and delivered to consignees abroad.

"Third. That the said defendants, in violation of said Act, since April 4, 1887, have charged and received, and do now charge and receive, a greater compensation for transporting property as hereinbefore described from Chicago and said western points to New York City, than they charged and received for like service under substantially similar circumstances and conditions for transporting like property from said Chicago and western points through New York City to European ports under common arrangement for joint rates with vessels and steamships, the shorter being included within the longer distance; that rates to foreign ports can now be obtained from Chicago through New York at about 3 cents per 100 lbs. less than to New York City.

"Wherefore, the complainants respectfully ask that the Honorable Interstate Commerce Commission shall investigate the matters herein complained of, and shall obtain from the defendants full and complete information in regard thereto, and shall then adjudge and determine:

"1. That in the particulars in this petition alleged the defendants have violated and are violating the 'Act to Regulate Commerce,' approved February 4, 1887.

"2. That all rates for transportation from Chicago to or through New York City to foreign

ports shall be the same for the transportation to New York.

"3. That compliance with the Law and with the order of March 8th, 1888, as to filing joint tariffs, be compelled by the methods and under the penalties provided, and that all such tariffs be likewise posted and published by order, to be issued under the discretion given to the Commission in that regard, and that in every bill of lading issued to a foreign port the inland rate and the ocean rate be stated separately.

"4. That, in reference to all of the matters complained of, your petitioners may have such other or further relief as to your Honorable Commission may seem just and proper."

The complaint was served on the several defendants, and answers made thereto.

It is not important to give these answers, or even their substance, further than to state that some denied the alleged violations of the Statute charged in the complaint, and others admitted that differences had been made in rates on export freight and domestic freight between November 4th, 1887, and February 20th, 1888, but justified those differences under their interpretation of the Statute, and all denied that such differences had been made subsequent to February 20th, 1888. At the hearing certain facts bearing upon the questions involved were given in evidence, but the case turned mainly upon questions of general policy and of law, with the view to a decision upon them, the facts being important only to have the questions presented.

On April 24th, 1888, the Pennsylvania Railroad Company presented the following petition:

"To the Honorable the Interstate Commerce Commission:

"The petition of the Pennsylvania Railroad Company on behalf of itself and the different lines operated, controlled and affiliated in interest with it, respectfully represents:

"That after the Act to Regulate Commerce had gone into effect the company entered into an arrangement with connecting carriers for the establishment of a continuous line or route for the carriage of freight from the cities of Chicago, State of Illinois, and Milwaukee, State of Wisconsin, and intermediate points, to Liverpool, London, Glasgow, and other European points, thus constituting a continuous carriage and shipment under a common arrangement, from a point in one of the States in the United States to a point or place in a foreign country.

"That by virtue of said arrangement a joint tariff of rates in a gross sum for such line or route was made and duly filed with this Honorable Commission, as is required by the fifth paragraph of section six of said Act.

"That this arrangement was continued until the twentieth day of February, 1888, when, pursuant to a resolution adopted by the Trunk Line Executive Committee, which had resolved, at a meeting held on the eleventh day of February, 1888, that 'the system now in operation of making through export tariffs be discontinued, and that thereafter the rates on export traffic be the same as the inland tariffs plus the ocean rates current from time to time,' the same was discontinued and inland rates alone filed, accompanied with a written state-

ment that through export freights were made by adding such inland rates to the rates of connecting ocean carriers.

"That although the resolutions above referred to were passed unanimously, yet they were accompanied by the statement on the part of the Pennsylvania Railroad Company that the acquiescence of the officers of that company was only occasioned by their deference to the desire of the other companies in the Trunk Line Association; and with the further statement that the officers of that company had not altered their opinion as to the justice and legality of the through billing system, and that they believed the results from its abandonment would be injurious. Experience since the twentieth of February, 1888, has sustained the correctness of the view of your petitioner thus stated, and your petitioner apprehends that it will be its duty at an early period to make a new arrangement for carriage from points within the United States to points in a foreign country for a gross sum.

"Pending the considering of this matter your petitioner received the order made by this Honorable Commission at its meeting held in the City of Washington on the eighth day of March, 1888, copy of which order is hereto attached and marked 'Exhibit A.' This order, if within the meaning of the Law and enforced by this Honorable Commission primarily and ultimately by the courts, would prevent the doing of that which, as your petitioner is advised, under said Act parties to such common arrangements for a continuous carriage are permitted to do, namely, filing the joint tariff of rates established for such route by such carriers, subject only to the requirements of publicity in such manner as might be deemed practicable by this Honorable Commission.

"Your petitioner most respectfully submits, that by the sixth section of said Act the power of the Commission is limited to requiring that the tariffs for joint through rates shall be filed, and to the direction as to the manner and measure of publicity.

"That nowhere in said Act can warrant be found for requiring any one of said joint carriers to show in their tariff or to make public, either the manner in which the through rates to the points of ultimate destination is to be determined when only the inland rate is definitely fixed, or, when a gross sum for the transportation is given from a point within the United States to a port or place in a foreign country, show what part of the whole is allowed to the inland carrier.

"Your petitioner further represents, that if the power of this Honorable Commission to make said order is vested in your Commission, the making thereof, under the circumstances, does not tend to subserve the purposes contemplated by said Act to Regulate Commerce, but on the contrary works to the prejudice both of the shipper and the carriers, as this petitioner believes could be established to the satisfaction of this Honorable Commission were opportunity afforded.

"This petitioner, therefore, most respectfully prays that it may be accorded a hearing, and that an order may be made modifying said order of the 8th of March, 1888."

2 INTER S.

On June 13th, 1888, the case was brought to a hearing upon the complaint and answers, and upon the petition, and the testimony taken.

The following facts appeared in evidence:

The New York Produce Exchange is a corporation duly created and existing under the laws of the State of New York, and located in the City of New York, composed largely of merchants engaged in foreign and domestic commerce.

Since April 4th, 1887, the respondent companies named in the petition have been railroad corporations, as therein alleged, engaged in the transportation of property shipped from Chicago, and other western points, to New York City and other Atlantic seaports, wholly by rail, a large proportion of the property so carried being transhipped to European ports by water. A part of such transportation was under contracts for a through rate to the foreign destination, and was carried under some arrangement for continuous carriage between the points of origin and the European port to which it was destined. Each of said respondent roads constituted a part or portion of some through and continuous line of transportation under established joint tariffs; and the respondents are, as to such transportation to New York City and other Atlantic seaports, within the provisions of the Act to Regulate Commerce.

The Trunk Line Association, the Central Traffic Association, the Joint Committee (respectively so called), and such fast freight lines as are operated over any of the respondents' roads are, to a qualified and limited extent, agents of the respondents or certain of them, and connecting lines with which respondents have established joint tariffs.

The Trunk Line Association, the Central Traffic Association and the Joint Committee, aforesaid, make rates, classifications, rules and regulations which are accepted by the railroads mentioned in the petition, and the fast freight lines operated over certain of them, which rates, classifications, rules and regulations are those which regulate, govern and control such through and continuous transportation between the points aforesaid as to classification and joint rates.

Since April 4th, 1887, the joint rates and classifications, via all rail, established, published, filed and maintained, have been as follows:

| Chicago to New York. | | | | |
|---|---------------------|---------------|---------------|---------------|
| Commodities. | Since Feb. 5, 1888. | | | |
| | Jan. 2, 1887. | Apr. 4, 1887. | Jan. 2, 1888. | Jan. 2, 1888. |
| Flour and grain in carload lots. | 25c. | 27½c. | 25c. | 25c. |
| Flour and grain in less than carload lots. | 30 | 33 | 30 | 30 |
| Provisions, as salted meats, in carload lots. | 30 | 33 | 30 | 30 |
| Provisions, as salted meats, in less than carload lots. | 35 | 38½ | 35 | 35 |

The joint rates for transportation of like property from a number of Western points to New York are based upon the Chicago rate, and have been and are either the same as the

Chicago rate or a certain percentage thereof, greater or less than the Chicago rate.

The membership of the New York Produce Exchange comprises a large number of merchants, who represent a capital of many millions of dollars, and are actively engaged in foreign and domestic commerce and in purchasing, transporting, storing, grading, inspecting, exporting and selling, for foreign and domestic use, the flour, grain and provision products of the west and southwest portion of the United States which are offered for sale in Chicago and other western points, and for the handling of which there is active competition between the merchants of the East and of the West.

The facilities in and about the Port of New York for handling the business aforesaid are large.

On November 4th, 1887, the Joint Committee aforesaid adopted the following rules with reference to export rates, viz:

"That substantially the basis for making through export freight rates from Chicago be: To add to the actual inland all rail tariff rates to each and all the different seaboard export cities, the different ocean steam quotations thence to the foreign ports to which it may be from time to time agreed to issue through rates upon the leading articles agreed to be specified in the tariff. The average result thus obtained, barring fractions, to determine the uniform through rates in cents per hundred pounds, via all ports, to each foreign destination." (For example, to take the New York and Philadelphia rates, and add them together, and then add the ocean quotations from those ports, and then to ascertain the average of all and make that a uniform rate from Chicago to the foreign port.)

On February 10th, 1888, said Joint Committee adopted the following:

"*Resolved*, That taking effect Monday, February 20th, 1888, the system now in operation of making through export tariffs be discontinued; and that thereafter the rates on export traffic be the sum of the inland tariffs plus the ocean rates current from time to time, except that the inland rate to Boston on export traffic may be the same as to New York; it being understood that on grain shipments the elevator charges at point of export shall be also added.

"*Resolved*, That the inland rates be filed with the Interstate Commerce Commission, with a written statement that the through export rates are made by adding such inland rates and elevator charges to the rates of connecting ocean carriers.

"*Resolved*, That from this date to February 20th, the published tariff rates to foreign ports will be used in giving rates to foreign ports named therein, but nothing to be contracted that cannot be forwarded by the 20th. For foreign points not named in the export tariff, full domestic rates are to be used as the proportion of the through rates, except that New York rates may be made to Boston on export traffic.

"*Resolved*, That export traffic contracted, way-billed and actually forwarded from points west of Chicago, St. Louis, etc., prior to Feb-

ruary 20th, will be passed at the present export tariff rates or the authorized export basis, to and including February 25th, at Chicago, St. Louis, etc., and thereafter the way-bills shall be corrected."

Between November 4th, 1887, and February 20th, 1888, the inland proportion of the rate for the transportation of merchandise through to foreign ports was frequently less than the rate for the transportation of the same kind of merchandise from the same point of shipment for delivery to the consignee at the seaboard; and the share of such through rate to the foreign port of each defendant line was in like manner less in one case than in the other.

The cost of transportation of freight from Chicago to New York and of delivery by lighter in New York harbor, is no greater on freight for New York consignees than on freight delivered to steamships for immediate export.

The method of making a uniform rate from Chicago and other western points to the seaboard, whether for export or for domestic consumption, except at Boston, has prevailed since July 1st, 1877, when an agreement as to rates was entered into by all the lines, until the Trunk Line resolution for a different method took effect, November 4th, 1887.

Under the resolution of November 4th, 1887, contracts were entered into by the carriers with shippers at the West for a through rate from point of shipment to the foreign port of destination, covering both the inland and the ocean transportation.

Under this system ocean rates largely advanced, and inland carriers were not able to maintain uniform inland rates, but were sometimes required to pay fifty per cent of the through rate to the ocean carrier, resulting in a discrepancy between the inland proportion of the export rate and the domestic rate of ten cents a hundred pounds at New York and eight cents at Philadelphia. The ocean rates are made by the ocean carriers, which are mostly owned abroad, and not under the control of inland carriers. And one effect of contracts for through rates to foreign ports had been to deprive inland carriers of the control of their own inland rates on export business.

The facilities in New York City for storing and holding the surplus grain from the West that accumulates there are in excess of the amount of such accumulations. Twenty millions of bushels are frequently in storage. The storage capacity is twenty-five millions of bushels.

Very full statistics were put in evidence showing the grain and flour transportation from the West to New York and other seaboard cities for a series of years, both for direct export and for consignment at the seaboard. These are too voluminous for the limits of this report, and only such selections will be made as relate to the points to be decided.

The number of tons of flour and grain respectively carried to the cities of New York, Boston, Philadelphia and Baltimore, consigned to those cities and exported, and compared with the tons of flour and grain carried by the Trunk Lines through those cities on through bills of

lading, consigned to foreign ports, during the periods below indicated, are as follows:

Flour.

| From— | To— | Seaboard consignments. | Foreign consignments. |
|------------------|------------------|------------------------|-----------------------|
| Dec. 1, 1883.... | April 30, 1884.. | 314,353 | 146,748 |
| Dec. 1, 1887.... | April 30, 1888.. | 428,702 | 302,936 |

Grain.

| From— | To— | Seaboard consignments. | Foreign consignments. |
|------------------|------------------|------------------------|-----------------------|
| Dec. 1, 1883.... | April 30, 1884.. | 869,526 | 74,049 |
| Dec. 1, 1887.... | April 30, 1888.. | 424,903 | 58,855 |

At New York City alone the comparison is as follows:

Flour.

| From— | To— | Seaboard consignments. | Foreign consignments. |
|------------------|------------------|------------------------|-----------------------|
| Dec. 1, 1883.... | April 30, 1884.. | 189,629 | 77,090 |
| Dec. 1, 1887.... | April 30, 1888.. | 196,284 | 107,088 |

Grain.

| From— | To— | Seaboard consignments. | Foreign consignments. |
|------------------|------------------|------------------------|-----------------------|
| Dec. 1, 1883.... | April 30, 1884.. | 489,554 | 24,109 |
| Dec. 1, 1887.... | April 30, 1888.. | 251,109 | 12,038 |

Tables were put in evidence showing the inland tariffs on certain commodities from Chicago to Baltimore, Philadelphia and New York, from November 4th, 1887, to February 20th, 1888, and the proportion of the through tariffs to Liverpool to the same cities for the same time.

The table showing the rates and proportions to New York will be a sufficient illustration. The columns under "A" represent the rates on consignments to the seaboard, and the columns under "B" represent the inland proportions of the through rates to Liverpool.

| From— | To— | Bacon pork and beef. | | Lard and canned goods. | | Flour. | |
|---------------|---------------|----------------------|--------|------------------------|--------|--------|--------|
| | | A | B | A | B | A | B |
| Nov. 4, '87. | Nov. 14, '87. | 30 | 25.31 | 30 | | 25 | 20 |
| Nov. 14, '87. | Nov. 21, '87. | 30 | 23.875 | 30 | 22.875 | 25 | 19.375 |
| Nov. 21, '87. | Dec. 27, '87. | 30 | 21.875 | 30 | 21.375 | 25 | 18.375 |
| Dec. 27, '87. | Jan. 2, '88. | 30 | 25.375 | 30 | 24.875 | 25 | 19.875 |
| Jan. 2, '88. | Jan. 11, '88. | 33 | 25.375 | 33 | 24.875 | 27.5 | 19.875 |
| Jan. 11, '88. | Jan. 26, '88. | 33 | 23.375 | 33 | 22.875 | 27.5 | 18.875 |
| Jan. 26, '88. | Feb. 1, '88. | 33 | 21.875 | 33 | 20.875 | 27.5 | 18.125 |
| Feb. 1, '88. | Feb. 2, '88. | 33 | 20.875 | 33 | 19.375 | 27.5 | 16.875 |
| Feb. 2, '88. | Feb. 3, '88. | 33 | 20.875 | 33 | 18.875 | 27.5 | 16.875 |
| Feb. 3, '88. | Feb. 6, '88. | 33 | 19.875 | 33 | 18.375 | 27.5 | 16.375 |
| Feb. 6, '88. | Feb. 7, '88. | 33 | 18.875 | 33 | 18.125 | 27.5 | 15.625 |
| Feb. 7, '88. | Feb. 8, '88. | 33 | 18.875 | 33 | 18.125 | 27.5 | 15.375 |
| Feb. 8, '88. | Feb. 9, '88. | 33 | 17.875 | 33 | 17.375 | 27.5 | 14.875 |
| Feb. 9, '88. | Feb. 10, '88. | 33 | 17.875 | 33 | 17.375 | 27.5 | 14.625 |
| Feb. 10, '88. | Feb. 11, '88. | 33 | 17.375 | 33 | 17.375 | 27.5 | 14.625 |
| Feb. 11, '88. | Feb. 20, '88. | 33 | 18.375 | 33 | 18.375 | 27.5 | 15.625 |

In view of the importance of the questions involved in this case, and the earnestness of the parties evinced in the discussion, and also that the record may show the differences among carriers themselves in respect to the rules that ought to govern the making of export rates, it is deemed appropriate to set out somewhat fully the arguments presented.

The argument in behalf of the complainants was in substance as follows:

2 INTER S.

First. The Commission had jurisdiction to make the order of March 8th, 1888.

Second. In charging less than inland tariff rates upon export business the defendants were guilty of unjust discrimination against New York consignees under section two of the Act to Regulate Commerce.

Third. Such lower rates upon export business violate the third section of said Act, which forbids undue and unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or the subjecting any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Fourth. Under the Law and the facts the preference and advantage given by an inland export rate which is lower than the inland tariff rate is undue and unreasonable as between competitors who can, and those who cannot, practically avail themselves of it, and as between export and domestic traffic.

Fifth. "The defendants violated the long and short haul clause, because they charged more for shorter distances than to the seaboard. The principal object of this fight is to knock out the long and short haul clause. If under section four a line can be projected to foreign ports, then rates from Chicago to shorter points than to the seaboard will not violate the Act, although they much exceed the sum received by the railroads to the seaboard, provided they are within the rate to Liverpool or Constantinople or Calcutta. This would be most disastrous to the efficiency of the Act as designed by Congress. There can be no longer line than to the seaboard under section four. To give to this section its clearly intended meaning we must fix the end of the long line at the seaboard, and must determine the extent of its application to interior point rates with reference to the seaboard competitive and other conditions."

Sixth. "Public policy forbids that inland export rates shall be lower than inland tariff rates, for many reasons, and hence there is no justification for them in this direction.

"(1) The ultimate result of the practice would be to destroy competition between the seaboard export points and interior storage centers in handling products, and to concentrate the control of both producer and consumer in fewer places and in fewer hands. No ultimate benefit can result therefrom. Public policy never favors this.

"(2) Competition in carrying to the seaboard would be lessened, because while the strong railroad lines could own, or control, or subsidize ocean lines or vessels, their competitors could not. This, in turn, would operate to destroy ocean competition at the seaboard, and to concentrate all business in the hands of some strong railroad lines and their ocean lines and vessels. This would be against public policy.

"(3) This part of our contention is fully covered by the fact that the defendants themselves have always maintained that like inland rates for both inland and domestic consignments to New York with certain concessions and differentials to weaker competing ports, is the best practical method of meeting and solving all the

conditions of the problem. Under this system a vast business has been built up and vast capital has been invested at the seaboard. Contentions and wars between railroads, and between competing ports, have been settled upon this basis and never could be on any other. In view of these facts is it wise, as a matter of public policy, to approve of a new method, which the experience of last winter shows will cripple the business and ocean carrying competition of the seaboard; which by reason of the situation of seaboard and interior competitors can only be practically available to those at interior points; which will demoralize all rates, and complicate the present difficult question of maintaining one set of inland rates, by adding, in all their troublesome relations, another set of rates based on different and uncontrollable conditions; which will invite rate cutting and strife among carriers, and open the door to new devices for favoring individuals, localities, etc.? Is it good public policy to thus disturb all business and defeat the intent of the long and short haul clause by extending lines beyond the seaboard; especially when the result will be to make American products much dearer in America than Europe, without benefit to the producer?

"(4) Export and import ports are fixtures — they are the natural centers of exchange with foreign countries. The conditions of all markets are there most quickly felt and responded to, and it is from those places that advantage can be most readily taken of foreign market demand and competition in ocean carrying. While they, for these reasons, cannot demand that their dealings with foreign countries *shall be favored by interior rates, so as to prevent billing between the interior and foreign market direct*, yet they only urge a sound public policy when they insist that railroads shall favor neither through billing nor seaboard consignment in their rates, but that the inland tariff, founded upon competitive conditions to and at the seaboard, shall be the basis of all rates.

"The theory that the inland export rate ought to be more flexible than the inland tariff rate, in order to place our surplus crops abroad, is all a misconception.

"Our exportable surplus of wheat, for example, is about one hundred millions of bushels. Of this quantity Great Britain absorbs about four-fifths, or eighty millions. That the market value of the exportable surplus product of any country fixes the value of the whole crop, is a well known and established fact. Prices would advance in England if our surplus was withheld, or its exportation merely checked. The attempt of the railroad companies, therefore, to meet markets or Indian competition, etc., is a direct and positive injury to the producer, because thereby the surplus is hurried to market, and prices depressed, not only on the quantity thus prematurely marketed, but of the entire crop, far below the nominal or actual value, if the regular course of supply and demand is allowed to prevail. Therefore, instead of helping the farmer, they create a new and uncertain commercial factor, which, while it injures every producer, by artificially depressing prices, at the same time reduces the legitimate earnings of the railroad companies, *cui bono?*

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"The inland tariff rate has always readily marketed our surplus crops abroad. This tariff rate is fixed by seaboard competitive conditions, and always prominent among those conditions are the very foreign market demands and requirements which a special low inland export rate is to be devised to meet. These are, and always must be, sufficiently met by the inland rate to the ocean.

"(5) Public policy demands *steadiness* in rates more than extreme cheapness. A divorce between inland tariff and inland export rates is a premium for strife over export business. The present penalty of disturbing all inland tariff rates by cutting the inland export rate is a wise and efficient restraint.

"American products for export are raised in all States from New York to San Francisco. To have two rates from each trade and producing center to each port would introduce chaos into inland rates, because of the ocean competition at each and all ports. It would be directly against the policy of the Interstate Commerce Act, which is to equalize rates, and not to encourage further inequalities.

"(6) Combinations with, and ownership in ocean lines by railroads is advocated as wise, and is the necessary result of through billing with a special inland export rate.

"To encourage this is not good public policy, but would tend to dangerous and uncontrollable monopoly.

"Without the capital, facilities and energy of the so-called middleman in gathering together and finding markets therefor, American products could not reach consumers, advantageously to the producer. Is it good public policy to wipe out those of them at the seaboard?

"Is it permissible under any view of what public policy requires to allow these servants, railroads, to engage in their partial destruction? We submit not."

Seventh. "The theory which was advanced on the hearing that the inland export rate ought to be as much lower than the inland tariff as is needed from time to time to market our surplus products abroad, however good and desirable, is utterly impracticable."

The Commission was asked to hold:

I. "That in charging a lower inland rate for export business to New York than the inland tariff rate, the defendants violated sections two, three and four of the Act to Regulate Commerce.

II. "That through rates to foreign ports through seaboard ports shall hereafter be made by adding the going, or agreed ocean rate, to the inland tariff rate, except that the New York rate shall be given to Boston on exports as heretofore.

III. "That in each through bill issued, the inland and ocean rate shall be separately stated.

IV. "That the order of March 8th be amended so as to require compliance with these requirements, and then be enforced."

The argument on behalf of complainant was strongly supported by the New York Central and Hudson River Railroad Company and its western affiliations; and by the Commercial Exchange of Philadelphia. The railroad companies mentioned contended that the evidence

tender^d to establish, and that the contrary cannot be maintained:

"1st. That the seaboard exporter has long held and holds a legitimate place in connection with the traffic of the country and should not suffer from unjust or even impolitic discrimination.

"2d. That, with the exception of a very limited amount, comparatively, of freight delivered directly to ocean steamers from railroad piers—conditions applying as well to local exports as to those upon through bills of lading—the expense to the railroad companies in transportation and in terminal service at the seaboard is practically no more upon domestic traffic than upon export traffic.

"3d. That it is of the greatest advantage to the commerce of the country that the extensive storehouses and storage facilities, long established at the seaboard, should be maintained and utilized, so that American products there accumulated should be always ready for vessels seeking cargo, and for prompt and sure forwarding and delivery to foreign markets.

"4th. That, without increased cost to the railroad company, the western exporter, if he so desires, should be permitted, in accordance with established custom, to handle his own products at the seaboard, making his ocean contracts and inspecting and properly preparing his shipments before delivery to the ocean carrier, instead of losing all charge of his property after delivery to the carrier in the far West.

"5th. That the commerce of any port is best created and fostered by the certainty of 'spot freight,' rather than by a dependence upon freight contracted through to foreign countries at the West, with the uncertainties of inland transportation, and the consequent necessity for contracts long in advance of sailings.

"6th. That the expense to the railroad companies being practically the same on both classes of export traffic, any difference in rate in favor of the through bill of lading—unless justifiable by dissimilar circumstances and conditions—is a discrimination against the seaboard exporters, and of bad policy.

"7th. That the seaboard exporter, making his own ocean rates with the steamship companies, and entitled to the same inland rate as that which the interior exporter receives on a through bill of lading, must necessarily be advised as to that inland rate, in order to be placed on an equality with the interior exporter, who secures both ocean and inland rates by his bill of lading; and this cannot be effected by subsequent and uncertain rebates to conform to fluctuations in the inland share of the *through* bill of lading rate, but necessitates a *fixed* inland rate, not subject to change without notice.

"8th. That, under ordinary circumstances, the New York tariff rate, at New York and Boston, with the agreed differences at Montreal, Philadelphia and Baltimore, has practically served well as this *fixed* inland rate for both classes of export traffic.

"9th. That in the past, the necessity for making export rates 'to meet the markets abroad,' has seldom, if ever, existed without at the same time such conditions of limited

movement of freight and competition to the seaboard, as to cause a reduction in seaboard rates on domestic business without reference to or thought of prices abroad.

"But conditions may exist, and are easily possible, which would justify, as was contended in the Boston case,* different rates on export and domestic business—differences which when capable of justification, obviously promote the business interests of localities and of the country, and are approved by public policy.

"10th. That ocean rates do fluctuate, and always have fluctuated, weekly, daily and hourly, even for the same sailing, and evidently from conditions not affecting rail carriers or affecting them in a less degree; and that it is not to the interest of rail carriers (or indeed of steamship companies) to combine inland and ocean rates as a through rate by any system which will thus extend this fluctuation to the rail proportion, which could otherwise be free from it.

"The power to quote through rates at pleasure might give a temporary advantage to any one line alone adopting that system, but considering the system in view of its general adoption—a necessary result so soon as the amount of traffic secured under it by one or more railroad companies was deemed excessive by the other companies—the constant changing of the inland proportion of through rates, in addition to the necessary loss of revenue to the rail, would make any protection to the seaboard exporter impossible.

"Especial attention to, and examination of, this matter of fluctuation in ocean rates is asked, as distinguished from any fluctuation in inland rates, because of its great weight and importance in the question at issue, the ocean rates being beyond the control of the Commission, and attention is called to one reason for this fluctuation, not requiring proof, but obvious, viz.: the regular lines of steamers have their fixed dates of sailing, and must secure cargoes regardless of rate; or, having secured a part, must complete the cargo with the particular class of freight, between decks or ballast, required; while all irregular steamers or 'tramps' must secure the earliest possible sailing, delay being often more expensive than a considerable concession of rates.

"11th. We believe also, that while a system of through rates to foreign ports, the same via all American ports and based upon percentage or other divisions between rail and ocean might be theoretically a perfect system, it would drive away some of our regular steamship lines, would make our ports most undesirable to outside vessels, would cripple if not destroy our seaboard exporters, would demoralize export and domestic rail rates, and in fact is wholly impracticable."

The summary of conclusions by these parties was:

I. "The seaboard exporter and the interior exporter should have the same inland rate."

II. "This equality of rate is best secured by making through rates to foreign ports, by the addition of current ocean rates to the fixed inland rate, which latter is charged to the seaboard exporter."

*1 Inters. Com. Rep. 754.

III. "This inland rate on export freight can, under exceptional and justifiable conditions, differ from the domestic tariff rate to the seaboard."

IV. "The separation of 'through rates' to foreign ports from the inland rates to the seaboard, by combinations with ocean lines, tends to demoralization and to unjust discrimination; as a system, is wholly impracticable, and, if adopted generally, would bring great injury to our foreign commerce."

V. "If the inland domestic tariff, or at least the inland rate charged to the seaboard exporter, forms the basis of through export rates, the publicity required by the Commissioners' export circular of March 8th, 1888, will enable the seaboard interests to know just what the inland rate or proportion is, to discover any discrimination, and to demand justification or correction."

For the Pennsylvania Railroad Company it was contended that a fair reading of the Act to Regulate Commerce does not contemplate a division of through export rates, and certainly not a publication of them as part of the publication of the rate itself. But if the power exists to require this it ought not to be exercised for the following among other reasons:

"(a) The action of the Canada lines, prevailing for years previous to the passage of the Interstate Law, in making through rates to Europe from points in the interior of the United States, via the Ports of Boston, Portland, Montreal and Quebec, which were, as we understand it, treated independently of their domestic rates from western points to the seaboard proper, and divided with the ocean carriers upon a percentage basis."

"(b) The fact that the City of Boston was the only eastern port having the advantage of two rates upon lines traversing a portion of the United States, one domestic, the other export."

"(c) The export traffic, whilst being a very small portion of the whole to be moved by the lines running through the territory of the West and South, involves the movement of the surplus production of grain, provisions, oil cake, tobacco, cotton and flour—the six articles that cover about all the export trade."

"(d) The fact that under the principle now prevailing, and which has prevailed except during the short period between November, 1887, and February, 1888, the Ports of Philadelphia and Baltimore are placed at a disadvantage in the fact that they do not enjoy as much and as spirited ocean competition as the City of New York."

"(e) The desire to create continuous lines from points in the United States to points in Europe, partly by rail and partly by water, which would place the whole rate, ocean as well as rail, under the jurisdiction of the Commission, and would guarantee to a shipper in the West or South the advantages of such continuous lines, without subjecting his property to assessment or delay of any kind *en route*."

"(f) The belief that it would be impossible for the Commission to legislate upon the inland proportion of such through rates, for the reason that the ocean charges from all ports fluctuate so suddenly and so widely, owing to the abundance or scarcity of unoccupied ships at the various ports at the same time, thus caus-

ing the inland proportions of the through rates to suddenly and violently fluctuate also."

"(g) The belief that the failure of the rail transportation companies between the West, South, and East to make a different rate per mile upon export business than that made upon domestic business would result either in an absolute loss of the surplus production or the shipment of it by other routes; it being understood, of course, that this surplus has to meet the competition of the world in foreign ports."

"(h) The present rate on grain from Chicago to New York is 25 cents per hundred pounds, five dollars per ton for one thousand miles, or about five mills per ton per mile. It is urged that the Commission should first decide as to whether that rate is in itself fair and reasonable, in consideration of the service performed. If, in its judgment, it is fair and equitable, then the surplus production of the western and southern States should be allowed to seek the markets of the world, always providing that the aggregate charge for the long haul should not be less than the charge for the short, over any portion of the same route, in the same direction."

Briefs in support of the same positions were also filed in behalf of the Associated Millers and the Chamber of Commerce of Minneapolis, and the Indianapolis Millers' Association.

The arguments of the leading contestants have been set forth at large to give the advocates of the rival plans urged for approval the benefit of their own forms of statement. Both carriers and shippers are to some extent divided as well in respect to the intent of the Law as to the principles of transportation that should govern, and the pronounced discordance of views as regards the Law indicates the difficulties that surround the subject.

Two distinct theories, as is seen, are advanced, involving radically different interpretations of the Statute and dissimilar systems of rates for home traffic and for foreign traffic, or, more precisely, for interterritorial traffic from an interior point to the seaboard even though subsequently exported, and like traffic consigned directly to a foreign country beyond the ocean.

The contention of the complainants and of the carriers and others who are in general accord with them, is that for all the purposes of rate making by inland carriers a seaport of transshipment of property transported from an interior point must be deemed the terminus of carriage, and that the inland rate upon such property consigned abroad and requiring ocean carriage must be identical with the rate charged contemporaneously for the transportation of like property to consignees at the same seaport for either local sale or for subsequent export, and therefore, when the inland proportion of a through rate to a foreign country is less than the rate from the same point of origin to the port of transshipment upon like property, the proportion of the export rate for inland carriage to the extent of such difference is unjustly discriminating and illegal.

The converse of this position is urged as the other theory, and it is insisted that if the aggregate through rate to a foreign country is fair and equitable a disparity between the domestic rate and the inland proportion of such through

rate is not unlawful, provided the total through rate is not less than the charge for a part of the distance over the same route in the same direction; that the domestic dealer or consumer is not harmed, and that on grounds of public policy these dual methods are valuable if not essential to the commerce of the country.

A wide field of inquiry and discussion is opened up in the consideration of these questions. They affect in a greater or less degree the whole interstate and foreign traffic of the country, and are invested therefore with a measure of national importance.

Doubtless more than common and perhaps exaggerated importance is attached to them by particular transportation lines and particular localities for reasons supposed to be peculiar and to have controlling weight, but the questions have broader scope than the assumed special interests of towns, whether at the seaboard or in the interior, or the exceptional advantages of a transportation line, and they can only be justly determined with reference to carriers as a body, and to the rights and interests of producers, dealers, and transporters wherever located. The regulations of commerce are intended by the Act to be general and for the common and equal benefit of all the interests to which they relate wherever the jurisdiction of the Government extends. Injustice in various forms is specifically defined and carriers are forbidden to practice it. They are also required to make public their rates and charges that the information they furnish may be general and impartial, and to carry all traffic at the published rates. These provisions, it is contended, are not inconsistent with two simultaneous sets of rates for the same carrier, one a fixed and public rate from an interior point to a seaport for the transportation of property to be sold at the seaport or subsequently exported, and the other an unspecified and unpublished lower rate, changing perhaps daily, or with the successive hours of the same day, for the contemporaneous transportation of like property, possibly in the same train, over exactly the same line, charged with the same terminal expenses, when the property is destined for immediate shipment across the ocean.

This discrimination is claimed to be justified by considerations of public policy. The surplus products of the country must seek foreign markets, and it is said that carriers should be at liberty to make and modify rates to enable these products to reach the markets of Europe in successful competition with like products of other countries. No proof was given in support of the assumption that conditions exist requiring the discriminations claimed to be necessary for these purposes.

Low general rates are not the subject of complaint. Carriers are not forbidden, but are expected, to make their rates as low as they can afford to serve the public without injury to themselves. Every legitimate reduction of charges is in the interest of the public. Apart from the Law, equitable business considerations would seem to have force, that while carriers may make their through export rates as low as they think the exigencies of the markets and of competition through Canadian channels may require, they should give the same inland rates to the exporter who handles his own traf-

fic at the seaboard at no additional expense to the carrier.

The complaint is against a reduction on a part of the traffic to the seaboard which is claimed to be prejudicial to the other and greater part, and without facts to justify it.

With regard to competition in foreign markets other things are of importance besides rates, and perhaps of equal importance. Among these are the abundance or diminution of supply—the quality of the products, and the operations of dealers or combinations of dealers in acquiring control of commodities and withholding or hastening their shipment. The other conditions are more or less influential, and rates, though of obvious and conceded importance, are not alone controlling.

The contention that a more flexible and lower rate to the seaboard for direct exports is needed for the surplus of the country, in order to stimulate the prosperity of its newer portions, is opposed by the historical facts of transportation and the progress of the development and growth of the country generally. Through many years of unexampled and substantially corresponding advancement in population, wealth and general prosperity at the seaboard and in other portions, the productions that enter into commerce have been generally moved on rates that made no distinction between consignments to the seaboard and abroad, without apparent advantages or disadvantages to geographical location. Cities at the seaboard, as the natural outlets and inlets of commerce, have advanced with amazing pace, while at the same time what was once the frontier, a thousand or two thousand miles from the coast, has disappeared, and wilderness and waste places have been transformed into fruitful fields and populous towns that are great centers of varied business activities, and abreast with the elder towns in the features of progressive civilization.

The theory of a necessary disparity between rates on transportation terminating at the seaboard and like transportation extended across the ocean is not supported, therefore, by the evidence in the case or by the general facts of experience.

The legal question, whether under the Statute a difference in rates for the contemporaneous inland carriage from an interior point to the seaboard can be justified by the circumstance of direct destination across the ocean, is one of vital importance. A decision of that question, declaring a rule applicable to all ports, is, however, not imperative in the present case. The practicability of an exceptional rule for through exports, both as a feasible method for inland carriers generally, and for purposes of regulation under the Act, as well as its justice, are obviously at the foundation of the question, and in these respects the objections to its use at the Port of New York are too serious to be disregarded.

The law applicable to the question under consideration was little discussed before the Commission on the part of the defendants, but the case was treated on their part almost exclusively as one of practical policy in making transportation rates involving ocean carriage, and as the carriers have been mainly concerned with its practical difficulties it is natural that

they should present that phase of it most prominently. It is not a matter of dispute whether through foreign rates should be made. Substantially no difference of opinion exists on that point. Carriers and dealers concur that they are desirable, and that the export business from the interior is simplified and subverted by a system of through rates that is practicable and affords some guaranty of uniformity and stability. Through rates have been made for a score of years and more, and various plans have been tried to find a satisfactory method and prevent frequent disturbances and confusion. The general rule, and the one to which a return has been made after every other experiment, has been to make the through rate by adding to the inland tariff rate to the seaboard the current ocean rate at the time. This rule preserves to the inland carrier its published rate, and makes no discrimination between shippers, and has therefore been found better for the interests of both.

The case presented and necessary to be decided relates to the business at and through the Port of New York. It involves, however, necessarily, the business at the various Atlantic seaports from Baltimore, Maryland, to Portland, Maine and Montreal, Canada. The conditions at these various ports, though not identical, are so similar that the various competing rail lines, all deriving their traffic, mostly of the same character, from the same general territory, have found it expedient for a long time to equalize their rates to these different seaports by mutual agreement upon a system of concessions or differentials at certain ports, that were thought to be equitable in view of the conditions at those ports. This adjustment the carriers interested have professed to respect, and claim to have nominally, at least, maintained. The importance of adhering to some proper and lawful arrangements in order to maintain fair rates and to prevent demoralization of business, is obvious enough to all, and fully understood by the carriers. The provisions of the Act requiring carriers to publish their tariffs, and to adhere to established schedule rates, added the obligation of legal duty to the voluntary agreements previously relied on. The stability intended to be given by the Law to all inland rates, and which is deemed of such importance that advances or reductions are prohibited under severe penalties except in compliance with specified conditions, is no less important and desirable upon export traffic, as well to producers and dealers, as to the carriers themselves. But this involves conditions of ocean carriage that the rail carriers have struggled with in vain for years, and which are practically beyond the reach of legislation, if attempted to be regulated at all. Experience has shown that the only practical control over ocean carriage results from stable inland rates, and that ocean rates, like all other incidents of commerce, adjust themselves to fixed conditions. Ocean carriers, like inland carriers, when they cannot arbitrarily determine the rates they will charge, are likely to act on the ordinary principle of accepting the best obtainable rates, if the business is regarded as desirable.

It is claimed by all the lines made defendants in this proceeding that, since the promulgation
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of the order of the Commission of March 8th, 1888, they have complied with that order both as to the publication of their export tariffs and the observance of the inland rates upon the traffic. Their testimony is also uniform that there are no inherent or practical difficulties in complying with that order. The propriety of the order is not questioned, but it has been supposed, and circumstances give color to the supposition, that the order has not been fully respected at all times, but that some of the lines, for purposes of their own, have made use of practices to give secret reductions from their established rates. Whatever traffic disturbances have occurred have arisen from causes extraneous to the order, and came from breaches of its requirements. They are traceable to wrongful acts of carriers themselves impelled by a desire for business, and impatient of the restraints of law.

The export commerce at the Port of New York and the related ports whose inland rates are based on New York for the calendar year 1888, as shown by the statistics officially furnished by the Government, was as follows:

| Ports. | Value of exports. |
|--------------------|-------------------|
| Baltimore | \$ 45,114,613 |
| Boston | 59,379,375 |
| New York | 299,895,853 |
| Philadelphia | 28,028,798 |
| Portland | 1,482,133 |

The flour and grain exported through the North Atlantic seaports, including Montreal, during the calendar year 1888, expressed in bushels, was 91,077,038; for the two preceding years the exports of the same products from the same ports were: In 1886, 150,383,499 bushels; and in 1887, 154,209,915. The percentages exported through Montreal during these three years were as follows: In 1886, 13.7 per cent; in 1887, 11.9; and in 1888, 11.01. For the ten years preceding 1886 the variation in the percentage of exports through Montreal averaged about one per cent.

The total exports of American merchandise from the same ports during the fiscal year ending June 30th, 1888, show a much smaller percentage exported through Montreal. The value of such products, as appears from figures furnished by the United States and Canadian Governments, was \$444,428,189, and of this amount only \$12,713,290, or 2.8 per cent, went through Montreal. The statistics for previous years show even smaller percentages.

The statistics quoted convey only an indefinite idea of the traffic carried to the different seaports by common carriers subject to regulation under the Statute. They represent aggregate exports of merchandise to foreign countries from the respective ports, and include that produced at the ports, that brought wholly by water, that brought by rail, and all varieties of traffic. The exports on through bills from interior points embrace only comparatively few leading articles. These are chiefly grain, flour, meal, meats, provisions, lard, tallow, canned goods, cotton, tobacco, oil cake and live stock. Exact proportions of the property carried by rail consigned locally to the ports and subsequently exported, and that which passes through the ports on direct foreign consignments are not at hand in any complete form, but only to

a partial extent. Approximately, however, the through consignments are much the smaller in amount, and do not exceed one third of the rail carriage, in some instances being more and in others much less. It is on this limited portion of the export traffic that the claim is founded for a method of making rates that affects the transportation and the market value of much the greater volume of like property, and prejudices the investments and business interests of large bodies of citizens.

In view of the very large export business of the country, and the varied interests engaged in it, the questions that naturally arise, are, Is it the intention of the Law to regulate equally the inland carriage of property whether consigned to the seaboard or across the ocean? Or is it its intention that the fact of a foreign consignment shall exempt inland transportation from the operation of the Act, except only that the charge for a haul of a thousand miles, from Chicago to New York, shall not be greater than a charge for the same haul with three thousand miles of ocean carriage added, when no difference in cost of inland service or terminal expense exists in either case? Practically, can two distinct methods coexist and be enforced without friction and disorder, by one of which tariff schedules must be published and adhered to by the carriers, and by the other of which schedules, if published at all, need not show the inland rate, but only the aggregate through rate?

Generalizations applicable to domestic transportation, such as decrease of charge per mile in the ratio of distance, competition of carriers not subject to the Law, and even broader considerations relating to competition in foreign markets or what are called the markets of the world, do not aid the interpretation of a domestic statute, nor so enlarge its application as to make it effective upon the ocean, and, by reflex influence, authorize different standards for internal rates.

The essential physical fact cannot be changed, that inland transportation and ocean transportation are distinct in their nature, and though a common charge may be made for both they are none the less separate in character; and where one gross rate is charged for both it will, as a rule, usually be found to involve percentages or estimated proportions for each.

Nor is the carriage always continuous in the matter of time. It is not uncommon for a through consignment to wait several days or a month or more at the Port of New York for ocean carriage.

The general facts relating to the business at New York, and that preceded this complaint, are as follows:

On November 4th, 1887, the Trunk Line Joint Committee, so called, adopted the following rules with reference to export rates:

"That substantially the basis for making through export freight rates from Chicago be: To add to the actual inland all rail tariff rates to each and all the different seaboard export cities the different ocean steam quotations thence to the foreign ports to which it may be from time to time agreed to issue through rates upon the leading articles agreed to be specified in the tariff.

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"The average result thus obtained, barring fractions, to determine the uniform through rates in cents per hundred pounds via all ports to each foreign destination."

These rules were in force until February 20th, 1888, when they were abrogated and the former method restored.

It was shown that while the rules referred to prevailed contracts were made by the rail carriers with shippers in the interior for a through rate from the point of shipment to the point of destination covering both the inland and ocean transportation, and that this rate was sometimes less than the established inland rate to the seaboard.

It was also shown that under this system ocean rates largely advanced, that inland carriers were not able to maintain uniform inland rates, but were sometimes required to pay fifty per cent of the through rate to the ocean carrier, and that usually there was a discrepancy between their proportion of the export rate and their domestic rate of ten cents a hundred pounds at New York and eight cents at Philadelphia. The vessels used for ocean carriage, being principally and most of them wholly owned abroad, are independent of the inland carriers, and, under such a system, fix their own charges. One effect of contracts for through rates was to deprive inland carriers of the control of their own inland rates on export business.

Other effects of the system in respect to rebates to shippers were indicated, but rather as probabilities or inferences than as ascertained facts.

The irregularities and discriminations in the export rates under the rules put in force November 4th, 1887, and the complaints to which they gave rise, were the occasion for the order made by the Commission on the 8th of March, 1888, requiring export tariffs to be made public and to show the charge for inland transportation to the seaboard when definitely fixed, and when the export rate is a gross sum to show what part is allowed to the carrier for inland transportation to the point of export by sea.

The object of this order was to check the unjust discriminations of which general complaint had been made.

Prior to this order, however, on the 11th of February, 1888, the Trunk Line Executive Committee resolved that the system in operation from the 4th of November preceding, of making through export tariffs, be discontinued and that thereafter the rates on export traffic be the same as the inland tariffs plus the ocean rates current from time to time; and this resolution became operative on the 20th of February.

The carriers of the Trunk Line Association were influenced to abandon the system under which the export business had been governed from November 4th by a conviction on the part of most of them of its impracticability and a sense of the unjust discriminations for which it was a cover. This experiment was, however, only a repetition of two preceding trials and rejections of substantially the same expedient. It had a trial of several months' duration in 1877, and according to the testimony taken before the Hepburn Committee of

the New York Legislature in 1879, the demoralization was so extensive that in July, 1877, it was abandoned and the normal method of adding the current ocean rate to the fixed inland rate resumed.

In January, 1880, another attempt was made to put in force a system of through export rates, and a Rate Committee was organized for the purpose. The scheme was, in substance, that the committee should have power to make through rates from common interior points of shipment to foreign ports, which rates should become the uniform and established rates via all the seaboard ports of the Trunk Lines; the rates to be quoted daily, or as often as necessary, to the agent at common points, and given to all the roads; the committee to have power to adopt uniform through bills of lading so framed as to give the carriers the right to forward the freight by any road, line, route or port. Notice was given that the plan would be enforced, but strenuous objections were made to it by western shippers, and it was abandoned before it was put in execution.

However plausible the theory of through export rates not founded on a fixed inland rate may appear, in practice it has been found impracticable. The troublesome factor in every instance, the element of confusion and demoralization, is the ocean carriage. If the domestic carriers were generally owners of the vessels that carry the freight, with no independent competitors on the ocean, a very different condition might exist. But they are not. Our exports are mainly carried in vessels owned abroad and sailing under foreign flags. They are not within the jurisdiction of our laws, like our inland carriers, and there are difficulties in applying to them the provisions of the Act to Regulate Commerce. They have power, therefore, and exercise it, as the testimony abundantly shows, to dictate their own terms in making a through rate, and among the results that follow are higher divisions of the through rate for ocean carriage, fluctuating inland rates, discriminations between the inland and export charges, and the effect on prices in foreign markets of lower through rates.

There are other incidental abuses that mostly have their origin in the desire to secure business, and involve to a greater or less degree infractions of law. Consignments of freight on through bills without an arrangement for ocean carriage, resulting in delay at the seaboard, or a higher ocean charge at the expense of the inland rate; or nominal foreign consignments and delivery of the property at the seaboard; or secret subsidies to ocean lines by the inland carriers; and other devices that lead to disorders, are not uncommon practices.

The delays that occur in the transshipment of freight at the seaboard consigned on through foreign bills illustrate the injustice of a through rate not founded on the inland rate. Can any valid or even plausible reason be assigned why shipments on a through rate billed to a foreign country, that wait a month or more for ocean carriage at a seaport, should be carried at a less inland rate than a shipment of the same kind of property over the same line consigned at the seaboard, that waits no longer and perhaps a shorter time, to cross the ocean?

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The work of the inland carrier is completed when he discharges his freight at the seaboard, whether in warehouses, elevators, or on board vessels. His service is identically the same whether the destination is the seaboard or a foreign port, and there is no reason founded on the character of the service for a difference in compensation, or why a fixed charge applicable to both should not exist. Peculiar circumstances may exist at some port why domestic dealers there as well as exporters may acquiesce in a concession to exports not at the same time given to the strictly domestic rate. But independently of such exceptional conditions a fixed inland rate would seem the fair and just rule.

A standard rate from Chicago to New York, uniform both for domestic and foreign consignments, has existed nominally at least for more than eleven years, and was the agreed result of experience and severe contention, as the only practical way by which all the interests involved would be adequately protected. It is in evidence that the recognized importance of reaching foreign markets was a very important element in fixing this rate, and except for this consideration, and water competition by the lakes and Erie Canal, the charge would likely be considerably higher. It is not claimed that the carriers have adhered with unswerving fidelity to the established rate, but, on the contrary, both before and since the Act to Regulate Commerce, departures, in the form of rebates and cuts, as is charged, have not been uncommon. But these have been wilful and wanton violations of an agreed and established rule. There was no element of instability in the conditions beyond the control of the carriers.

The case is very different with ocean rates. There has not been, and cannot be in the nature of existing conditions, fixed or permanent ocean rates. It is undoubtedly the fact that "ocean rates do fluctuate, and always have fluctuated, weekly, daily and hourly, even for the same sailing, and evidently from conditions not affecting rail carriers, or affecting them in a less degree."

The testimony illustrates the practical working of the contracts for through rates under the disadvantages of these fluctuations and the absence of any control over them. It shows in substance that when the railroad companies, under the plan of November 4th, 1887, fixed the through rate based on the average of inland and ocean rates, some of the steamship companies increased their rate and asked the railroad company more than the proportion they were to receive of the through rate. Thus, if the inland carriage were twenty-five cents a hundred, and the average ocean carriage ten cents a hundred, the through rate established would be thirty-five cents a hundred. This would be published as a through rate, and the next day, when the rail carrier wished to take any business to a steamship with which no previous understanding existed, the steamship company would demand fifteen cents a hundred for its part of the work, and the railroad company, having guaranteed a through rate of thirty-five cents a hundred would have to carry the business for less than the average inland proportion on which the rate was originally based.

The extent to which inland rates were affected by the fluctuations in ocean rates is shown by tables in evidence. The established inland tariff from Chicago to New York from January 2nd, 1888, to February 11th, on bacon, pork, beef, lard and canned goods, was 33 cents per hundred pounds, and on flour 27½ cents per hundred pounds. The inland proportion of the through rate to Liverpool via New York on January 2nd was 25.375 cents on bacon, pork and beef, 24.875 on lard and canned goods, and 19.875 on flour. These proportions fluctuated until they fell on February 10th to 17.375 cents on all except flour, and on flour to 14.625, being about half the established rate on the same articles consigned to New York.

As the freight sent across the ocean on a through rate affects the price of all like freight stored or accumulated at the seaboard, the disadvantages of the seaboard exporter under such disparities in the inland rate are evident.

In the testimony statements were produced showing the quantities, in tons, of flour and grain respectively carried to the Cities of New York, Boston, Philadelphia and Baltimore, consigned to those cities and exported, and also the quantities carried through those cities on through bills of lading during certain periods, and are set out in the findings of facts. By these statements the proportions of flour and grain exported on through bills through the several cities named, in comparison with the amount carried to the same cities and subsequently exported, were as follows:

From December 1st, 1883, to April 30th, 1884, 46.67 per cent of flour; from December 1st, 1887, to April 30th, 1888, 70.50 per cent;

From December 1st, 1883, to April 30th, 1884, 8.51 per cent of grain; and from December 1st, 1887, to April 30th, 1888, 13.85 per cent of grain.

At the City of New York alone the comparisons were as follows:

From December 1st, 1883, to April 30th, 1884, the proportion of flour exported on through bills was 40.65 per cent; and from December 1st, 1887, to April 30th, 1888, 54.56 per cent.

Of grain the proportion exported on through bills from December 1st, 1883, to April 30th, 1884, was 4.92 per cent; and the proportion from December 1st, 1887, to April 30th, 1888, was 4.79 per cent.

More complete statements of the exports at New York on local consignments and on through bills show the following comparisons:

Total exports of flour for the year 1886 were 6,052,118 barrels, of which the percentage exported on through bills was 30.38. Total exports of flour for the year 1887 were 6,506,436 barrels, of which the percentage exported on through bills was 29.86.

It is a generally accepted conclusion among those who have given most attention to transportation, that the great fluctuations constantly taking place in ocean rates at different seasons of the year under the ever changing conditions of commerce, make it entirely impracticable to vary the inland rates as the ocean rates may vary, and that the plan of equalizing the through rates upon the average sum of ocean and inland rates can never be successfully carried out. But on the other hand the evi-

dence furnished by the statistics of the movements of commerce prove that it is one of the laws of transportation that ocean rates adapt themselves with almost invariable precision to established inland rates. Whatever advantages may be urged in favor of a through foreign rate from interior points not founded on a fixed and public inland tariff rate manifestly cannot accrue to the country at large, nor promote the territorial distribution and individuality of business pursuits that are generally regarded as desirable, and conducive to the public welfare. But on the contrary, the tendency under such a system is more likely to be towards concentrated control or combinations in commerce that may be productive of results prejudicial to individual enterprise and to the public interests.

It is not surprising that, in view of past experience, the great majority of those familiar with transportation questions and practically engaged in transporting products for export, substantially concur with the petitioners with regard to the method of making foreign rates. All the parties to this proceeding whose opinions have been expressed, with one exception, favor that mode, and it is also supported by the testimony. This general coincidence as the mature result of experience, study and practical knowledge of the subject of transportation and of the factors that must be considered in fixing a basis for rates, is a significant and important circumstance. Upon the practical aspects of the question of the proper method of making through foreign rates, the largely preponderating testimony of those directly interested in the business, both as shippers and transporters, is entitled to reasonable weight.

The questions that arise under the Act have to be determined under it as it stands, and the Statute should not be impaired, or deprived of its efficiency, by artificial or fanciful construction. If there are any defects or errors in the existing Law it is far better that they should be endured for a time, until proper changes can be made by the legislative body, than that construction should be resorted to for the accomplishment of purposes only to be appropriately attained through legislation. It is certainly not to be expected that the first attempt to regulate by law the immense transportation interests of this country, with such endless diversities in the conditions of transportation, and such great variety in the character of products to be carried, should be complete in all its parts, or free from some provisions that may produce friction, or, to some extent, perhaps, injurious results. Indeed, the wonder is that a statute of such a character, and for such purposes, could have been framed, as a first experiment, with so comparatively few defects.

A general and careful survey of the export business of the country, and the conditions under which it is carried on, through the various ports, seems to warrant certain deductions which largely simplify the question under consideration. These deductions may be summarized as follows:

The proportion of the export trade to which the exceptional rate is sought to be applied is very small in comparison with the general transportation business to the seaboard, and relatively small in proportion to the export business itself.

There is no reason to believe, founded upon any evidence in the case, that foreign markets cannot be profitably reached by our surplus products upon a fixed inland tariff rate to the seaboard with the current ocean rate added, but, on the other hand, there is affirmative evidence that no difficulty has been experienced in reaching those markets advantageously upon a rate so made.

The demand for an exceptional export rate is not shown to be founded upon any necessity of the business, but, as would seem, is urged argumentatively by certain railroads on their own account, and has for its object supposed advantages to particular lines rather than the general interest of the public.

The competition of like products through Canadian ports, though important in amount, is not shown to involve conditions so peculiar and controlling in their character as to require an exceptional rule for the business in question. —the percentage of exports through Montreal for a period of thirteen years has been very nearly uniform, and whatever irregularities there may be in that competition they are susceptible of correction by appropriate legislation.

The transportation of property from the interior to the seaboard at the same inland rate for the interior exporter and the seaboard exporter produces no injustice to either, and gives neither any advantage over the other, and the competition between interior and seaboard exporters is left to the control of natural forces and natural laws, without artificial helps or hindrances to either, and enterprise and energy may contend on an equal footing for the success to which they are entitled.

To these must be added the general principle that a rule for making rates, like all general rules of business, should be founded upon and adapted to the main proportion or bulk of the business, and not upon an exceptional part of it; and especially should this be the case when a rule based upon the exceptional part would be likely to injuriously affect all the remainder and much greater proportion of the business; and if it be true (which is not conceded, however,) that the smaller or exceptional part of the business might to some extent be injured by not giving it a free foot to run as it pleases, it is consistent with sound principles that, if evil results must follow from general rules, it is better that they should apply to the less and not to the greater proportion of the business.

There is no such pronounced dissimilarity in the essential conditions of the export business that a general rule for making and publishing rates cannot apply without serious injury to any important interest—at least until Congress shall see fit to authorize exceptions. Any practical difficulty in the application of the positive provisions of the Law is not to be remedied by construction on the part of the Commission, but is properly a subject for legislative action.

The principle that inland charges to a port of transshipment shall be the same for like service though part of the traffic is booked to go beyond the port by sea has long been the rule in England, and is in terms provided for by statute.

A practice having grown up under the Act
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of 1854* of making through passenger rates by railway and steam vessel beyond the port of transshipment, of which the inland proportion of the railway company was less than the established rate of the same company to the seaport, the Regulation of Railways Act of 1868† enacted that the rate should be equal on the railway whether the passenger was destined to the seaport or beyond by steam vessel, and that the ticket should indicate the respective charges by steam vessel and by railway.

And in respect to imports the recent English Act (August 10, 1888) provides (section 27, sub. 2) "that no railway company shall make, nor shall the court or the commissioners sanction, any difference in the tolls, rates or charges made for, or any difference in the treatment of home and foreign merchandise in respect of the same or similar services."‡

Like charges for like inland service is therefore the established rule in England, and the fact that merchandise may be carried by rail to the seaboard for export, or be imported by sea to be carried inland by rail, is not allowed to create an exception to the rule.

The rule applied in England is not a tentative one, but is the result of discussion and experience. It agrees with the method approved by experience in this country. Although our Statute does not contain the explicit enactments of the English Acts, its general provisions permit the enforcement of a rule supported by so many considerations, and under which it is possible to regulate export rates with some assurance of stability and equality.

The Act to Regulate Commerce was designed to govern the transportation business of the whole country. Its operation was intended to be beneficial to the public, and its provisions as regards public interests are conservative. It does not attempt to revolutionize business pursuits, but its purpose is to aid legitimate business by requiring justice and impartiality on the part of the transportation agencies that serve the public. Its chief provisions aim at the extirpation of known abuses, the prevention of an arbitrary use of the powers of carriers to give undue preferences to localities or individuals to the prejudice of others, and proper recognition of the principle that equality is the right of the citizen and the duty of the carrier. It lays down principles of national policy intended to be general in their application, and to secure the enjoyment of the equal rights to which all the citizens of a common country are entitled.

It is clearly essential that the mode of making through inland and ocean rates should be one that is practicable, and at the same time not a cover for discrimination and injustice. It is also reasonably evident that for these purposes, under existing conditions, the fixed inland tariff rate must be the basis of the through rate. No other feasible mode has as yet been devised that so fully assures conformity with the provisions of the Law, and that furnishes any positive criterion by which unjust discriminations may be determined and dealt with on a consistent basis.

The Commission had in view these consider-

* See 1 Inters. Com. Rep. 844.

† See 1 Inters. Com. Rep. 846.

‡ See App. I., p. xiv.

ations when the order of March 8, 1888, for the publication of such rates, was promulgated. The authority of the Commission to make such an order was clear and ample. The language of the Act is:

"And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable, for such common carriers to publish, and the places in which they shall be published."*

By the amendments made to the Act March 2, 1889, the following provisions were added in respect to advances and reductions in joint rates, the publicity to be given to such advances and reductions, and the duty of observance by carriers of their established joint rates:

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the increased rates, fares, or charges will go into effect. No reduction shall be made in joint rates, fares and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs.

"It shall be unlawful for any common carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time."†

By the enactments quoted from the original Act the duty of carriers to file their joint tariffs of rates, fares or charges for continuous lines or routes over which freight passes, is imperative. The duty is no less imperative to make public such rates, fares and charges when directed by the Commission, and to such extent as the Commission—not the carriers—may deem practicable. The Statute also provides that publicity may be required to be given to the whole or a part of such joint rates, fares and charges as in the judgment of the Commission may be deemed practicable. The duty

both to file and to publish is imposed by the Statute, but the performance of the duty to publish, and the extent of the publicity, are left to the discretion of the Commission under a grant of power without qualifications. This power, like all other powers, is to be exercised reasonably and for the beneficial public purposes contemplated by the Act. The objects of the publication of tariffs are to inform the public what rates and charges are made so that all may have the same knowledge for the purposes of their business, and to prevent discriminations and preferences. It is not questioned that internal tariffs for the transportation of property to the seaboard, whether for consumption and distribution there or for subsequent export under an independent arrangement with ocean carriers, should be made public. In these cases the jurisdiction of the Commission to require publication and to give effect to the Act admits of no doubt. When, however, property is consigned directly to a foreign port from an interior point upon a through rate for inland and ocean carriage, it is claimed that the part of such rate accepted by the inland carrier is not to be deemed a rate subject to the same requirements as in the other cases, but that the reasonableness of the aggregate through rate is alone to be dealt with by the Commission. The Statute, however, makes no such exception, and the Commission has never intimated that a particular portion of a joint through rate received or participated in by one or more of the carriers forming a part of the line may not be called in question, and its justice or lawfulness determined under the provisions of the Act. There may be cases, as in the case of *The Boston Chamber of Commerce vs. The Boston & Albany Railroad Co. et al.* 1 Int. S. Com. Rep. 754 (1 I. C. C. Rep. 436), where the contention is with the through rate as an entirety, in which the divisions allotted to different roads are unimportant for the purpose of the case, but it is otherwise with the case in hand. The division of the through rate accepted by the inland carrier is for all practical purposes its rate to the seaboard, and is as fully subject to the provisions of the Act and the jurisdiction of the Commission as a rate terminating at the seaboard. If it were otherwise the Law would be ineffectual for a large proportion of the commerce it was intended to regulate, and the immunity of only a fractional part of the traffic would injuriously affect all of the residue though many times greater in amount. This is one of the considerations that led to the petition in this case.

By the Amendments of March 2, 1889, the further duty of notification of advances and reductions, and the maintenance of joint tariffs, render the practice of changing every day, or several times a day, joint through rates, whether wholly inland or partly inland and partly ocean, an impossibility if these provisions of the Statute are to be observed at all. The notification of advances and reductions is intended to precede the time when they take effect, and not to follow after the shipment of the property, when the notification is useless. And an advance upon ten days' notice, or a reduction upon three days' notice, is wholly inconsistent with daily or more frequent changes. These provisions are intended to secure stability in

* See 1 Inters. Com. Rep. 6.

† See App. II., p. xlii.

rates, and the Commission has no authority to absolve carriers from their observance.

The exact ground of complaint is the alleged discrimination by the inland carriers, who transport wheat, corn, flour, cotton, tobacco, live-stock, dressed meats, and other productions of the interior, in favor of dealers who consign their shipments on through bills directly to foreign ports, and against the dealers in like traffic in the seaboard cities who purchase either for local sale or for subsequent export; the consequences being, as claimed, to give foreign purchasers advantages over home dealers, and to establish prices in foreign markets for the entire products exported, and, to some extent, for the domestic sales as well. The fact that discriminations of the nature charged were made during the period mentioned in the complaint, and the extent to which they were carried, appear in the testimony, and have been before noticed. Substantially the charge of the complaint in respect to discrimination is sustained by the evidence, and it was not justified by the circumstances and conditions shown to exist. The discrimination was actual; it was unjust, and therefore unlawful.

The necessary conclusion is that in making and publishing export tariffs the rate to the seaboard should be specified and should not discriminate against the inland tariff rate unless justifiable conditions exist for a difference. It is not shown that such conditions exist at New York, and very clearly they do not exist.

The decision of the Commission is that the order of March 8th, 1888, stand and continue in force as promulgated, and that the several defendants cease and desist from unjustly discriminating in their rates and charges for inland transportation, between traffic consigned on through bills to foreign ports from interior points, and like traffic consigned to the seaboard.

The disposition of this case is confined mainly to the practical aspects of the matters involved. It has not been considered necessary to critically discuss the question whether the Act may not be so interpreted as to apply its provisions to ocean carriage, and to authorize through rates to foreign countries independently of the established inland rate. In the judgment of the Commission the addition of current ocean rates to the fixed inland tariff rate is the only practicable method for the export business as a whole, and the only mode to which the regulations of the Act can be effectively applied, especially since the amendments of March 2, 1889.

The Commission believes the policy of this method of making export rates will best protect all interests, and leave no substantial ground upon which to base any complaint for injustice. The welfare of the great body of producers, dealers and carriers will, it is believed, be best promoted by an adherence to this policy, leaving to the wisdom of Congress the question whether the policy should be permanent, or to provide by changes in the Statute for whatever exceptional or different methods may be deemed expedient or necessary.

TOLEDO PRODUCE EXCHANGE *et al.*
v.

LAKE SHORE & MICHIGAN SOUTHERN R. CO. *et al.*

(No. 183.)

ABSTRACT of amended complaint, filed June 7, 1889. For original see *ante*, 492.

Complaint is made especially against the Lake Shore & Michigan Southern, the Michigan Central, the New York Central, and the Boston & Albany Railway Companies.

The basis of the complaint is:

First. The differential charged from all western points to the points we have referred to, namely, Boston and Boston points, of 5 cents per 100 pounds on third, fourth, fifth and sixth class freight, and 10 cents per 100 pounds on first and second class freight, above the rates charged on like classifications of freight from the West to New York.

Second. We complain of the railways last referred to, namely, the Lake Shore & Michigan Southern, the Michigan Central, the New York Central, and the Boston & Albany, that while they are associated together as one line of road in making and charging this differential of 5 cents per 100 pounds from all western points on the classes of freight referred to, the New York Central and all other roads leading east from Buffalo, in connection with the Boston & Albany, the Connecticut River, the Providence & Worcester and other roads, only make and charge a differential from Buffalo to Boston and Boston points of $2\frac{1}{2}$ cents per 100 pounds over the rate made and charged from Buffalo to New York on the classes of freight below second class.

The complainant includes all New England with Boston for relief from the differential of 5 cents per 100 pounds in favor of New York.

It asks to have the written argument of *Messrs. Gaston & Whitney*, attorneys for the Boston Chamber of Commerce in the *Chamber of Commerce Case*, considered part of its argument in favor of this amended petition.

Denies that adverse conditions exist against Boston as compared with other roads which reach New York in competition with the New York Central, and alleges that the Pennsylvania Road and the Baltimore & Ohio Road ignored all difference in the cost of removing freight on their respective roads with adverse grades and curves as compared with the New York Central Road, and claimed and received a differential for a shorter distance from Chicago to their respective sea-coast terminals; the former of two cents and the latter of three cents per 100 pounds as compared with the New York rate.

Denies that trains of the New York Central are broken up at Albany. Alleges that 60 per cent of the grain and flour from the West to Schenectady and Albany, for consumption in this country, is consigned to New England and Boston. Denies that equality of distance has been considered by the Commission in its decision, and cites illustrations, among which is

mentioned the Pennsylvania Road, which transports to and from Boston, 1252 miles, a loss of 212 miles, at corresponding rates of freight.

Denies that ocean service mentioned in the *Boston Chamber of Commerce Case* (1 Inters. Com. Rep. 760), is an important element in solving the question of rates. Alleges that all roads to Boston and New York have for years adopted a common rate to each city on western products for export, and claims that New England consumers pay 5 cents per 100 pounds more for such transportation than English consumers, receiving freight through Boston, and alleges that the New England roads do not get the 5 cents differential, but that the through rate is prorated, resulting as follows: 3 cents per 100 pounds being allowed for terminal charges in New York, making an actual differential of 8 cents per 100 pounds instead of 5 cents.

| | |
|--|---------|
| From Chicago to New York a carload of 30,000 pounds at 25 cents per 100 pounds, pays | \$75.00 |
| A car of 30,000 pounds to New England, or Boston, at 30 cents per 100 pounds..... | 90.00 |
| Of these amounts the Lake Shore & Michigan Southern Railroad receives, on the car to New York..... | 41.00 |
| And on the car to New England or Boston..... | 46.56 |
| The New York Central receives on the New York car..... | 22.94 |
| And on the New England or Boston car..... | 26.05 |

Thus charging New England and Boston eight $\frac{6}{100}$ dollars more than to New York for precisely the same service, over the same lines, the distance on their respective roads, in the same direction.

That is the theory of the New York transportation in comparison to that of New England and Boston, but the practical, real and true statement of the case presents far greater hardships. As we have said, the real comparison in rates from Chicago is at 22 cents to New York, after deducting the 3 cents terminal charge in New York, and 30 cents to New England and Boston. On that basis a carload of 30,000 pounds to New York earns \$60, and the carload to New England and Boston earns \$90.

Complainant alleges that such extra compensation goes mostly to the Lake Shore & Michigan Southern and the New York Central Railway for no extra service whatever.

Attached to such amended complaint, as supplementary thereto, is the following:

To the Interstate Commerce Commissioners:

Gentlemen: The complaints of our Produce Exchange is of unjust discrimination against Toledo; find herewith tariff of L. S. & M. S. and M. C. railroads.

We do not wish to question the right of railroads to obtain fair rates on an equalized basis; and asking reform of rates we take as a basis rates established by traffic associations East and West and agreed upon by railroads for traffic to New York, and we find Toledo is charged 10 cents per 100 on grain to Buffalo whereas the pro rata rate to New York is less than 7 cents per 100.

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Transportation to Boston and Boston points. The L. S. & M. S. and Michigan Central Railroads are hauling New York business on a net basis of 16½ cents per 100, to New York and 24½ per 100 to Boston, for an additional distance of 56 miles for the longest service or about 42 per cent in excess of the New York rate.

Rate established and maintained by agreement of roads in traffic associations as a fair compensation.

The discrimination falls heavy upon an interstate traffic which is the large item in business of the country and of railroads.

Let us look at the importance and we find the corn belt is Ohio, Indiana, Illinois, Iowa, Kansas, Nebraska and Missouri, that raised in 1885 1,239,246,000 bushels of corn; the estimate is that 80 per cent is consumed at home and 20 per cent seeks transportation, which would be 247,849,200 bushels, and our exports the crop year following was 64,320,000 bushels leaving 183,529,200 bushels seeking transportation, largely to New England; and in support of the estimate it is safe to say that the traffic of railroads, lakes and canals goes far to confirm the estimate as correct.

We call your attention to the importance of adjusting rates for our interstate commerce trade. As cereals are low, a bushel of corn does not pay the producer to ship at 24 cents per bushel, and the large markets, say for ¾ of it, are discriminated against 42 per cent at least over rates agreed upon by railroads as fair for transportation.

We therefore respectfully ask you to adjust, as the title of your Law provides protection to our agricultural interest and ultimately the traffic of our railroad, as any and all injustice to agriculture will ultimately reduce the tonnage of railroads, as it is a well established fact that every 100 pounds of beef and pork carries 400 pounds of corn, and western farmers will be forced to avail themselves of that policy extending in provisions and go into wool, cheese and butter and further reduce tonnage.

Respectfully yours,
C. A. King.

I file this with you as supplement to charges filed against L. S. & M. S. and Mich. Central Railroads by D. B. Smith, C. A. King, J. E. Zahm, Committee.
[Verified.]

The joint answer of the New York Central & Hudson River Railroad Company and the Boston & Albany Railroad Company was filed in this case July 12, 1889, referring to the amended "extended" petition.

The answer of the Lake Shore & Michigan Southern Railway Company was filed June 24, 1889.

The answer of the Michigan Central Railroad Company was filed July 1, 1889.

These answers deny that the petition shows contravention of the Act.

They allege due publication and filing of their combined rates, and that they are just and reasonable and not discriminative.

They deny that they are associated together as one line in making or charging the differential rates, and allege that the tariffs containing such differentials have from time to time been made, duly filed and observed jointly by said

companies and eastern railroad companies connecting with the Boston & Albany Railroad Company, as well differential rate from Chicago as from Buffalo; allege reasonableness of such differential rates, and deny that out of all rates from western points to New York there is a terminal charge of 3 cents per 100 pounds.

They allege that circumstances and conditions exist which will render a higher through rate to Boston than to New York just and reasonable, and that some of such circumstances and conditions are clearly and truthfully stated in the report and opinion of the Interstate Commerce Commission in *Boston Chamber of Commerce v. Lake Shore & Michigan Southern R. Co.* et al. 1 Inters. Com. Rep. 754, decided February 15, 1888, and refer to such decision as a part of said answers.

Respondents, specifically answering, ask leave, upon any hearing directed in this matter, to get proof as to any material allegation of fact contained in the amended extended petition.

HEZEL MILLING COMPANY

v.

ST. LOUIS, ALTON & TERRE HAUTE
R. CO.

(No. 197.)

A BSTRACT of complaint, filed May 17, 1889.

Complainant states that it is a corporation now and at the times hereinafter mentioned was a corporation existing under and by virtue of the laws of the State of Illinois and is engaged in the manufacture and sale of flour, the mills of complainant being located at East St. Louis, Illinois.

That the defendant is a railroad corporation under the laws of the State of Illinois and is engaged in a general railroad business, operating from East St. Louis, Ill., to New Orleans, La.

Complainant further states that in violation of the Interstate Commerce Act, the defendant has, almost continuously since the passage of the Act, required it to pay the same rate per 100 pounds or per barrel to southern points on defendant's line as the shippers on like goods from St. Louis, although it is located at East St. Louis, and delivers flour at defendant's receiving depot there at its own expense, while defendant employs and pays transfer wagons or the St. Louis Bridge & Tunnel Railway Co. to transport the goods of the St. Louis shippers to its said receiving depot at an expense of 4 cents per mile per 100 or 8 cents per barrel; and that said defendant allows the St. Louis shippers the said sum of 4 cents per 100 or 8 cents per barrel for private transportation on delivery of flour to its receiving depot at East St. Louis, thereby making a less rate for the St. Louis shippers to points South than for the East St. Louis shippers to the great damage of the complainant.

(Here follows the usual prayer for relief.)

A BSTRACT of answer in the above case, filed May 25, 1889.

Defendant denies that it is operating from
2 INTER S.

East St. Louis, Ill., to New Orleans, La., except as it accomplishes this result by and through other lines with which it connects within the State of Illinois; denies violation of the Act; admits delivering small or less than carload lots of flour at one of its depots in East St. Louis; but avers that until recently complainant loaded all its flour in cars at its mill,—to and from which defendant switched cars free of charge, and continues to load cars at its mill so far as carload lots are concerned, and might so load less than carload lots at its own mill free of charge if it chose to do so.

Defendant further denies that it has discriminated against complainant, but admits that from one depot in St. Louis it uses what is known as the "transport company," and from another the "bridge company," to transport consignments made over its line from such depots to its track on the east side of the river, thus constituting the transfer company and bridge company its agents to concentrate its freight in East St. Louis, where its trains are made up—denies paying drayage or compensation for delivering goods, and therefore refuses to pay complainant for delivering flour at depots from its mill.

PENNSYLVANIA COMPANY, Operating
Jeffersonville, Madison & Indianapolis Railroad,

v.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO.

(No. 213.)

A BSTRACT of complaint, filed July 10, 1889.

Complainant alleges that it is a corporation duly organized under the laws of Pennsylvania, with authority to construct, operate, and maintain railways, etc.; that it is now, and for some time past has been, operating and maintaining the Jeffersonville, etc., R. R., from Louisville, Ky., to Indianapolis, Ind., and from Madison to Columbus, Ind., and from Columbus to Cambridge City, Ind.

That the defendant is in direct competition with complainant for passenger traffic between Louisville, Ky., and Chicago, Ill.; and that it has established \$9 as first class passenger fare between said cities, but that it habitually sells to all persons applying for the same 1000 mile tickets for \$20 each, in form of a book with coupons representing the number of miles to be torn from said ticket after each trip less than 1000 miles, and that said tickets are made not transferable by printed condition indorsed thereon, signed by the purchaser.

That said defendant purposely disregards the conditions—by either not requiring the purchaser to indorse his name or permitting him to write thereon the name of any other person, and by instructing its conductors to make no effort to identify the holder thereof; that such use is made of such mileage tickets, by transfers and redemptions by scalpers and other agents, as to make the rate between said cities \$7; and that all this is done with the knowledge and connivance of the defendant, but that the traveling public, who have not

learned of this device, are charged and pay \$2 more for such trip than those who have.

That such use of such mileage tickets results in not only discrimination between its own passengers, but attracts to its own road, in a manner contrary to law, a large proportion of the traveling public, who would otherwise patronize complainant's road.

That such unlawful practice has resulted in great loss to complainant and corresponding gain to defendant.

Relief is prayed for.

CHICAGO, ST. LOUIS & PITTSBURG
R. CO.

v.

CLEVELAND, CINCINNATI, CHICAGO
& ST. LOUIS R. CO.

(No. 214.)

A BSTRACT of complaint, filed July 10, 1889. Complainant alleges incorporation, etc., and further says that defendant's regular first class passenger rate between Cincinnati and Chicago is \$8.80.

Complainant further alleges the same practice with reference to sale and use of 1000 mile tickets, making the rate 2 cents per mile, and the fare from Cincinnati to Chicago, thereby reduced to \$7, as is shown in the preceding complaint, No. 213.

The complaint and relief asked are otherwise substantially similar to the said preceding case, No. 213.

PITTSBURG, CINCINNATI & ST. LOUIS
R. CO.

v.

BALTIMORE & OHIO R. CO.

(No. 215.)

A BSTRACT of complaint, filed July 10, 1889. After alleging the incorporation of the plaintiff and defendant, complainant states that defendant has in operation so called "party rates," whereby parties of ten or more persons traveling together on one ticket will be transported over its lines, constituting a system of railroads from Maryland through Pennsylvania, West Virginia and Ohio, at 2 cents per mile *per capita*; the regular rate being 3 cents per mile.

That defendant is in the habit of selling round trip excursion tickets between points on its lines at less than ordinary rates without publicly posting the rates at which such tickets are sold.

That such practice is unlawful, and that complainant has declined to adopt it, but has suffered damage by its existence on defendant's line.

Complainant prays that defendant be required to withdraw such "party rates" and to discontinue selling such excursion tickets unless rates for the same are posted in its offices, etc.

2 INTER S.

OREGON SHORT LINE R. CO.

v.

NORTHERN PACIFIC R. CO.

(No. 216.)

A BSTRACT of complaint, filed July 16, 1889. Complainant alleges its incorporation and that it owns and operates a line of railroad from the Town of Granger, Wyoming Territory, running northerly and westerly to the Town of Huntington, Oregon, and that, as lessee of the Oregon Railway & Nav. Co., it is in possession of and operates a railroad connecting with its own line at Huntington, Oregon, and extending northerly and westerly through the State of Oregon to the City of Portland, and also operates a line of steamboats plying between the ports upon Puget Sound in Washington Territory, and British Columbia.

That said Town of Granger its said railroad is connected with the Union Pacific Railroad, easterly to the Missouri River, there connecting with various other lines extending to the Atlantic coast.

That the defendant is a corporation, etc., and owns and operates a railroad connecting with the lines of the said Oregon R. & Nav. Company's railroad at said Portland, Oregon, and running thence northerly and westerly to the City of Seattle and other points upon Puget Sound in Washington Territory, thus completing a continuous connecting line of railroad between the Atlantic and Pacific coasts, by way of said Portland.

Avers and charges that defendant refuses to conform to the provisions of the Act to Regulate Commerce, and declines, not only to afford equal and proper facilities for interchange of traffic between its line and the line of complainant, but has refused and still refuses to grant like privileges and facilities for interchange of traffic with its said line as it has afforded and is now affording to other lines of railroad connecting therewith.

Further avers that the Oregon & California R. R., now operated by the Southern Pacific R. Co., forms direct communication between San Francisco and Portland; that said defendant freely exchanges traffic, freight and passengers with said Southern Pacific R. Co., and receives freight in carload lots from said S. P. Co., destined to said ports upon Puget Sound, and advances freight charges thereon to the said S. P. Co., and has also honored, received and accepted tickets issued and sold by said S. P. Co. from local points along its line, to such ports, and is daily receiving passengers and baggage from said S. P. Co. and transporting the same to said points upon the through tickets so issued and sold by said S. P. Co.

That complainant has applied to the freight and passenger agents of defendant at Portland for like facilities and interchange of business, and that said defendant refused and still refuses to grant such like facilities, or any reasonable facilities, and has refused, and now refuses, to interchange business with complainant.

That on or about June 18, 1889, complainant tendered to the said defendant a carload of eastern freight consisting of meats which had come over its said lines, in a car specially adapted for the transportation thereof, and consigned to Victoria in British Columbia.

That the ordinary and usual way of transporting through freight, like said carload of meats, from Portland to Victoria, is over said line of defendant to Tacoma in Washington Territory; thence by the steamers of your petitioner to destination.

That upon said tender said company wrongfully, and in violation of the terms of the Act aforesaid, arbitrarily and absolutely refused to transport said freight over its lines, although presented and tendered the full amount of the freight charges over its road.

That defendant has for a long time required all freight coming over the lines of complainant to be unloaded and reloaded into cars of defendant.

That upon declining to receive the carload of meats as above stated, in said car, complainant demanded of defendant that it furnish a car of its own in which said freight might be loaded and go forward, which demand was refused and complainant was not permitted to ship said freight over defendant's said road, upon any terms whatever.

That such refusal was in violation of the Law aforesaid, and caused great damage and injury to said carload of freight.

That on or about July 3, 1889, complainant received over its said lines of railway, one engine and tender consigned to the Seattle, L. S. & E. R. Co. at Seattle, Washington Territory, which it presented to defendant at its depot in Portland, and requested that the same should be transported over its said line of railroad to its destination, and there delivered to the consignee, but that the agent of said defendant refused to receive or transport said engine and tender although complainant duly tendered in advance, the usual schedule freight charge of said defendant, to wit, the sum of \$82.42, which the defendant declined, and wrongfully refused to receive or transport said engine and tender upon any terms except the same should be first shipped to St. Paul, Minn., and there delivered to defendant, although, as petitioner avers, and so the fact is, the said defendant transports for other persons, engines and tenders of the kind and description of the one tendered to it, and has published regular schedule rates therefor.

That defendant is interchanging traffic with all other transportation lines centering at Portland, as is usual on business originating at eastern points, and is denying to complainant the same reasonable, proper, and equal facilities, to its great damage and to the injury and annoyance of the public at large.

Relief is prayed and complaint duly verified.

George RICE

v.

ATCHISON, TOPEKA & SANTA FÉ R. CO.; Atlantic & Pacific R. Co.; Alabama Great Southern R. Co.; Alabama & Vicksburg R. Co.; Central Pacific R. Co.; Cincinnati, New Orleans & Texas Pacific R. Co.; Illinois Central R. Co.; International & Great Northern R. Co.; Louisville, New Orleans & Texas R. Co.; Mobile & Ohio R. Co.; Newport News & Mississippi Valley Co.; New Orleans & North Eastern R. Co.; Southern Pacific Co.; St. Louis, Iron Moun-

tain & Southern R. Co.; Texas & Pacific R. Co.; and Union Pacific R. Co.

(No. 218.)

TO THE HONORABLE, THE INTERSTATE COMMERCE COMMISSION:

The petition of the above named complainant respectfully shows:

I. That your petitioner is a refiner of petroleum at Marietta, Ohio, and has been at various times and desires to be in the future a shipper of refined petroleum and other products of petroleum as interstate commerce over the various lines of railway operated and controlled by the several respondents.

II. That the said several respondents are railroad companies and common carriers of interstate commerce on the several lines of railroad operated and controlled by them respectively between different States of the United States as hereinafter shown, and as such common carriers are subject to the Act to Regulate Commerce.

III. That there is in the United States an organization known as the Standard Oil Trust, to which are affiliated a great number of corporations, associations, firms, and individuals, who are refiners of petroleum in various parts of the country, and who together control, as the complainant is informed and believes, about ninety per cent of the entire petroleum refining business of the United States; and that a number of the said affiliated corporations, associations, firms, and individuals, and especially five corporations known as the Standard Oil Company of Kentucky, the Standard Oil Company of Ohio, the Camden Consolidated Oil Company of Parkersburg, West Virginia, the Waters-Pierce Oil Company of St. Louis, and the Consolidated Tank Line Company of Cincinnati, Ohio, are large shippers of petroleum and its products as interstate commerce over the various railroad lines of the respondents.

IV. That the said shippers of petroleum and its products affiliated to the Standard Oil Trust aforesaid, are now and have been for a long time favored in rates and facilities by the said several respondents, and by means thereof have been and still are able to exclude your petitioner from fair and open competition in various markets reached by the lines of the several respondents; and that one of the systems of unjust and illegal discrimination against the petitioner and in favor of the said shippers affiliated to the Standard Oil Trust as aforesaid, and for the correction of which this present petition is filed, consists in naming comparatively low rates to various important central and junction points at which the said shippers affiliated to the said Standard Oil Trust have large receiving and shipping tank stations, so that the said shippers so affiliated to the Standard Oil Trust aforesaid can at such stations receive petroleum and its products over the lines of the respondents, reconsign and reship the same over the various lines of the respondents to intermediate and other final points of delivery at much less rates for the entire service than are charged to the petitioner for shipment of similar products from the points of origin upon said respective lines direct to the final points of delivery, without the intervention of reshipping

as aforesaid—the said points of origin and final delivery being respectively the same as those between which by means of the said transshipment as aforesaid the shippers affiliated to the said Standard Oil Trust are enabled as aforesaid to ship at lower rates than the petitioner. That among the rates now prevailing respectively upon the several lines of the respondents, and of which the petitioner complains as unfair, unjust, and unreasonable, are the following:

A. On Transcontinental Lines.

V. On the line formed by the Union Pacific Railway and the Central Pacific Railroad, from Omaha to San Francisco, the rates on petroleum and its products are as follows: From Omaha to Sacramento and San Francisco (nineteen hundred and twenty miles) and other Pacific coast terminal points, ninety cents per one hundred pounds, which is the same as the rate from New York City to San Francisco (thirty-three hundred and twelve miles) via the lines of the said two companies; while the rate on the same products from Omaha to Ogden, Utah Territory (ten hundred and thirty-four miles), and to all points west of Ogden, except the terminal points aforesaid, is one dollar and ninety-five cents per one hundred pounds, and the rates from Omaha westward to Ogden are progressive so as to reach the point of one dollar and ninety-five cents per one hundred pounds at Ogden as aforesaid.

VI. On the two lines formed first by the Atchison, Topeka & Santa Fé Railroad and the Atlantic & Pacific Railroad, and second, by the Atchison, Topeka & Santa Fé Railroad and the lines of the Southern Pacific Company, from Kansas City, Missouri, to the Pacific coast, the rates on petroleum and its products are as follows:

From Kansas City to Los Angeles, San Francisco, Sacramento, and other terminal points, ninety cents per one hundred pounds; while the rates on the same products from Kansas City to Las Vegas in New Mexico, and to all points westward of Las Vegas, except the said terminal points, are one dollar and ninety-five cents per one hundred pounds; while between Kansas City and Las Vegas the rate is a progressive one, reaching one dollar and ninety-five cents at Las Vegas as aforesaid.

B. On the Southwestern Lines.

VII. On the route from St. Louis to Galveston, composed of the lines of the St. Louis, Iron Mountain & Southern Railroad, the Texas & Pacific Railway, and the International & Great Northern Railroad, the rates on petroleum and its products per one hundred pounds are as follows from St. Louis:

| | | |
|---------------------|---------------------------------|--------------------------|
| To Hoxie, Ark. | 226 miles (St. L., I. M. & S.), | 15 cts. |
| " Newport, Ark. | 262 " | " 15 " |
| " Little Rock, Ark. | 345 " | " 22½ " |
| " Malvern, Ark. | 388 " | " 32½ " |
| " Texarkana, Ark. | 490 " | " 45 " |
| " Polk, Tex. | 500 " | (Texas Pacific), 65 " |
| " Aldine, Tex. | 807 " | (I. & G. N. R. R.), 65 " |
| " Houston, Tex. | 820 " | " 35 " |
| " Galveston, Tex. | 870 " | " 35 " |

VIII. On the route from St. Louis to El Paso, Texas, formed by the lines of the St. Louis, Iron Mountain & Southern Railway and the Texas & Pacific Railway, the rates per one hundred pounds on petroleum and its products are as follows from St. Louis:

hundred pounds on petroleum and its products from St. Louis are as follows:

| | | |
|-----------------|---------------------------|--------|
| To Polk, Tex. | 500 miles (Texas Pacific) | \$ 65 |
| " Cisco, " | 858 " | " 65 |
| " Odessa, " | 1,072 " | " 1 10 |
| " Arispe, " | 1,262 " | " 1 43 |
| " El Paso, Tex. | 1,350 " | " 1 05 |

IX. On the route from Cincinnati to New Orleans, formed by the lines of the Cincinnati, New Orleans & Texas Pacific Railway, the Alabama Great Southern Railroad, and the New Orleans & North Eastern Railroad, being part of what is known as the Queen & Crescent Route, the rates on petroleum and its products from Cincinnati are as follows:

| | |
|-------------------------|----------------------------------|
| To King's Mountain, Ky. | 136 miles, 22 cts., per 100 lbs. |
| " Meridian, Miss. | 630 " 44½ " |
| " Poplarville, " | 756 " 44½ " |
| " Slidell, La. | 797 " 32½ " |
| " New Orleans, La. | 826 " 22½ " |

X. On the route from Cincinnati to Vicksburg, formed by the lines of the Cincinnati, New Orleans & Texas Pacific Railway, the Alabama Great Southern Railroad, and the Alabama & Vicksburg Railway, being also part of the Queen and Crescent Route aforesaid, the rates on petroleum and its products from Cincinnati are as follows:

| | |
|--------------------|-----------------------------------|
| To Brandon, Miss. | 711 miles, 48½ cents per 100 lbs. |
| " Jackson, " | 726 " 48½ " |
| " Clinton, " | 735 " 44½ " |
| " Bovina, " | 760 " 40½ " |
| " Vicksburg, Miss. | 770 " 22½ " |

XI. On the Illinois Central Railroad the rates per one hundred pounds on petroleum and its products from Cairo, Illinois, over the Southern Division of said company are as follows:

| | |
|--------------------|---------------------|
| To Clinton, Ky. | 30 miles, 16 cents. |
| " Milan, Tenn. | 86 " 22 " |
| " Grenada, Miss. | 256 " 36 " |
| " Jackson, " | 267 " 22 " |
| " Osyka, " | 462 " 41 " |
| " Manchac, La. | 513 " 41 " |
| " Kenna, " | 540 " 38 " |
| " New Orleans, La. | 550 " 16 " |

XII. On the Mobile & Ohio Railroad the rates per one hundred pounds on petroleum and its products from St. Louis are as follows:

| | |
|-------------------------|----------------------|
| To Wickliffe, Ky. | 156 miles, 19 cents. |
| " Rives, Tenn. | 202 " 29 " |
| " Jackson, " | 257 " 32 " |
| " Corinth, Miss. | 315 " 37 " |
| " Tupelo, " | 364 " 39 " |
| " Lauderdale, Miss. | 490 " 54 " |
| " Meridian, " | 509 " 49 " |
| " Enterprise, " | 524 " 55 " |
| " Eight Mile Station, " | 636 " 55 " |
| " Mobile, " | 644 " 18 " |

XIII. On the Newport News & Mississippi Valley Railroad the rates on petroleum and its products from Louisville are as follows:

| | |
|--------------------|---------------------------------|
| To Big Clifty, Ky. | 62 miles, 22 cents per 100 lbs. |
| " Lucy, Tenn. | 579 " 59 " |
| " Memphis, Tenn. | 392 " 12 " |

XIV. On the route from Louisville to New Orleans, composed of the lines of the Newport News & Mississippi Valley Railroad and the Louisville, New Orleans & Texas Railway, the rates per one hundred pounds on petroleum and its products from Louisville are as follows:

| | |
|--------------------|----------------------|
| To Merigold, Miss. | 499 miles, 52 cents. |
| " To Sauve, La. | 842 " 52 " |
| " Vicksburg, Miss. | 627 " 18 " |
| " New Orleans, La. | 847 " 18 " |

XV. On the Louisville, New Orleans & Texas Railway the rates per one hundred pounds on petroleum and its products are as follows from Memphis, Tenn.:

| | |
|-------------------------|---------------------|
| To Lake View, Miss..... | 13 miles, 18 cents. |
| " Halpin, Miss..... | 213 " 30 " |
| " Vicksburg, Miss..... | 235 " 17 " |
| " Harrison, Miss..... | 269 " 30 " |
| " Norwood, La..... | 329 " 30 " |
| " Slaughter, La..... | 347 " 30 " |
| " New Orleans, La..... | 435 " 18 " |

XVI. And the complainant avers that the acts and doings of the several respondents are in contravention of the provisions of the Act to Regulate Commerce, approved February 4th, 1887, and its Supplements—in that

(a.) The said rates are unjust and unreasonable;

(b.) The said rates make and give an undue and unreasonable preference and advantage to the shippers aforesaid affiliated to the Standard Oil Trust over the complainant and subject the latter to an unreasonable prejudice and disadvantage as compared with the former;

(c.) By the said rates the several respondents charge and receive a greater compensation in the aggregate for the transportation of petroleum and its products under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the said shorter distance being included within the longer distance.

XVII. Wherefore the petitioner prays that the defendants may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the several respondents to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

Dated at Philadelphia, July 18th, 1889.

Duly signed and verified.

Franklin B. Gowen,
Counsel for Petitioner,

119 South Fourth Street, Philadelphia.

George RICE

v.

MOBILE & OHIO R. CO.

(No. 219.)

ABSTRACT of complaint, filed July 22, 1889

After preliminary statement as in *Rice v. Atchison, T. & S. F. R. Co.*, No. 218, next preceding, complainant alleges that under the freight tariffs of the respondent, refined petroleum packed in wooden cases, each case containing two tin cans, of five gallons each, of refined petroleum, is charged at fourth class rates, while petroleum in barrels is charged at sixth class rates, and the respondent refuses to permit your complainant to make up a full carload of petroleum partly composed of oil in wooden cases as aforesaid and partly in oil in barrels, thus placing the complainant at a great disadvantage in competition with producers of greater extent than himself who are enabled to load full carloads of each class of traffic when the complainant is frequently able only to secure the benefit of full carload lots by making up carloads composed of both classes of freight.

That refined petroleum in cases as aforesaid

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and refined petroleum in barrels are similar freight and entitled to a like classification.

Relief is asked.

Duly signed and verified.

Bennet D. MATTINGLY

v.

PENNSYLVANIA COMPANY.

(No. 220.)

ABSTRACT of complaint, filed August 1, 1889.

Your petitioner, Bennet D. Mattingly, respectfully represents: that he is a distiller, engaged in the business of operating a distillery near the City of Louisville, in Kentucky; that for the purpose of receiving and forwarding freight to and from the said distillery, the owners thereof have constructed at their own expense and own a railroad track from their said distillery to railroad tracks of the Kentucky & Indiana Bridge Company, about one and one quarter miles long; that he has no other connection with any railroad except over the said switch and the connecting tracks of the said bridge company.

The said Kentucky & Indiana Bridge Company owns a bridge across the Ohio River between New Albany, Indiana, and the western end of the City of Louisville, together with about ten miles of railroad track connecting with various depots and railways in the said City of Louisville. Said bridge is used in connection with the railroads on the two sides of the Ohio River in the business of interstate commerce.

That the respondent, the Pennsylvania Company, is a common carrier engaged in the business of interstate commerce and is the lessee of the Jeffersonville, Madison & Indianapolis Railroad, and as such operates the said railroad including a branch road running from Jeffersonville, Indiana, into New Albany in the same State connecting at State Street with the Louisville, Evansville & St. Louis Consolidated Railroad Company. This latter company owns and operates a line of railway westward through the southern parts of Indiana and Illinois and connecting with the other railroads in that region. Along the said road operated by the respondent, a connection is made at Vincennes Street in the City of New Albany with the Louisville, New Albany & Chicago Railroad, a company owning and operating a railway from New Albany, Indiana, to Chicago, Illinois.

Complainant further alleges that defendant refuses to transfer his grain and supplies to the K. and I. Bridge Co., as it does other like freight to other persons and companies, for the purpose of forcing him to use the Louisville Bridge in which the defendant is interested, and which crosses the Ohio River between Jeffersonville and Indiana and the said City of Louisville, thereby increasing the cost to him because of the additional necessary switching charges imposed in the City of Louisville, and thereby discriminating against him unlawfully.

NEW YORK COURT OF APPEALS.

Samuel C. ROOT, *Respt.*,
v.
LONG ISLAND R. CO., *Appt.*
(....N. Y.and 4 L.R. A. 331.)

An agreement by a railroad company to transport coal at a specified rebate from regular tariff rates in consideration of the shipper's erecting a dock and coal pockets on the company's land for use by both parties, is not as matter of law void because of unjust discrimination against other shippers, especially where the shipper also agrees to do his own loading and to ship in large quantities. The question of unjust discrimination is one of fact.

(May 3, 1889.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment entered in Queens County upon the report of a referee in favor of plaintiff in an action to recover rebates alleged to be due upon certain shipments of coal over defendant's road. *Affirmed.*

The facts are sufficiently stated in the opinion.

Mr. Edward E. Sprague, for appellant:

The agreement for a rebate is void as against public policy. Unjust discrimination by a common carrier is forbidden by the common law.

Re Niagara Falls & W. R. Co. 11 Cent. Rep. 272, 108 N. Y. 375; *People v. New York Cent. & H. R. R. Co.* 28 Hun, 545.

The precise question of discrimination in rates does not appear to have been the subject of decision in this court, but the duty to forward without undue preference in time has been clearly asserted.

Keeney v. Grand Trunk R. Co. 47 N. Y. 525; *Tierney v. N. Y. Cent. & H. R. R. Co.* 76 N. Y. 305. See *State v. Delaware L. & W. R. Co.* 2 Cent. Rep. 726, 48 N. J. L. 55; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Scofield v. Lake Shore & M. S. R. Co.* 1 West. Rep. 812, 43 Ohio St. 571; *McDuffee v. Portland & R. R. Co.* 52 N. H. 447; *New England Exp. Co.*

v. Maine Cent. R. Co. 57 Me. 188; *Samuels v. Louisville & N. R. Co.* 31 Fed. Rep. 57, 30 Am. & Eng. R. R. Cas. 79; *Hays v. Pa. Co.* 12 Fed. Rep. 309; *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 15 Fed. Rep. 650, 9 Am. & Eng. R. R. Cas. 374; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33; *Shipper v. Pa. R. Co.* 47 Pa. 338; *Rhodes v. Northern Pac. R. Co.* 34 Minn. 87, 21 Am. & Eng. R. R. Cas. 31; *Baltimore & O. R. Co. v. Adams Exp. Co.* 22 Fed. Rep. 32, 404, 18 Am. & Eng. R. R. Cas. 461.

The English and American statutes forbidding unjust discrimination are declaratory of the common law.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667 (28 L. ed. 291); *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Concord & P. R. Co. v. Forsaith*, 59 N. H. 122; *Shipper v. Pa. R. Co.* 47 Pa. 338.

Illegality is a good defense as between the parties to the contract.

Arnot v. Pittston & E. Coal Co. 68 N. Y. 558; *Knowlton v. Congress & E. Spring Co.* 57 N. Y. 518; *Messenger v. Pennsylvania R. Co.* *supra*.

Mr. Francis Lynde Stetson for respondent.

Haight, J., delivered the opinion of the court:

In June, 1876, the defendant and one Quintard entered into a written contract, which, among other things, provided that Quintard should build at Long Island City upon the lands of the defendant a dock 250 feet long, and 40 feet wide, and erect thereon a pocket for holding and storing coal, according to certain plans and specifications annexed. The defendant was to have the use of the south side of the dock, and also of 30 feet of the shore end, and the right to use the other portions thereof when not required by Quintard. In consideration therefor the defendant agreed with Quintard to transport in its cars all the coal in carloads offered for transportation by him at a rebate of 15 cents per ton of 2,240 pounds from the regular tariff rates for coal transported by the defendant from time to time, except in the case of the coal carried for the Brooklyn Water-Works Company, with which company the defendant reserved the right to make a special rate, which should not

NOTE.—Carriers; discrimination, when justified.

A railway company is justified in carrying goods for one person at a less rate than that at which it carries goods for another, only where there are circumstances which make the cost of carrying the former less than the cost of carrying the latter. *Garton v. Bristol & E. R. Co.* 6 C. B. N. S. 639, 28 L. J. N. S. (C. P.) 306; 1 Nev. & M. 218; *Oxlade v. North Eastern R. Co.* 1 C. B. N. S. 454, 26 L. J. N. S. (C. P.) 129, 1 Nev. & M. 72; *Nittsill etc. Coal Co. v. Caledonian R. Co.* 2 Nev. & M. 39. See 1 Inters. Com. Rep. 862.

The difference in rates must bear some proportion to the difference of the cost to carriers. *Harris v. Cockermouth & W. R. Co.* 1 Nev. & M. 97-102, 3 C. B. N. S. 693; *Garton v. Bristol & E. R. Co.* 1 Nev. & M. 227; 6 C. B. N. S. 639-655; *Nicholson v. Great West-*
2 INTER S.

ern R. Co. 1 Nev. & M. 185; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L.R. 11 App. Cas. 122; *Baxendale v. Great Western R. Co.* 1 Nev. & M. 202; *Ransome v. Eastern Counties R. Co.* 1 Nev. & M. 69.

A difference in bulk will not justify difference in rates (*Lotspeich v. Central R. & Bkg. Co.* 73 Ala. 306. See 1 Inters. Com. Rep. 862), or difference in expense of loading and unloading. *Chicago & A. R. Co. v. People*, 67 Ill. 26.

To determine the reasonableness and justness of any freight rate made by a railroad company, all the surrounding circumstances and conditions must be considered as well as the rights of the shippers. *Business Men's Asso. v. Chicago, St. P. M. & O. R. Co.* 2 Inters. Com. Rep. 41.

Interstate Commerce Act construed. See U. S. v. Tozer, 2 L. R. A. 444, note.

be considered "the regular tariff rate." The defendant also agreed with Quintard to provide him with certain yard room and office room free of rent, and the contract was to continue for the term of ten years, and at the termination of the contract the dock and structures were to be appraised, and the value thereof, less the sum of \$2,000 advanced by the defendant, to be paid to Quintard. Pursuant to this agreement the dock and coal pocket were constructed at an expense of \$17,000, and coal in large quantities was shipped over the defendant's road by Quintard or his assignee under the contract, and it is for the rebate of 15 cents per ton upon the coal so shipped that this action was brought. The defense is that the contract was against public policy, and was therefore illegal and void.

The defendant is a railroad corporation organized under the laws of the State, and is therefore a common carrier of passengers and freight, and is subject to the duties and liabilities of such. These duties and liabilities have often been the subject of judicial consideration in the different States of the Union. In Illinois it has been held that a railroad corporation, although permitted to establish its rates for transportation, must do so without injurious discrimination to individuals; that its charges must be reasonable. *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Vincent v. Chicago & A. R. Co.* 49 Ill. 33.

In Ohio it was held that where a railroad company gave a lower rate to a favored shipper with the intent to give such shipper an exclusive monopoly, thus affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances. *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 1 West. Rep. 812.

In New Jersey it has been held that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than it would carry under the same condition for others is void, as creating an illegal preference; that common carriers are public agents, transacting their business under an obligation to observe equality towards every member of the community, to serve all persons alike, without giving unjust or unreasonable advantages by way of facilities for the carriage, or rates for the transportation, of goods. *Messenger v. Pa. R. Co.* 36 N. J. L. 407; *State v. Del., L. & W. R. Co.* 48 N. J. L. 55, 2 Cent. Rep. 726.

In New Hampshire it has been held that a railroad is bound to carry at reasonable rates commodities for all persons who offer them, as early as means will allow; that it cannot directly exercise unreasonable discrimination as to whom and what it will carry; that it cannot impose unreasonable or unequal terms, facilities, or accommodations. *McDuffee v. Portland & R. R. Co.* 52 N. H. 430.

To similar effect are cases in other States. *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188; *Shipper v. Pa. R. Co.* 47 Pa. 338; *Fitchburg R. Co. v. Gage*, 12 Gray, 393; *Menchow v. Ward*, 27 Fed. Rep. 529.

In New York the authorities are exceedingly meager. The question was considered to some extent in the case of *Killmer v. N. Y. Cent. & H. R. R. Co.* 100 N. Y. 395, 1 Cent. Rep. 525, 2 INTER S.

in which it was held that the reservation in the general Act of the power of the Legislature to regulate and reduce charges, where the earnings exceeded 10 per cent of the capital actually expended, did not relieve the company from its common-law duty as a common carrier; that the question as to what was a reasonable sum for the transportation of goods on the lines of a railroad in a given case is a complex question, into which enter many elements for consideration.

In determining the duty of a common carrier, we must be reasonable and just. The carrier should be permitted to charge reasonable compensation for the goods transported. He should not, however, be permitted to unreasonably or unjustly discriminate against other individuals, to the injury of their business, where the conditions are equal. So far as is reasonable, all should be treated alike; but we are aware that absolute equality cannot in all cases be required, for circumstances and conditions may make it impossible or unjust to the carrier. The carrier may be able to carry freight over a long distance at a less sum than he could for a short distance. He may be able to carry a large quantity at a less rate than he could a smaller quantity. The facilities for loading and unloading may be different in different places, and the expenses may be greater in some places than in others. Numerous circumstances may intervene which bear upon the cost and expenses of transportation, and it is but just to the carrier that he be permitted to take these circumstances into consideration in determining the rate or amount of his compensation. His charges must therefore be reasonable, and he must not unjustly discriminate against others; and in determining what would amount to unjust discrimination all the facts and circumstances must be taken into consideration.

This raises a question of fact, which must ordinarily be determined by the trial court. The question as to whether there was unjust discrimination embraced in the provisions of the contract does not appear to have been determined by the referee, for no finding of fact appears upon that subject. Neither does it appear that he was requested to find upon that question, and consequently there is no exception to the refusal to find thereon. Unless, therefore, we can determine the question as one of law, there is nothing upon this subject presented for review in this court.

Is the provision of the contract, therefore, providing for a rebate of 15 cents per ton from the regular tariff rates, an unjust discrimination as a matter of law? Had this provision stood alone, unqualified by other provisions, without the circumstances under which it was executed explaining the necessity therefor, we should be inclined to the opinion that it did provide for an unjust discrimination; but, upon referring to the contract, we see that the rebate was agreed to be paid in consideration for the dock and coal pocket which was to be constructed upon the defendant's premises at an expense of \$17,000, in part for the use and convenience of the defendant. Quintard was to load all the cars with the coal that was to be transported. It was understood that a large quantity of coal was to be shipped over de-

defendant's line, thus increasing the business and income of the company. The facilities which Quintard was to provide for the loading of the coal, his services in loading the cars, the large quantities which he was to ship, in connection with the large sums of money that he had expended in the erection of the dock, in part for the use and accommodation of the defendant, are facts which tend to explain the provision of the contract complained of, and render it a question of fact for the determination of the trial court as to whether or not the rebate, under the circumstances of this case, amounted to an unjust discrimination, to the injury and prejudice of others.

Therefore, in this case, the question is one of

fact, and not of law; and, inasmuch as the discrimination has not been found to be unjust or unreasonable, the judgment cannot be disturbed.

The defendant in its answer alleged that the rebates accruing between the 1st day of January and the 31st day of October, 1879, were waived by the parties. The referee, upon request, refused to find that this was the case, and an exception was taken to such refusal. Had we been sitting as a trial court, it is possible we should have reached a different conclusion, but on review the evidence is too meager and indefinite to justify a reversal.

The judgment should be affirmed, with costs.

All concur.

THE INTERSTATE COMMERCE COMMISSION.

George D. SIDMAN

v.

PIEDMONT AIR LINE R. CO.

(No. 221.)

A BSTRACT of complaint, filed August 5, 1889.

Complainant alleges that he is a clerk in the Department of the Interior at Washington, D. C., and a resident of Herndon, Fairfax Co., Va., at which place he owns a country home.

That the defendant above named is a common carrier, etc.

That he is a "commuter" on the Washington, Ohio & Western Division of defendant's railroad, holding ticket No. 78, dated June 13, 1889, and good for 180 rides between Herndon, Va., and Washington, D. C., during the three months ending August 31, 1889.

That on or about the morning of July 10, 1889, he boarded the defendant's railroad cars at Herndon, Va., en route to Washington, D. C., and when called upon by the conductor for his fare discovered that he had inadvertently left his commutation ticket at home; that in compliance with the conductor's demand (although the conductor knew he was a "commuter") he was compelled to pay the regular cash fare (eighty cents) between Herndon and Washington, and in addition thereto he was compelled to pay the sum of twenty-five cents, so called train rates, and in the nature of a fine for not having procured a regular ticket before starting. The same sum was also paid under the same conditions and circumstances on his return to Herndon in the evening of same day. (Conductor's receipts for said payments already on file with the Interstate Commerce Commission.)

That in accordance with what was understood to be the rules of defendant, he called at the defendant's general offices, at the corner of 13th St. and Pa. Ave., in the City of Washington, D. C., on or about the 11th day of July, 1889; presented his commutation ticket to the agent of the defendant, the same being the chief clerk in the office of the general passenger agent of said defendant, and then and there formally demanded a rebate of \$2.10, collected from him by the conductor on the day previous, at the same time offering his commutation ticket for cancellation of the two rides aforesaid.

2 INTER S.

That the chief clerk of defendant's general passenger agent refused to make such rebate, and in support of his refusal to do so, quoted a certain section of a contract printed on the ticket, to wit:

"5.—That I have no claim for rebate on account of the nonuse of this ticket from any cause."

That he is informed that the defendant has made rebate to many persons heretofore for fares collected of "commuters" under such circumstances, and that one George Lacy, a commuter between Herndon and Washington, did demand and receive rebate from this defendant for fares paid under like circumstances, on a similar ticket.

Complainant verily believes that such payment to George Lacy, and refusal of such rebate to him, for a payment made under like circumstances and contract, was a violation of the Law, in that it was a discrimination in rates between patrons of the said defendant. Complainant claims that the contract was intended to protect defendant only to the extent of a demand for rebate of so much of the ticket as might remain unused after the date of its expiration.

Relief is prayed.

POUGHKEEPSIE IRON CO.

v.

BOSTON & ALBANY R. CO.

(No. 222.)

A BSTRACT of complaint, filed August 5, 1889.

Complainant alleges that it owns two blast furnaces at Poughkeepsie, N. Y., and is a large producer of pig iron, and formerly owned and operated two other blast furnaces at the same place, which have been dismantled within the past year.

That the Boston & Albany R. R. Co. charge a higher rate on pig iron shipped from Poughkeepsie, N. Y., via Hudson, N. Y., to points on their line, than on pig iron shipped from the Ohio region.

That when the iron is destined for places on a third line there is an arbitrary rate charged of 60 cents to \$1.50 per ton. On schedule No. 227 the rates cover to all points designated as

through trunk line points, whereas the same road, charging an arbitrary rate on Hudson pig iron, accepts a proposition of the through rate; being much less than the arbitrary rate and refers to Exhibit "A."

That defendant's rates on pig iron from the Hudson River furnaces are prohibitory, unreasonable, and unjust. This can be proved by the quantity of pig iron transported on the line. Last year it handled about 50,000 tons, received at all points and connecting lines, which is about $\frac{1}{2}$ per cent of the total tonnage.

The special tariff on pig iron from Poughkeepsie to eastern points:

| | | | |
|----------------------|-----------|-----------|---------------------|
| Hudson to Westfield, | 87 miles, | \$1.50, 1 | $\frac{7}{10}$ cts. |
| " " Springfield, | 97 " | 1.50, 1 | $\frac{5}{10}$ " |
| " " Warren, | 122 " | 1.50, 1 | $\frac{3}{10}$ " |
| " " Worcester, | 150 " | 1.50, 1 | " |
| " " Boston, | 195 " | 1.50, 0 | $\frac{7}{10}$ " |

That the Troy & Boston R. R. Co. is willing to make as low rates on pig iron as asked for, and the New York Central's basis on pig iron is as low as desired; yet with these two favorable conditions a fair rate cannot be secured, owing to the exorbitant rates established by the B. & A. R. R. Co.

Relief is prayed as follows:

First. That the same freight rates per ton from Hudson River be made by defendant and others on pig iron produced on Hudson River as for pig iron manufactured in Ohio and other western points.

Second. That all arbitrary rates be abolished on local through shipments to all points where through trunk line rates govern.

Third. That the railroads shall not be allowed to charge a higher rate on pig iron, etc.

Complainant requests an investigation to be made as to the rate charged by the defendant on the through and local traffic, the earnings from the through and local traffic, and the conditions and circumstances which entitle them to make such high prohibitory rates on pig iron in comparison with rates charged by the railroad systems through the country.

INTERSTATE COMMERCE RY. ASSOCIATION.

v.

CHICAGO & ALTON R. CO.

(No. 223.)

THE PETITION of the above named complainant, filed August 7, 1889, respectfully shows:

First. That it is an association of railroad companies organized in the manner and for the purposes set forth in its articles of agreement, of which a copy is filed in the office of the Commission and is hereby referred to.

Second. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of Missouri and points in the State of Illinois, and as such common carrier is subject to the Act to Regulate Commerce. That the defendant was a member of said association until July 15, 1889.

Third. That the defendant is a competitor for the transportation of live stock, and products thereof, from Kansas City to Chicago with other lines, members of said association, to wit: the Chicago, Burlington & Quincy R. R. Co. and its affiliated lines, Chicago, Rock Island & Pacific R. Co., Chicago, Milwaukee & St. Paul R. Co., Wabash Western R. Co., Chicago, Santa Fé & California R. Co., and Missouri Pacific R. Co. That said last mentioned companies, together with the defendant, have united in the establishment of a tariff for the transportation of said commodities from points beyond Kansas City to Chicago,—a copy of which, on file in the office of the Commission, is referred to, being Joint Through Freight Tariff No. 4,—naming rates on live stock between points in Kansas, Indian Territory, Missouri and Nebraska, and Chicago, St. Louis and common points therewith, taking effect April 1, 1889, issued by J. W. Midgley, chairman; which tariff was superseded on July 12, 1889, by similar tariffs, issued by W. W. Finley, chairman, which are also referred to, entitled Joint Freight Tariff No. 38 A, Joint Freight Tariff No. 46, and Joint Freight Tariff No. 52. That said lines also united in the establishment of a tariff on live stock, dressed beef and packing house products, etc., from Kansas City to Chicago; and reference in like manner is made to such tariffs, to wit, one taking effect April 1, 1889, which was on July 19, 1889, superseded by another containing reduced rates, both issued from the office of said J. W. Midgley, chairman.

That the course of business in the handling of such traffic is as follows: shipments of cattle are received in Kansas and the Indian Territory, by lines reaching the grazing points, which are consigned by the shippers to Chicago at rates named in the first above mentioned tariffs, with privilege, nevertheless, of stopping off at Kansas City, Mo. If the cattle stopped under this privilege are not sold at the Kansas City market, their transportation is resumed and continued to Chicago under the original billing. If such cattle are sold, local rates to Kansas City from the points of origin are paid to the lines originating the shipments, and such cattle thereupon may be either slaughtered at Kansas City and transported eastward, in the form of dressed beef or otherwise, unless consumed locally; or, they may be shipped forward alive by the purchasers to Chicago under the original billing, or rebilled upon some other line, if any, with which the originating line has established a joint tariff for that purpose.

Each line engaged in said traffic owns a considerable amount of equipment especially constructed therefor; the number of cattle cars belonging to the various lines is shown upon their annual reports to the Commission, which are referred to. Of late, however, the transportation of cattle, especially from Kansas City to Chicago, has been very largely carried on by the use of private stock cars, of various so-called improved patterns, the owners of which are accustomed to engage shipments by negotiation with dealers in live stock and to collect from the lines hauling the cars a mileage of $\frac{1}{2}$ cent per mile run; such cars are to a large extent taken west from Chicago to initial points and loaded for Chicago, with or without the

privilege of the Kansas City market as the shippers may desire. One result of this practice is that the cattle cars owned by all the lines are now to a large extent unemployed.

Fourth. The American Live Stock Commission Company is an association of shippers, chiefly ranche owners, 105 in number, who expect to forward during the present year about 200,000 head of cattle, or, approximately, 8,000 carloads. Complainant is informed and believes that the defendant has leased four hundred of its said unemployed cattle cars to said American Live Stock Commission Company at a rental of \$6 per car per month. The following is a copy of a circular which has recently been issued:

"Chicago & Alton Railroad Company. Office of Car Accountant. Notice. Bloomington, Ills., July 1, 1889. This company has leased to the American Live Stock Commission Company, three hundred stock cars, numbered 6001 to 6601, odd numbers, inclusive, and marked C., A. & St. L. R. R., leased to the American Live Stock Commission Company." Reports of movements, and mileage, of above cars should be made to this office on a separate report from mileage earned by other C., A. & St. L. cars. Send bills for repairs to C. Kelsey, auditor, Chicago. (Signed) F. W. Bridges, Car Accountant. Approved. (Signed) T. W. Bates, Sup't Transportation. An additional 100 stock cars, numbered 6601 to 6799, inclusive, odd numbers, have been leased to the above named company. Please report all these cars under the initials A. L. S. C. Co. to this office. Yours truly, (Signed) F. W. Bridges, C. A."

The mileage upon said cars in both directions, in the ordinary course of affairs, would amount to at least \$12 per month, affording a profit of at least \$6 per month per car to said lessees. Complainant says that the repairs on said cars, and the services as assumed by the lessor in collecting mileage earned, makes the so called rental almost nominal; that an arrangement of this character, whereby the ordinary equipment of a line is leased outright to shippers, is unusual and irregular; that in so far as the payment of such mileage is made or participated in by the defendant in the use of its own cars, any sum in excess of \$6 per car per month realized by said lessees is in the nature of a rebate; and complainant avers that the transaction is a device whereby the defendant will receive from said American Live Stock Commission Company a less compensation for the transportation of cattle than it receives from other persons for a like and contemporaneous service under precisely similar circumstances and conditions, and said company will pay less than other shippers. The interest of the American Live Stock Commission Company in this arrangement will be to forward its cattle direct from the points of origin to Chicago over the Alton Line, saving per car, over the customary methods, the usual yardage and commission at Kansas City, together with the profit on the car mileage as above stated. The pecuniary inducement to shippers, thus afforded by said action of the defendant, is alleged to be an unjust discrimination and in contravention of the provisions of the Act to Regulate Commerce. Lines competing with the Alton

at Kansas City eastward do not desire to enter into similar arrangements with shippers, believing the same to be an injudicious method of securing favor, and are suffering from the device adopted to that end by said defendant. If all lines should adopt the same plan with heavy shippers, whose large business might make them desirous of leasing cars, the greatest discriminations would result. Complainant is unable to set out the precise terms of the contract referred to, which is not in its possession, and therefore asks that the defendant be required to make the same a part of their answer hereto, and it avers, upon information and belief, that said contract, when so produced and examined in connection with the circumstances attending said traffic, and the results which have already been produced, will be clearly seen to be illegal.

Fifth. The complainant also alleges, upon information and belief, that the said defendant has entered into a contract of another character, substantially as follows: There are five principal houses engaged in the business of slaughtering cattle and hogs at Kansas City and vicinity and shipping eastward dressed beef and other fresh meats, together with packing house products of all kinds; a contract of some nature, the precise terms of which are unknown to complainant, has been made by said Chicago & Alton Railroad Company with one or all of said shippers for the exclusive transportation of such shipments for a considerable term of years. The arrangement is believed to provide for an adjustment of rates upon a fixed basis during the entire period, under which a given maximum is not to be exceeded, and a minimum is believed also to be provided for. The traffic in question, controlled under said alleged contract, is very large and comprises the principal shipments eastward from Kansas City. A contract of that nature with one of said shippers would practically control the establishment of rates for all, and a contract by one line in effect controls the rates of all the other lines. A very material reduction in rates from Kansas City to Chicago, made, as above stated, July 19, 1889, was forced upon the other roads by said defendant, and, as is believed, with a view to put the defendant in a position to carry out its obligations under said contract. Upon information and belief the complainant avers that said contract is in contravention of the Act to Regulate Commerce in many ways, and among others in this: that it affords to the favored shipper or shippers referred to, a guarantee of rates for a long term of years, while their competitors, if any, at said Kansas City or at other points,—acting upon tariffs subject to the ordinary fluctuations of rates, recognized as permissible by the Act to Regulate Commerce,—are without that advantage and unable to engage in enterprises of magnitude in competition with said Kansas City firm or firms; also that the alleged agreement for minimum rates to be paid by said shippers will become illegal whenever established rates shall fall below said minimum, and otherwise as will appear after an inspection of the said contract. Complainant therefore asks that defendant be required to make said contract a part of its answer; and avers that upon its inspection it will be found to contravene

the provisions of the Act to Regulate Commerce in the foregoing and in many other respects.

Sixth. Complainant further shows that under section 12 of the Act to Regulate Commerce the Interstate Commerce Commission has authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, is required to keep itself informed as to the manner and methods in which the same is conducted, and is given the right to obtain from such common carriers full and complete information necessary in the premises. Under said section the complainant requests an investigation by the Commission in respect to the methods of the Chicago & Alton Railroad Company, concerning its management of said traffic in the transportation of live stock and its various products, with special reference to the alleged contracts aforesaid, averring that arrangements of this character necessarily operate to stifle competition, and can only be met on the part of competing lines, which regard them as illegitimate and injudicious, by fluctuations in the rates of transportation, detrimental not only to the interests of the railroads as carriers of freight, but also to the interests of the commercial public. The petitioner therefore desires an investigation of said subjects, in order that all facts related thereto may be fully disclosed in the manner contemplated by law, and that such orders and recommendations in the premises as may seem just and necessary be made by the Commission.

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

Dated at Chicago this 3d day of August, 1889.

Interstate Commerce Railway Assn.

by Aldace F. Walker,

Chairman of Executive Board.

(Sworn to, etc.)

CHICAGO, ROCK ISLAND & PACIFIC
R. CO.,

v.

CHICAGO & ALTON R. CO.

(No. 224.)

ABSTRACT of complaint, filed August 7, 1889.

Complainant alleges that both parties are common carriers, and that the line of defendant from Kansas City to Chicago is competitive with a portion of complainant's through line between said cities. That a certain tariff, entitled Joint Through Freight Tariff, No. 4, was issued on behalf of the railroad companies named therein, by J. W. Midgley, chairman, stating rates on live stock between points in Kansas, Indian Territory, Missouri, and Nebraska, and Chicago, St. Louis and common points therewith, taking effect April 1, 1889,

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which tariff, on file in the office of the Commission, is referred to. The names of both complainant and defendant appear as parties to said tariff, complainant's line west of the Missouri River being there designated as the Chicago, Kansas & Nebraska Railway, which line, however, since August 1, 1889, has been and now is operated by and in the name of the Chicago, Rock Island & Pacific Railway Company, as lessee. That since April 1, 1889, no division of through rates has existed between the complainant and defendant.

That the course of business is as follows: shipments of cattle are received in Kansas, the Indian Territory, etc., by the complainant's line, which are there consigned by the shippers to Chicago, at the rates named in the above mentioned tariffs, with the privilege of stopping off at Kansas City, Mo. If the cattle stopped under this privilege are not sold at the Kansas City market their transportation is resumed and continued to Chicago under the original billing. The defendant has claimed the right, however, in case such cattle are sold at Kansas City, to receive the same for transportation to Chicago upon terms whereby no more was paid for the total carriage than the through rate under which they were originally billed by complainant, which was a sum considerably less than the amount of its local rate from Kansas City to Chicago.

That so far as such cattle originating upon complainant's line are concerned the defendant had no right to carry the same under any pretense of a joint through rate, but was only entitled to carry the same at its open public rate aforesaid, in force between Kansas City and Chicago.

Complainant alleges that defendant has accepted for transportation at Kansas City live stock in car loads which originated at stations on complainant's line west of the Missouri River, and has protected the rates named in said Through Joint Freight Tariff No. 4,—and proof of such transactions will be made upon the hearing,—in violation of section 6 of the Act to Regulate Commerce, which provides that when "any such common carrier shall have established and published its rates, fares, and charges, in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force."* And complainant insists that as to live stock originating on its line west of the Missouri River defendant has no right to transport the same, except under its own local tariff from Kansas City to Chicago.

Wherefore the petitioner prays that defendant may be required to answer the charges herein, and that, after due hearing and investigation, an order be made commanding the defendant to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

*1 Inters. Com. Rep. p. 5.

D. S. ALFORD

v.

CHICAGO, ROCK ISLAND & PACIFIC
R. CO.

(No. 225.)

A BSTRACT of complaint, filed August 9, 1889.

Complainant alleges that he is a citizen of Kansas, and a resident of the City of Lawrence, in said State, and that said city is situate upon the line of railroad hereinafter described, and is a city of a population of about 12,000.

That defendant operated, among other lines of railway, a line of road through the City of Lawrence aforesaid to points east and west thereof; and that said railroad company wholly refuses to afford any railway facilities whatever to the inhabitants of said City of Lawrence, or to stop any of its trains at said City, for the accommodation of its citizens; and unreasonably subjects said locality to great disadvantage thereby, and does and has wholly refused to transport your petitioner from said Kansas City, in the State of Missouri, to said City of Lawrence, or to sell tickets to your petitioner for transportation on its said road between said points, said railroad company alleging as its excuse therefor, that it operates its said trains between said Kansas City, Missouri, and through said City of Lawrence, over the railway track of the Union Pacific Railroad and under a contract with said Union Pacific Railway Company that it, the said Chicago, Rock Island & Pacific Railroad Company, shall do no business at the said station of Lawrence, and accept of no business to or from said City of Lawrence to or from any other point, which contract, if such exists, your petitioner alleges was made after the "Interstate Commerce Act" went into force and effect, and that said contract is in conflict with the terms of said Act, and more especially that portion of section 1, which provides that the "term 'railroad' as used in this Act shall include all . . . the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, etc.," and also of section 3 of said Act.

Relief is prayed.

J. A. MOORE

v.

MISSOURI PACIFIC RAILROAD CO.

(No. 226.)

A BSTRACT of complaint, filed August 15, 1889.

Complainant alleges that on the 9th of July, 1889, there was shipped to his address at Greeley, Kansas, from Mt. Gilliad, Ohio, via St. Louis, 5000 pounds of machinery (knocked down), consisting of a hydraulic cider press. The charges to East St. Louis, about two thirds of the whole distance, was 27 cents per hundred pounds, or \$13.50. The charges by the defendant from East St. Louis to Greeley was 83 cents per hundred pounds, or \$41.50, which the

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complainant deems excessive, and in violation of the Act to Regulate Commerce.

Petitioner prays relief.

THE HOLLY SPRINGS COMPRESS AND
MANUFACTURING COMPANY

v.

THE KANSAS CITY, MEMPHIS & BIR
MINGHAM RAILROAD COMPANY.

(No. 227.)

A BSTRACT of complaint, filed August 17, 1889.

Complainant is a corporation created by the laws of the State of Mississippi, with its domicil, office, and place of business at the Town of Holly Springs, Mississippi, owning and operating a cotton compress, and engaged in the business of compressing cotton bales for home and export shipment; and the cotton compressed by it meets the requirements made by ocean carriers for export shipment.

Defendant is a common carrier, etc.

Said Town of Holly Springs is on defendant's line of railroad, being only forty-five (45) miles from the City of Memphis, in the State of Tennessee, and at the crossing of defendant's line with the Illinois Central Railroad; that defendant charges \$1.45 per bale for transporting compressed cotton from Holly Springs to Memphis; that defendant has the free use of a side track which runs from defendant's main line to complainant's compress, a distance of about 200 yards, and that complainant, at its own cost, loads defendant's cars with the cotton, and defendant receives the \$1.45 per bale for the transportation alone, which said charge is unjust and unreasonable. Defendant transports flat cotton, the same distance, to wit, forty-five miles (45) for \$1.10 per bale between points within said State of Mississippi.

Defendant has subjected the business of compressing cotton at Holly Springs, and the traffic in compressed cotton there, to an undue and unreasonable prejudice and disadvantage in this: defendant receives at its platform in Holly Springs flat cotton and loads it upon its cars and transports it to said City of Memphis and delivers it to the warehouses in said city for \$1.45 per bale, whereas defendant charges \$1.45 per bale for the transportation and switching of compressed cotton which is in all cases through cotton from Holly Springs via Memphis, the difference in favor of flat cotton and against compressed cotton being the difference in cost of switching compressed cotton, which is understood to be two (\$2.00) dollars per car, and the cost of loading flat cotton at shipping point and delivery to the warehouses at the expense of defendant, which delivery alone is understood to be fifteen cents per bale; and defendant is thus injuring complainant's business unjustly and unreasonably.

(Here follows a comparison of above rates on cotton, flat and compressed, with those from other points to Memphis, and also an allegation that defendant has failed to comply with the Law in posting notices of freight and passenger rates.)

Clarence D. SIMPSON and Thomas H. WATKINS, Under Firm Name of Simpson & Watkins,

v.

DELAWARE & HUDSON CANAL CO.

(No. 223.)

ABSTRACT of complaint, filed August 24, 1889.

The complainants are miners, shippers and dealers in coal, residing, etc., in Scranton, Pa., with two anthracite coal mines, or collieries: one on the New York, Lake Erie & Western R. R., or a line of road leased by it, and the other upon a line of railroad connecting directly with that of the defendant.

The defendant is a common carrier of passengers and property by railroad, and is also a large miner and shipper of anthracite coal from the same anthracite coal regions of Pennsylvania over its line of railroad from Wilkes-barre, Pa., to Rouse's Point, New York.

The complainants are desirous of shipping their anthracite coal, as interstate commerce, northward, over the said defendant's line of road to the various points thereon; but are unable to do so upon any rates they are able to obtain from the defendant. They allege that they are unable to obtain a specific rate of freight, but in answer to an application therefor, are furnished with two freight tariff sheets, mentioning rates on six classes of freight by the one hundred pounds, over something like 440 miles of railroad. The rate on coal is not mentioned; specifically, in said tariff sheets, and even if it is embraced in the sixth and lowest class, such rate would be prohibitory, as, after payment of freight out of the market value of the coal, the sum remaining would not equal the cost or market value of the coal at the colliery.

Complainants allege that, notwithstanding said freight charges, the defendant is now, and has been for a long time past, shipping the anthracite coal mined by itself from the same Carbondale coal fields northward by its said line of railroad to the said several points in New York State aforesaid, and has maintained, and does still maintain, a practical monopoly of the anthracite coal trade over its line to said points, to the exclusion of complainants and all other individual shippers of anthracite coal from said fields. That they are unable to ascertain whether defendant charges against its own coal so sent to the said various points the full rates of freight named for the sixth or any other class in said tariff sheets, but aver that if they do, there remains to the defendant a sum much less than would be represented by the market value or cost of said coal, and that the system of business referred to makes it incumbent upon the defendant, as a common carrier, to carry the coal of complainants to said points at rates, to each, to be ascertained by deducting from the market value of the coal at such point the sum of the market value of the coal of the defendant in the Carbondale district, plus 25 cents per ton, guaranty commission, for the sale at the point of destination.

Complainants further allege that defendant

is now and has been, for some time carrying bituminous coal over like distances in the same direction between points in the anthracite coal fields aforesaid to said New York points at rates per ton per mile which they believe to be about one third of those charged on anthracite coal to like points in the same direction, and claim that they are entitled to a like classification for anthracite as is given to bituminous between like points in the same direction.

Complainants further allege that defendant is the owner of several thousand dump coal cars, known as "gravities," in use for shipment of anthracite coal as interstate traffic over its road from the Carbondale coal district to Honesdale, Pa., at which place such coal is transferred to the New York, Lake Erie & Western R. R. Co. for transshipment as interstate traffic to various points in New York; and that during the busy season of the year defendant uses the "gravity" cars for its own mining operations, and declines and refuses to deliver to them their proper proportion or quota of such "gravities."

They further allege that there are 1000 coal cars in use upon the N. Y. L. E. & W. R. R. Co., known as Delaware & Hudson "exclusives," and that when such cars are upon the line of the defendant it is bound to apportion the same among all shippers of coal on its line, and does so at seasons of the year when there is no scarcity of coal cars; but that when the coal trade is active and cars scarce, it takes all the said cars for its own exclusive use for its own collieries, and refuses to apportion to the complainants any of the same, to their loss and injury, and in violation of its duty as a common carrier.

Complainants aver that all the foregoing is in violation of the Interstate Commerce Act and its Amendment, and therefore pay relief, etc.

The complaint is duly verified.

Franklin B. Gowen,
Counsel for Petitioner.

Andrew LANGDON, Sumner W. T. WHITE,
and Charles R. HENEAGE, Trading as
Copartners Under the Firm Name of Andrew Langdon & Co.,

v.

DELAWARE & HUDSON CANAL CO.

(No. 223.)

COMPLAINT in this case was filed August 24, 1889, by same counsel, and is similar in all respects to the last preceding, except as to names of parties, and special situation of their respective collieries,—one being known as the Belmont Colliery, situate at Carbondale, and another as Grassy Island Colliery, situate at Peckville in the Carbondale anthracite coal fields of Pennsylvania; and with the further exception that no mention is made of the "gravities" and "exclusives"—coal cars—referred to in the preceding complaint.

Clarence D. SIMPSON and Thomas H. WATKINS, Trading as Copartners Under the Firm Name of Simpson & Watkins,

NEW YORK, LAKE ERIE & WESTERN R. CO.
(No. 230.)

COMPLAINT in this case was filed August 24, 1889, by same counsel as in the two preceding cases, and is closely related to No. 228 and No. 229, the two foregoing cases.

The complaint, after stating the preliminaries as in No. 228, shows that defendant is the owner of all the capital stock of a corporation known as the Hillside Coal & Iron Co., engaged in mining and shipping anthracite coal from the Carbondale district over the line of defendant's road to points in the States of New York and New Jersey on its line, and to which points complainants are also shippers of coal; that defendant carries coal of the Delaware & Hudson Canal Co. and the Hillside Coal & Iron Co. from Carbondale district, both from Honesdale and Carbondale, to the said various points in New York and New Jersey at much lower rates of freight than it charges complainants for like service, the discrimination being often as high as from 25 cents to 50 cents per ton.

They further allege additional indirect discrimination by sale of coal from the Hillside Coal & Iron Co.'s mines in the market at the points in New York and New Jersey aforesaid, at prices which, after paying the lower rates mentioned, would leave to the Hillside Co. much less than the market value of the coal at the mines, and that therefore the respondent, as sole stockholder of said Hillside Co., should deduct such loss from the freight charges of defendant in order to ascertain the proper rate of freight which the complainants should pay to the same several points.

Complainants further allege discrimination against them in favor of the Delaware & Hudson Canal Co. and the said Hillside Co. in the distribution of cars, by giving to the said two companies a much greater proportion than to the complainants, so that, in the busy season of the year, the collieries of the said two companies are enabled to work full time, while the collieries of the complainants are often idle for want of cars.

The complainants further mention the Delaware & Hudson "exclusives," and their use, as in No. 228, and claim that they should be treated as part of the general stock of coal cars of said defendant and distributed *pro rata* among all shippers of coal over its line, including complainants, but that on the contrary, they are confined to the exclusive service of the D. & H. C. Co.

Complainants claim that the foregoing constitute violations of the Interstate Commerce Act and its Amendment, and pray relief.

HOAG & TITCHENER

N. Y. L. E. & W. R. CO.

(No. 232.)

ABSTRACT of complaint, filed August 30, 1889.

2 INTER S.

Complainants show that defendant charged them \$31.86 for hauling a carload of empty nail kegs, weighing 8,850 lbs., from Youngstown, Ohio, to Binghamton, N. Y., while it offered to transport a carload of nails, weighing 24,000 lbs., between the same points, in the same direction, for \$27.60; and allege that such different rates constitute unlawful discrimination.

AMERICAN WIRE NAIL CO.

QUEEN & CRESCENT FAST FREIGHT LINE.

(No. 233.)

ABSTRACT of complaint, filed August 30, 1889.

Complainant alleges unlawful discrimination on the part of defendant, and the railroads operated by it, in charges for carriage of interstate commerce, to wit:

Forty cents per cwt. on wire nails in kegs, from Cincinnati, Ohio, to Chattanooga, Tenn.; while the rate is only 15 cents per cwt. for transporting iron nails, generally known as "cut nails," between the same points in the same direction; and that such difference in rating is shown by defendant's published freight tariffs, and is not made by any other carriers, East, West or North.

George RICE

The CINCINNATI, WASHINGTON & BALTIMORE R. CO.; The Cincinnati, Indianapolis, St. Louis & Chicago R. Co., *et al.*

(No. 184.)

George RICE

The CINCINNATI, WASHINGTON & BALTIMORE R. CO.; The Ohio & Mississippi R. Co., *et al.*

(No. 185.)

George RICE

The LOUISVILLE & NASHVILLE R. CO.

(No. 194.)

Construction of the Act to Regulate Commerce as it relates to the compulsory production, under subpoenas duces tecum, of books, tariffs, contracts, and papers for the purposes of evidence, and the duties of carriers engaged in interstate commerce in giving information shown by their books concerning rates, facilities furnished, and general movements of freight to parties interested in such matters and applying for such information in good faith.

1. In laying down rules upon the subject of what an application shall contain for the compulsory production of books, papers, tariffs, contracts, agreements, and documents relating

to any matter under investigation, the Commission is governed by the provisions of the Act to Regulate Commerce and the objects and purposes of this Statute, but in connection with these will also consider the practice in the courts of the United States, as well as the rules prescribed by federal statutes in proceedings which seem to be most nearly analogous to proceedings in which such application to the Commission is made.

2. **In proceedings between parties**, when such an application is made to the Commission to compel parties who are not engaged as carriers in interstate commerce, or others who are strangers to the proceeding, to produce books, papers, and documents, the **application should be in writing**, addressed to the Commission, and **should specify**, as nearly as may be, the books, papers, or documents for the production of which process is desired, and be accompanied by an affidavit that the books, papers, or documents described are in the possession of the witness, or under his control, and should set forth facts which make a *prima facie* case that these contain evidence that is material and necessary to the party seeking their production in the pending proceeding; and in such a case the *prima facie* showing that what is required to be produced will be legal evidence for the party demanding it ought to be very clear and full.

3. **Where the application is made to compel one who is a party to the proceeding**, and who is a carrier engaged in interstate commerce, to produce its books for the purpose of evidence in a pending proceeding, it is **sufficient** for the application to **indicate in writing in a general way what books of the carrier should be produced**, and that there is reason to believe, and that the applicant does believe, that in the course of the hearing they will become of service, on account of the light they will throw upon the questions in controversy in the proceeding, and **as an evidence of good faith**, in making the application, the applicant **should make an affidavit**, as part of the application, that such application is made in good faith, and not for the purpose of vexing or harassing the defendant, and upon such a showing, as a general rule, the **process should issue, unless the number of books called for should be so large**, or from other exceptional circumstances, the Commission should order the **testimony to be taken at such place as would avoid oppression** in producing the books at a far-distant hearing, and expedite the progress of the investigation.

4. **The difference that exists in what should be a *prima facie* showing for compulsory process for the production of books, papers, and documents as be-**

tween parties not engaged as carriers in interstate commerce, or strangers to the proceeding, on the one hand, and, on the other hand, carriers who are engaged in interstate commerce, is one that is **very manifest. The books of carriers engaged in interstate commerce**, whether made up from shipping tickets, way bills, expense bills, or otherwise, are supposed to give the exact particulars of the consignment, showing the weight, rate, and amount of charges to be paid to the company's agent, and are put in this enduring form at the time of the consignment, as part of the transaction, upon rates that the Law requires to be open and public, and thus they give a history of the details of the transaction, and are in the nature of semi-public records. Shippers, consignees, and even the public, may well have an interest, under certain circumstances, in the evidence these records afford as to rates, charges, facilities furnished, and the general movements of freight. **The books of strangers to the proceeding** and of parties not engaged as carriers in interstate commerce, do not necessarily occupy any such relation to these transactions, though there may possibly be such a showing as would make them material and competent evidence in proceedings in which these transactions come into controversy.

5. **There are several modes of procedure by which the inconvenience** to the defendant carriers of producing books and the delay and labor of going over their entries, **might be avoided** by petitioner. For example: If one or more witnesses should be subpoenaed from the different companies proceeded against, and a notice should be served with the subpoena requiring the witnesses to furnish the published rates and tariffs of such company, for a specified period, and also requiring them to furnish statements of the actual charges made and car facilities furnished, during such period, to the Standard Oil Trust and the others named in the application, if different from the published tariffs and schedules, it would probably be sufficient for all the purposes of these proceedings; or if the parties would take depositions, by consent, in advance of the hearing, it would answer the same purpose.
6. **In proceedings like these, it is enough to show the rates actually charged**, if there are or have been any such to certain shippers or consignees different from the published tariff rates, or the preferential facilities, if any such, furnished by the defendants to some shippers or consignees, and not to others, or the comparative rates on the different commodities named in the complaints, and from and to designated points. Innumerable shipments, with all their minuteness of detail, over the various lines, that were made for many years

before the Act to Regulate Commerce took effect, as well as since that date, and the names of the consignors and consignees at so many different points, through these long periods of time, seem to be immaterial. It appears to be sufficient for all the purposes of these cases to show **the rates published, the rates actually charged, and the facilities furnished from and to designated points since the Act to Regulate Commerce went into effect, and, for whatever light these may throw upon the question of the reasonableness and justness of the rates, if any, and the fairness of the facilities afforded by way of comparison what these were for a reasonable time—for example, for a period of twelve months before the Act to Regulate Commerce went into effect.**

7. **The books of the defendant carriers as to rates charged, facilities furnished, and general movements of freight, being in the nature of semi-public records, to any extent that they can fairly and justly save time, labor, or expense to complainant, or to their companies, by giving to him, in response to any calls he may make, statements of facts shown by their books, records, or files which may probably have importance on the hearing, the officers and agents of the defendant carriers under the direction of defendants, ought to give such statements, and ought to do so as promptly as may be found reasonably practicable. Much unnecessary controversy, inconvenience, and delay might well be avoided in the first instance, as well as in subsequent stages of proceedings, if carriers would exhibit, without technical objection, what their books show in reference to a transaction in question to anyone who calls for the information in good faith, believing, though perhaps erroneously, that it is, or may be, important to his interests, and when the application is seasonably and properly made, with a due regard for the convenience of the carriers' agents and officers; and the instances are numerous in which it would put an end to the controversy, and in many others that the party would not then trouble the carrier for the production of the books.**

8. **As the application in these cases does not conform to the rules herein stated in reference to making a *prima facie* showing for the compulsory production of the books, papers, and documents, either as against the defendant carriers or those who are strangers to these proceedings, the relief it seeks cannot now be granted, and for the present must be denied; but this does not preclude the petitioner from renewing his application, provided, in doing so, he conforms to the rules indicated.**

IN THE MATTER of the application of petitioner for subpoenas *duces tecum* for the production of books, contracts, vouchers, accounts, and papers by John D. Rockefeller; George H. Vilas; John Bushnell; Ambrose McGregor; M. A. Robinson; J. E. Terrill; R. M. Frazier, General Freight Agent; Thomas L. Kimball, General Manager; A. S. Van Kuran, Freight Auditor; J. A. Monroe, General Freight Agent; W. F. White, Traffic Manager; S. B. Hynes, General Freight Agent; H. C. Clements, Auditor; The Central Pacific Railroad Company; The Southern Pacific Railroad Company; Milton H. Smith, Vice-President; John M. Culp, General Freight Agent; T. H. Flagler, President American Cotton Oil Trust; T. O. Moss, Treasurer American Cotton Oil Trust; Robert P. Monroe, Auditor American Cotton Oil Trust; George H. Webster, of Armour & Company; Joseph Sears, Vice-President, Fairbanks Co., and Lyman Klapp, President Union Oil Company. *Denied.*

Hon. Franklin B. Gowen for the application.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

These several proceedings being at issue on petitions and answers and set for hearing, but no testimony taken, application is now made by the complainant for subpoenas *duces tecum* to a considerable number of witnesses requiring them to produce before the Commission at the hearing a large variety of books, vouchers, ledgers, accounts and other papers covering current business transactions in the shipments of freight over a large portion of the country for long periods of time, showing the methods of doing the business and rates charged and received by the defendant carriers on these shipments direct, and other freight brought back as return loads on the same cars, as well as the mileage paid as rental for the use of tank and combination cars loaded or returning empty where that was done, in all the infinite variety of these transactions. Or, in lieu of producing all these books, vouchers, ledgers, accounts and other papers, that the witnesses furnish statements embracing all these transactions in all their details.

This application is as follows:

"To the Interstate Commerce Commission:

"The complainant, by his counsel, Franklin B. Gowen, respectfully requests the Commission to order subpoenas *duces tecum* in the above cases as follows:

"To John D. Rockefeller, 26 Broadway, New York;

"To George H. Vilas, 26 Broadway, New York;

"To John Bushnell, 26 Broadway, New York;

"To Ambrose McGregor, 26 Broadway, New York; with the following *duces tecum*:

"And bring with you any book, record or statement showing the names and amounts of capital of all corporations, firms and associations in which the Standard Oil Trust has any interest;

"Also all books, accounts or statements showing all amounts and kinds of petroleum and its products, cotton seed oil and turpentine, shipped since April 4, 1887, to date of hearing, by

the Standard Oil Company of Ohio, and other corporations, firms or associations affiliated to the Standard Oil Trust, to Pacific Coast terminal points and to intermediate Pacific Coast common points, and other points west of the Mississippi and Missouri Rivers, with all shipments from Pacific Coast terminal points, to all points or stations eastward, showing dates and amounts of each shipment and net rates paid on the same;

"Also all bills, vouchers or receipts showing payments and rates for shipment of petroleum or its products to Pacific Coast common or terminal points, for five years prior to April 4, 1887, with statement of any car mileage paid for return of empty cars, if any, during said five years;

"Also all bills, statements, accounts, vouchers and receipts for payments of freight charges on above named shipments, and all books, accounts, receipts or vouchers for any mileage rebates or allowances on account of the freight charges above named;

"Also all shipments by water to Pacific Coast terminal points since April 4, 1887, showing dates and amounts of each shipment and by what lines or vessels;

"Also the contract for purchase of control of the patent right for combination tank and box car.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To M. A. Robinson, 26 Broadway, New York;

"To J. E. Terrill, 26 Broadway, New York;

"And bring with you a statement or list of all tank cars, and combination box and tank cars, and other cars of the Union Tank Line, and including all such kinds of cars in use by all corporations, firms or associations affiliated or connected with the Standard Oil Trust, if under any other name, together with the weights and numbers of each, with the separate weights of the tanks in the combination cars, and of the cylinders of the tank cars;

"Also all books, accounts or statements showing the rates and the total mileage payments received by the Union Tank Line from railroad or other transportation companies, for the year ending April 1, 1888, and the year ending April 1, 1889, and also showing separately the amounts for mileage payments received for each of the said two years on the combination cars from the Pacific Coast lines;

"Also all books, accounts or statements showing the rates and the amount of rentals thus received from each and every source for the use of the Union Tank Line or other tank cars under your control and management in which cotton seed oil and turpentine has been transported during each of the said two years aforesaid;

"Also all books, accounts or statements showing the number of barrels of petroleum and its products carried by all the cars of the Union Tank Line for each of the two years aforesaid, and the number of barrels or other kind of loading other than petroleum and its products carried during each of the said two years.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"In the two cases of the Cincinnati, Washington & Baltimore Railroad Company and others—

"To R. M. Frazier, Cincinnati, Ohio:

"And bring with you all books, accounts or statements showing all shipments of petroleum and its products in car lots over the Cincinnati, Washington & Baltimore Railroad to Pacific Coast terminals and intermediate Pacific Coast common points, and all other points on the Union Pacific Railway and the Atchison, Topeka & Santa Fé Railroad, and including Cincinnati, St. Louis, Louisville and Chicago, since April 4, 1887, with dates, consignor, consignee, amounts, rates of each shipment, with all rebates, drawbacks or allowances paid or allowed in any manner by reason of each shipment—also to include cotton seed oil and turpentine, together with statement showing dates, rates, payee and amounts paid, as car mileage, or otherwise, on loaded or empty tank cars, separately specified, and to include east and west bound oil traffic, and also all amounts received for the transportation of each and every tank car which has carried the above freight, with dates and rates;

"Also all terminal or other charges paid, allowed or deducted in any manner, shape or form on oil shipments;

"Also to bring with you an original sample voucher 10 days apart from April 4, 1887, showing how and in what manner above shipments were billed, and to include as above a voucher showing how the freights were paid.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To Thomas L. Kimball, Gen. Man., Union Pacific R'y Co.;

"To A. S. Van Kuran, Freight Aud., Union Pacific R'y Co., Omaha, Neb.;

"To J. A. Monroe, Gen. Fr't Agent, Union Pacific R'y Co., Omaha, Neb.;

"And bring with you all books, accounts or statements showing all shipments of petroleum and its products in car lots over the Union Pacific Railway to Pacific Coast terminal points, and intermediate Pacific Coast common points, and all points on the Union Pacific Railway west of the Missouri River, since April 4, 1887, with dates, consignor, consignee, amounts, rates of each shipment, with all rebates, drawbacks, or allowances paid or allowed in any manner by reason of each shipment; also include cotton seed oil and turpentine north bound, together with statement showing dates, rates, payee and amounts paid, as car mileage or otherwise, on loaded or empty tank cars, separately specified, and to include east and west bound oil traffic, and also amounts received for the transportation of each and every empty tank car which has carried the above freight, with dates and rates;

"Also all terminal or other charges paid,

allowed, or deducted in any manner, shape or form on oil shipments;

"Also to bring with you an original sample voucher 10 days apart from April 4, 1887, showing how and in what manner above shipments were billed, and to include a voucher as above, showing how the freights were paid.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To W. F. White, Traf. Man., Atch., T. & S. F. R. R. Co., Topeka, Kan.;

"To S. B. Hynes, G. F. Agt., Atch., T. & S. F. R. R. Co., Topeka, Kan.;

"To H. C. Clements, Auditor, Atch., T. & S. F. R. R. Co., Topeka, Kan.:

"And bring with you all books, accounts or statements showing all shipments of petroleum and its products, cotton seed oil, turpentine, in car lots, over the Atchison, Topeka & Santa Fé Railroad to Pacific Coast terminals and intermediate Pacific Coast common points, and all stations on the Southern Pacific Line and Atlantic & Pacific Railroad, also all stations west of Kansas City, since April 4, 1887, to date of hearing, with dates, consignor, consignee, amounts, rates of each shipment, and to include number and weight of contents of each tank car, with all rebates, drawbacks, or allowances paid or allowed in any manner by reason of each shipment, together with statement showing dates, rates, payee and amounts paid, as car mileage or otherwise, on loaded or empty tank cars, separately specified, and to include east and west bound oil traffic, also to include all amounts received for the transportation of each and every tank car which has carried the above freight, with dates and rates;

"Also all terminal or other charges paid, allowed or deducted in any manner, shape or form on said shipments;

"Also to bring with you original sample vouchers, one in every ten days from April 4, 1887, to date of hearing, showing how and in what manner above shipments were billed, and to include a voucher as above to show how the freights were paid;

"Also tariff sheets or statements made therefrom, showing lowest rate prevailing during five years prior to April 4, 1887, to Pacific Coast and intermediate points, together with statements showing charges then prevailing, if any, for returning empty tank cars.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"In the above two cases also the complainant respectfully asks for an order from the Commission directed to the Central Pacific Railroad Company and to the Southern Pacific Railroad Company, each one of whom is a party in one of the above cases, to produce at the hearing a statement of all shipments of petroleum or its products since April 4, 1887, from Pacific Coast terminal or intermediate Pacific Coast common points eastward over their several lines, showing points of shipment and points of destination, name of consignor,

rate of freight charge, character of shipment,—*i. e.*, whether tank, barrels, or combination car,—and statement of all allowances, rebates, drawbacks, car mileage or otherwise paid or allowed on any of such shipments.

"In the case of the Louisville & Nashville Railroad Company *only*.

"To Milton H. Smith, Vice President, L. & N. R. R. Co. Louisville, Ky.;

"To John M. Culp, Gen. Frt. Agt., L. & N. R. R. Co., Louisville, Ky.:

"And bring with you all books, accounts or statements showing all shipments of petroleum and its products south and west over the lines of the Louisville & Nashville Railroad and its branches or connections since April 4, 1887, car lots, with dates, consignor, consignee, amounts and rates of each shipment and full account of all car mileage, rebates, drawbacks, or allowances paid or allowed on or by reason of each shipment, together with statement showing dates, payee and amounts paid as car mileage or otherwise on account of returning empty cars which had carried any of the above freight, and also all amounts received for the transportation of each and every empty car which had carried any of the above traffic;

"And also all books, statements or accounts showing how many, if any, of the cars carrying the above traffic have returned with back loading of cotton seed oil or turpentine, and the number and weight of each tank carload thereof, and the freight charges on the same, together with all allowances, car mileage or rebates or other payments paid or allowed on such cars or cargo returning as aforesaid with cotton seed oil and turpentine, or either;

"And also a statement showing the total bulk or amount transported south and west of petroleum and its products and the total bulk or amount transported north and east of cotton seed oil and turpentine, showing also how much of the two latter classes of freight came north and east in cars that had gone south or west with petroleum and its products since April 4, 1887;

"Also statement showing the car number and owner of each tank car passing over your line or any part thereof with cotton seed oil or turpentine, since April 4, 1887, with the weight of cargo on which freight was charged on each car, and the net rate of freight received for each car, and the origin, destination, consignor, and consignee of each;

"Also statement of all shipments of petroleum or its products over the lines of the Louisville & Nashville Railroad and its branches since April 4, 1887, showing respective amounts in barrels and respective amounts in tank cars of all such shipments;

"Also statement showing all shipments of petroleum or its products in carload lots, and in less than carload lots, respectively, each specified, over the lines of the Louisville & Nashville Railroad and its branches from Louisville, Decatur, Birmingham, and all other points to Cullman, Alabama, since April 4, 1887, with date of shipment, consignor, and consignee, and amount of freight received on each, together with rebate or drawback, if any, allowed on each shipment;

"Also separate statement showing all shipments of petroleum or its products to Birmingham

ham and Decatur since April, 1887, with date of shipment, character of car, whether tank or otherwise, weight of cargo, rate of freight charge and drawback or rebate, and name of consignor and consignee of each shipment.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To T. H. Flagler, Prest., American Oil Trust, New York;

"To T. O. Moss, Treasurer, American Oil Trust, New York;

"To Robert P. Monroe, Auditor, American Oil Trust, New York;

"And bring with you Stock Ledger and list of Stockholders of the American Cotton Oil Trust;

"And also bring with you all contracts, accounts and statements showing the number of cars of the Union Tank Line used by the Cotton Seed Oil Trust, or its consignor, since April 4, 1887, with the amounts paid for the use of the same, the mileage made by the said cars, and the amounts of mileage charges or otherwise received for the use of the said cars on the railroad for all or any railroad or other transportation company, and all bills, vouchers, receipts or other statements showing amounts of cotton seed oil shipped by or to the said Cotton Seed Oil Trust, and by or to firms, associations or corporations affiliated thereto, since April 4, 1887, showing by what line shipped, at what rates of freight, and all rebates or allowances, mileage or otherwise, received on account thereof.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To George H. Webster, of Armour & Co., Chicago, Ill.:

"And bring with you all books, accounts, vouchers, or other statements showing the amounts of cotton seed oil received by railroad by Armour & Co., since April 4, 1887, the dates when received, the names of the railroad companies receiving and delivering the same, the origin and destination of each consignment, the number and weight of contents of each tank carload thereof, and the freight charges on each shipment—together with all rebates, drawbacks or other allowances received by Armour & Co., for or on account of consignment aforesaid;

"Also the dates, with rates and amounts paid for rental or use of tank cars to Union Tank Line or others;

"Also bring with you original sample vouchers or freight receipts, one for each ten days, from April 4, 1887, showing how and in what manner freight rates were paid.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To Joseph Sears, Vice-Prest., The Fairbanks Company, Chicago, Ill.

"And bring with you all books, accounts,

vouchers or other statements showing the amounts of cotton seed oil received by railroad by the Fairbanks Company, since April 4, 1887, the dates when received, the names of the railroad companies receiving and delivering the same, the origin and destination of each consignment, the number and weight of contents of each tank carload thereof, and the freight charges on each shipment, together with all rebates, drawbacks or other allowances received by the Fairbanks Company for or on account of each consignment aforesaid;

"Also the dates, with rates and amounts paid for rental or use of tank cars to Union Tank Line or others;

"Also bring with you original sample vouchers or freight receipts, one for each ten days from April 4, 1887, showing how and in what manner freight rates were paid.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"To Lyman Klapp, Prest., Union Oil Company, Providence, R. I.:

"And bring with you all books, accounts, vouchers or other statements showing the amounts of cotton seed oil received by railroad by the Union Oil Company as well as the Providence Mills as at the New Orleans Mill, via the Louisville & Nashville Railroad, the name of the railroad receiving and delivering the same, the origin and destination of each consignment, the number and weight of each tank carload thereof, and the freight charges on each shipment,—together with all rebates, drawbacks or other allowances received by the Union Oil Company for or on account of each consignment aforesaid.

"*Note.* (Please note that a statement containing the facts asked for extracted from the books or other papers will answer all purposes, without the production of all original papers and books.)

"Very respectfully,

Franklin B. Gowen,

Attorney for Compl.,

"No. 119 South 4th Street, Philadelphia, June 18, 1889."

In a separate paper the object of the testimony asked for in these subpoenas *duces tecum* is set out by complainant as follows:

"I. The first four witnesses named are officers and agents of the Standard Oil Trust. The object of the testimony asked for is to show:

"*First.* What concerns are affiliated to the Standard Oil Trust.

"*Second.* The shipments and rates paid by the various corporations affiliated to the Standard Oil Trust over the lines of the defendants.

"*Third.* The rates paid previous to April, 1887, for comparison with present rates, upon the question of reasonableness, etc.

"*Fourth.* The car mileage and other rebates received by the Standard Oil Trust—the allegation of the complaint being that the Standard Oil Trust is favored by defendants.

"*Fifth.* The amount of water shipment to Pacific Coast—as evidence upon the question of whether the water competition justifies reduced rates to certain points.

"Sixth. The contract for the purchase or control of a certain patent car. We allege that the railroads favor shipments by a particular species of car, of which the Standard Oil Trust has control of the patent right.

"II. The next two witnesses, Mr. Robinson and Mr. Terrill, are officers of the Union Tank Line, and the object of the testimony asked for is to show the exact relations between the Union Tank Line and the several railroads in the shipment of both petroleum and cotton seed oil.

"III. The next witness, Mr. Frazier, of the initial line over which shipments go to the Pacific Coast, is asked for such data only as is necessary under the allegations of the complaint, to show the charges against and methods of treatment of the various shippers over the line.

"IV. The next six witnesses, viz., Messrs. Kimball, Van Kuran and Monroe, and Messrs. White, Hynes and Clements, are the officers of the two principal companies defendant—and they are asked to produce from their books only such testimony as would be evidence under the allegations of the complaint, with possibly this exception, that while the complaints only refer to the rates to Pacific Coast terminal or common points, the subpoenas ask for information about points east of any of the above. We ask for this because it is our intention to amend the complaints in these two cases by averring that the defendants are charging more for a short haul than for a long one, and our allegation will be that this is done to enable the Standard Oil shippers to reship eastward from common or terminal Pacific points at rates the aggregate of which going and coming is less than the open going rate to the particular point.

"You will note on page 7 *that in addition to the subpoenas *duces tecum* we ask for orders on the Central Pacific Railroad Company and the Southern Pacific Company, both of whom are parties, to produce certain statements. This is asked for to avoid subpoenaing or examining witnesses who live 3,000 miles away, and the jurisdiction of the Commission over parties is ample to compel the production of such statement.

"V. The remaining witnesses are all in the case of the Louisville & Nashville Railroad Company, and the testimony asked for is all directed to the question of discrimination in petroleum, cotton seed oil, and turpentine freights, and to the subject of what particular rates are charged to different parties competing with complainant, either directly or by means of rebates or allowances on petroleum, or reduced rates on cotton seed oil and turpentine."

The petitioner is a refiner of petroleum at Marietta, Ohio, and in his first two complaints above stated, which are exclusively against railroad companies named therein, he makes the following charges:

"Third. That there is an organization known as the Standard Oil Trust, to which are affiliated a great number of corporations, associations, firms and individuals who are also refiners of petroleum in various parts of the country, and shippers of refined oil and other products of petroleum as interstate traffic over the lines of the several railroads above named, from various billing points in the East to the points upon the

Pacific Coast reached by the lines of the said respondents.

"Fourth. That by Tariff Sheet No. 18 of the Transcontinental Association, dated January 1, 1889, under which shipments are made and transported upon the lines of the respondents, the rates on coal or carbon oil, crude or lubricating petroleum, benzine, gasoline, and naphtha, at owner's risk of fire and leakage, from common points east of the ninety-seventh meridian of longitude to San Francisco, Sacramento, Marysville, Stockton, San José, Oakland, Los Angeles, and San Diego, all in California, and to Portland and Astoria, in Oregon, are one dollar and twenty-five cents per one hundred pounds. That by a prior tariff sheet, No. 15, dated September 1, 1888, the said rates were eighty-two and one half cents per one hundred pounds. And the petitioner is informed and believes, and avers upon such information and belief, that for a long time the said respondents transported refined oil and other products of petroleum for those affiliated to the Standard Oil Trust, over the same route as hereinabove described, in the same direction, and in like circumstances and condition, at seventy-two cents per one hundred pounds.

"Fifth. That your petitioner is desirous of shipping petroleum in wooden barrels, the weight of which wooden barrels, empty, is seventy-five pounds, and the weight of contents of oil three hundred and twenty-five pounds, and that the shippers affiliated to the Standard Oil Trust aforesaid ship in two other methods as follows:

"(a) By bulk, in tank cars composed of a longitudinal tank mounted upon two trucks, and—

"(b) By two upright iron tanks placed at the ends over the trucks inside of a box car, leaving space between said upright tanks for other freight to be carried in the same box car.

"Sixth. That your petitioner is obliged to pay for the weight of his wooden barrel package, but that the respondents make no charge whatever to those affiliated to the Standard Oil Trust for the weight of the longitudinal tank, or for the weight of the two upright tanks transported in the box car as aforesaid, although your petitioner avers that the expense and risk of the transportation of oil in bulk by longitudinal or upright tanks as aforesaid is greater than that attending the transportation by wooden barrel packages; that the dead weight of tank carried in said longitudinal tank cars and said upright tanks in box cars, taking into account the fact that both are transported both ways as against barrel packages one way, is much greater in proportion to contents than the dead weight of the barrel packages; and that the cost of transporting the iron tanks, exclusive of the weight of the contents, is as great or greater than the cost of transporting the weight of the wooden barrel, exclusive of the oil therein contained; and your petitioner states that he is informed and believes, and therefore avers, from such information and belief, that the respondents return the empty tank cars and tanks for the shippers affiliated to the Standard Oil Trust without charge, and that in many instances the said respondents pay a car-service mileage upon said empty tanks and tank cars.

"Seventh. That the discrimination, per bar-

*See ante, p. 588, bottom of left-hand column.

rel measure of actual oil on the Pacific Coast, against the petitioner, as a shipper by wooden barrels, as compared with those affiliated to the Standard Oil Trust, shipping by longitudinal or upright tanks, and irrespective of any discrimination or allowance for returning empty tanks or tank cars, is, at the several rates hereinabove named, as follows:

| | | | |
|--|--|--|--|
| At 72 cents pr. 100 pounds, 54 cents per barrel. | | | |
| " 82 $\frac{1}{2}$ " " " 61 $\frac{1}{4}$ " " | | | |
| " \$1.25 " " " 93 $\frac{3}{4}$ " " | | | |

and that such discrimination excludes your petitioner from the markets of the Pacific Coast, and enables those shippers affiliated to the Standard Oil Trust to secure and maintain a monopoly of the petroleum trade at all points reached by the lines of the respondents, to which the rates hereinabove mentioned are applicable.

"Eighth. That the respondents do not and will not furnish to your petitioner, or to shippers generally, either longitudinal tank cars or upright tanks in box cars for the shipment of petroleum and its products; that your petitioner is unable to obtain such tanks for shipment over the respondents' lines; that petroleum is an article of common and universal use, and one of the great natural products of the country, which is produced to the extent of over twenty million barrels annually; and that it is as much the duty of respondents to furnish cars of all kinds, tank or otherwise, for the transportation of petroleum, as it is to furnish cars for the transportation of any other natural or manufactured product; and that especially is it the duty of the respondents to furnish cars of all kinds, tank or otherwise, to the public for the transportation of petroleum if they maintain rates of unequal effect, whereby one shipper by one particular system of transportation is enabled to secure an advantage of ninety-three and three fourths cents per barrel measure of oil over his competitor.

"Ninth. And your petitioner avers:

"(a) That the said rate of one dollar and twenty-five cents per one hundred pounds hereinabove complained of, is unreasonable and unjust.

"(b) That the system of charges herein complained of constitutes a discrimination against your petitioner, and in favor of shippers affiliated to the Standard Oil Trust, in that it obliges the former to pay more than the latter for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

"(c) The said system of charges, and failure to furnish tank cars and tanks in box cars to your petitioner, gives an undue and unreasonable preference or advantage to shippers affiliated to the Standard Oil Trust over your petitioner, and subjects your petitioner to an undue and unreasonable prejudice or disadvantage as compared with the other shippers aforesaid.

"(d) The said system of charges, and the failure to furnish tank cars and tanks in box cars to your petitioner and the public generally, gives to the shipments by tanks, whether in tank cars or in tanks in box cars, an undue and unreasonable preference or advantage over shipments by wooden barrel pack-

ages, and subjects the latter kind of traffic, as compared with the former, to an undue and unreasonable disadvantage."

The averments of the second complaint are in substance much the same as the first.

In the third proceeding, which is against the Louisville & Nashville Railroad Company, after enumerating the relative rates charged by its tariffs on coal oil from and to various points going south, and on cotton seed oil and turpentine from and to points going north, and the advantages of the Standard Oil Trust and the corporations, firms and associations affiliated with it in owning and being furnished tank cars, while petitioner is subjected to the disadvantage of not being furnished with tank cars and of being charged relatively higher rates on his oil shipments in barrels than in tank cars, the complaint summarizes the grievances of petitioner as follows:

"(a) The rates on coal oil above given are unjust and unreasonable.

"(b) The said rates on cotton seed oil and turpentine respectively and on coal oil, mentioned in the seventh paragraph of this complaint, make and give an undue and unreasonable preference or advantage to the traffic in cotton seed oil and turpentine, respectively, over the traffic in coal oil.

"(c) The said rates on coal oil subject the traffic in coal oil to an undue and unreasonable prejudice or disadvantage as compared with the traffic in cotton seed oil and turpentine respectively.

"(d) The said rates as aforesaid make and give an undue and unreasonable preference and advantage to the traffic in coal oil in tank cars over the same traffic in barrel packages, and subject the latter to an unreasonable prejudice or disadvantage as compared with the former.

"(e) The said rates make and give an unreasonable preference and advantage to the Standard Oil Company of Ohio, the Standard Oil Company of Kentucky, the Camden Consolidated Oil Company of West Virginia, and other shippers affiliated to the Standard Oil Trust, over your complainant, and subject the latter to an unreasonable prejudice and disadvantage as compared with the former.

"(f) The said rates and charges mentioned in the tenth section of this complaint are in contravention of section 4 of the Act to Regulate Commerce aforesaid.

"(g) That the refusal of the respondent to furnish tank cars is in contravention of the provisions of the second paragraph of section 3 of the Act to Regulate Commerce aforesaid."

The questions arising upon this application are such as relate to the proper practice to be observed in the issuance of subpoenas *duces tecum* by the Commission, or by a commissioner, under the Statute, and the rules that should govern parties in the production of books and documentary evidence. The power conferred upon the Commission, bearing upon this subject, is found in section 12 of the Act to Regulate Commerce,* and is in the following language: . . . "and for the purposes of this Act the Commission shall have power to

*As amended Mar. 2, 1889, Appendix II., p. xliv.

require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements and documents relating to any matter under investigation, and in case of disobedience to a subpoena, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers and documents under the provisions of this section.

"And any of the Circuit Courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this Act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding." And in section 17 of the Statute as amended March 2, 1889, it is provided that "Either of the members of the Commission may administer oaths and affirmations and sign subpoenas."

It is also further provided in the seventeenth section:

"That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. . . . Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States."

In laying down rules upon this subject which will best conduce to the proper dispatch of business and the ends of justice, we have considered the practice in the courts of the United States, as well as the rules indicated by federal statutes, in proceedings which seem to be most nearly analogous to the present, and such others as arise before us. In the courts of the United States the practice appears to be for the application for a subpoena *duces tecum* to be made to the court, or the judge thereof, by petition supported by affidavit, unless the petition be the official statement of a district attorney, or other prosecuting public officer, of the facts therein alleged, and the facts set out in the petition must describe the books or papers called for with that degree of certainty which is practicable, considering all the circumstances of the case, so that the witness may be able to know what is wanted of him, and to have the books and papers at the trial, in order that they may be used if necessary before the tribunal in which the proceeding is pending. *United States v. Babcock*, 3 Dill. C. C. 566.

In section 869 of the Revised Statutes of the United States, a *prima facie* case must be made 2 INTER S.

to the effect that the "paper, writing, written instrument, book or other document is in the possession or power of the witnesses, and that the same if produced will be competent and material evidence for the party applying therefor," before the subpoena *duces tecum* is issued.

In proceedings between parties, pending before us, where it is sought to compel parties, who are not carriers subject to the Act to Regulate Commerce, or who are strangers to the proceedings, to produce books, papers, or documents, a proper rule is for an application to be made in writing to the Commission specifying, as nearly as may be, the books, papers, or documents, for the production of which the subpoena *duces tecum* is desired, accompanied by an affidavit that the books, papers, or documents described, are in the possession of the witness, or under his control, and setting forth facts which make a *prima facie* case that these contain evidence that is material and necessary to the party seeking their production, in the pending proceeding. Such a rule will not only conduce to the proper dispatch of business, and to the ends of justice, but it will guard the issue of such process against a latitude that may be useless or oppressive. Witnesses as well as parties, and frequently strangers, have rights in all such matters, and any rule upon the subject must be such as will have a due regard for the rights of all interested, while at the same time it reaches, with proper dispatch, the ends of justice, and the rule thus indicated is one of substance and not mere form.

According to the views we hold upon this subject, the test of such an application for the compulsory production of books, papers and documents, is: Does it make a *prima facie* case that they are in the possession or under the control of the witnesses, what they are by name, description, or such reference to them or to their contents as will indicate what said books or papers are, no matter by what name they may be called by those making or holding them, and setting forth facts which show that the same, if produced, will be competent and material evidence for the party applying therefor? This being the test, we proceed to consider whether the application in this instance makes a *prima facie* case for the compulsory production of the books, papers, and documents to which it relates, as against those who are not parties to these proceedings, and in doing so it is apparent to us that the very able and eminent counsel who prepared this application, did so perhaps in accordance with systems of practice which we know to prevail in many of the States, under which subpoenas *duces tecum* are issued almost as a matter of course on application for them.

There is no affidavit in support of the application, and under the rule we have stated there should be an affidavit. The application does not state that the books, papers, and documents are in the possession or within the power of the witnesses to produce, and, under the rule we have stated, the application should state these things, or their equivalents. Under the rule we have stated the application should state facts which would make a *prima facie* case that the books, papers and documents named would be competent and

material evidence for the petitioner, upon the hearing of these proceedings, if produced, and the application does not state this. There are other features of this application that require notice, and the entire subject involved in it is one that is too important to be disposed of without indicating the rules that we think should prevail in this branch of the jurisdiction we are required to exercise under the Statute. These rules should, as far as practicable, be defined and stated for the guidance as well as the protection of parties, and a knowledge of them should not reside alone in the breast of the officer who is called upon to issue such extraordinary process.

The books, accounts, written papers and documents called for by the application appear to divide themselves for convenience of reference into two classes: those that belong to corporations, firms or associations not parties to these proceedings; and those that belong to corporations that are parties to these proceedings. Those that are not parties to these proceedings are, The Standard Oil Trust, and the corporations, firms, and associations affiliated to the Standard Oil Trust, or in which the Standard Oil Trust has an interest; The Union Tank Line; The American Cotton Oil Trust; The Union Oil Company; Armour & Company; and The Fairbanks Company. Those who are parties are the railroad companies, defendants, named in the complaints.

Whether the Standard Oil Trust and its affiliated corporations, firms, and associations, constitute a corporation or an association, or a partnership, the application does not state, nor do the complaints, but we think upon the averments of the application that they come within the category of being an association or partnership. The Union Tank Line is evidently a corporation, association or partnership; and this is true also we think of The Union Oil Company, The American Cotton Oil Trust, and The Fairbanks Company; while according to the statements of the application it would seem that Armour & Company is a firm, or partnership. Unless the books, papers and documents of these corporations, associations and partnerships, not parties to these proceedings, are material and competent evidence against these defendants, their compulsory production cannot be required.

The settled rule appears to be that entries in the books of a corporation relating to matters of fact, other than corporate proceedings, such as its mere business transactions, while these may be admissible against the corporation itself in certain stages of evidence, are not admissible in evidence in any way to affect strangers. 2 Waterman, Corp. pp. 646-647, 1 Whart. Ev. 3d ed. § 662.

The same rule applies to partnership books (2 Whart. Ev. 3d ed. § 1132); and also to account books kept by strangers. 1 Whart. Ev. 3d ed. § 175.

It would seem from the principles recognized in the law of evidence as laid down by these and other authorities, that the books, accounts and documents, the compulsory production of which is called for by this application to be made by the corporations, firms or associations not parties to these proceedings, would not be competent or legal evidence for the pe-

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tioner in these proceedings, even if produced; and that therefore a *prima facie* case is not made by the application for their production. The same result follows as to written instruments, which these corporations, associations and firms are called upon by the application to produce. 2 Whart. Ev. 3d ed. § 1044.

While, so far as now appears, upon the averments of the petitions in these proceedings, and of this application, the books of the corporations, firms, and associations, not parties to these proceedings, are not legal evidence against these defendants, yet it is not intended to be intimated that there may not be facts, contained in some of their entries, which are material evidence upon some of the issues in these cases. If there are such facts, these may be testified to by witnesses orally, if they can do so, or with the aid of the books containing them, if necessary for accuracy, or to assist their memories. But these proceedings have not yet reached a stage where it appears that these books will be necessary or important for any such purpose, even if it be assumed that they contain entries in which are incorporated any such material facts, and as to whether they will ever reach any such stage is one of the contingencies which we cannot foresee upon the threshold of these proceedings and before any evidence has been introduced.

An obvious comment upon the first branch of this application is that the books, papers, and documents, which are called for to be produced by the corporations, firms, and associations not parties to these proceedings, are *prima facie*, at least as to the parties to these proceedings, *res inter alios*, and for that reason, if for no other, not legal evidence. It may be contended, however, that it is expected on the hearing so to connect the defendant with the facts, which it is supposed will be proved by the writings demanded, as to make a showing of such facts not only proper, but important. We understand this is to be the ground on which it is supposed the application should be granted, and that if these corporations, firms, and associations not parties to these proceedings have profited by the unjust discriminations charged, the defendants should be allowed no legal exemption from having proof of the facts made by the books and papers of those who have thus profited. To this it must be said that whether there has been such unjust discrimination, from which these corporations, firms and associations not parties to these proceedings have profited, is the very fact in controversy, which one party to these proceedings affirms and the other denies, and the proof in regard to which is yet to be presented. In this stage of these cases, action and orders preliminary to their trial must avoid prejudging the issue and must not assume that one party, rather than the other, will on the hearing support his allegations by convincing proofs. We cannot overlook the plain principle of justice, when an order for the production of books and papers is called for, that the order, if made, must not ignore the fact that as yet the parties charged are not convicted, and may prove to be erroneously charged.

A charge like that here made is one that may occasionally be made in other proceedings before us against business men, who are not par-

ties to such proceedings, and the order applied for, if granted upon the present showing, would be a precedent for a similar order upon a similar showing for process, directed, for example, to a factor at New Orleans or a merchant at San Francisco, or Seattle, or Portland, neither of whom were parties to the proceeding, to compel him to appear hundreds or even thousands of miles from his place of business with his books, bills, accounts, and vouchers, running through many years, the mere investigation and sifting of which, for the purpose of such production, might be the work of many weeks, or even of several months, and the production a matter of serious embarrassment to the regular, orderly and profitable transaction of his business. The exercise of such an extraordinary power cannot be justified upon an application which fails to show a *prima facie* right to make use of, as material and competent evidence, what is called for, after the witness, at whatever inconvenience and cost to himself, has been compelled to produce it. The *prima facie* showing that what is required to be produced will be legal evidence for the party demanding it ought to be very clear and full. We cannot forget that witnesses and strangers in such matters have rights, as well as litigants, and until some such showing is made, the extraordinary process now called for, as against those who are not parties to the proceeding, or who are not carriers subject to the Act to Regulate Commerce, would not only be oppressive, burdensome and expensive, but would also be impertinent and intrusive.

As to the second branch of the application, some of the considerations above stated are without relevancy. In so far as the books, papers, and documents called for are those of parties defendant, who are subject to the Act to Regulate Commerce, they are supposed to show facts having more or less of a bearing according to the manner in which they are made up and kept, upon the issues to be tried, and to have a relevancy which the defendants cannot dispute. An examination of the Statute from which the Commission derives its powers satisfies us that the power is plenary, and that it is our duty to call for the production of such books and papers whenever the nature of the inquiry to be gone into is such as to render their production necessary or proper.

The actual questions for our investigation and consideration in these complaints are, in substance, whether the Statute has been violated by the defendants in charging petitioner and other refiners, who ship their product in barrels, higher rates than have been or are charged to others, who ship the same kind of products over their lines in tank cars; or in furnishing tank cars to some and refusing them to others; or in making such allowances for the rent of tank cars as to greatly reduce the actual rates charged for shipping oil in them, thereby unjustly discriminating in their favor as against barrel shipments; or in violating the long and short haul clause of the Statute, or in an unjust discrimination against coal oil in barrels by a comparison of the rates on this commodity with those on cotton seed oil and turpentine.

Now in reference to each of these questions, while it may be true that the rate sheets of the carriers, their tariffs, their schedules, or any

other rates, tariffs, or schedules under which the service was rendered, or facilities and accommodations furnished, or the testimony of witnesses who know the facts, as to what rates were actually charged and paid, or accommodations and facilities furnished, if there are any such witnesses, are evidence, it is none the less true that the "books" of the carriers may have such relation to these transactions and may be so kept as to come also within the scope of being evidence as against the carrier making them, and indeed for other purposes. If the violations of the Statute, as charged in these proceedings, have occurred, and are occurring in current transactions, involving shipments of vast quantities of freight, over many thousand miles of railways, and by many different carriers, and under different ownerships and managements, it would appear reasonably probable that they would show some of their traces in the rate sheets, tariffs, schedules and books of these carriers, and if so, these rate sheets, tariffs, schedules and books would be evidence to show this, in so far as they may show it, if at all; or the testimony of witnesses, who know the facts as to what rates were charged, or facilities furnished, would be evidence, whether such rates actually charged, and facilities furnished, were in accordance with, or different from, published rates, tariffs, and schedules.

The twelfth section of the Act to Regulate Commerce contemplates that "the books" of the carrier shall be admissible in evidence for whatever light they will throw upon the transactions in question, as much so as the tariffs, schedules, rate sheets, contracts, or agreements the carrier may have made bearing in any way upon any of such transactions. These books, whether made up from shipping tickets, way bills, expense bills, or otherwise, are supposed to give the exact particulars of the consignment, showing the weight, rate, and amount of charges to be paid to the company's agent, and are put in this enduring form at the time of the consignment, as part of the transaction, upon rates that the Law requires to be open and public, and thus they give a history of the details of the transaction. The relation that these books bear to every such transaction, and the attitude that those occupy in making and keeping them, under such circumstances, not only to the shipper and consignee, but to the public, would seem to fairly indicate that the rule as to a *prima facie* showing for their production when necessary to be used as evidence in a pending proceeding, to which the carrier is a party, should for obvious reasons not be as stringent as in the case of parties who occupy no such attitude or relation to the transactions, or who are strangers to the proceedings. It appears to us to be sufficient in such a case for the application to indicate in a general way what books of the carrier it is desired should be produced, and that there is reason to believe, and that the applicant does believe, that in the course of the hearing they will become of service on account of the light they will throw upon the questions in controversy in the proceeding, and as an evidence of good faith in making the application, the applicant should make an affidavit as part of the application, that such application is made in good faith, and not for the purpose of vexing or harassing the defendant, and that, gen-

erally speaking, upon such a showing as this the process should issue for the production of the books, unless the number of books called for should be so large, or from other exceptional circumstances the Commission should order the testimony to be taken at such place as would avoid oppression in producing the books at a far distant hearing, and expedite the progress of the investigation. We have seen cases in our experience where carriers, at the instance of complaining petitioners, were required to produce their books, at a distance of hundreds of miles, for the purposes of evidence at a hearing, and when thus produced were not even opened by those at whose earnest call they were brought, and it would seem that there ought to be some safeguard in the shape of a rule.

There are several modes of procedure by which the inconvenience to the defendants of producing books, and the delay and labor of going over their entries, might be avoided by petitioner. If one or more witnesses should be subpoenaed from the different companies proceeded against, and a notice should be served with the subpoena requiring the witnesses to furnish the published rates and tariffs of such company for a specified period, and also requiring them to furnish statements of the actual charges made, and car facilities furnished, during such period to the Standard Oil Trust and the others named in this application, if different from the published tariffs and schedules, it would probably be sufficient for all the purposes of these and other proceedings; or, if the parties would take depositions, by consent, in advance of the hearing, it would probably answer the same purpose. If a railroad company, or its officers, should refuse to furnish the proper evidence from its books in some such reasonable manner as is here indicated, it might then become necessary to resort to harsher proceedings, either by an examination of its books by a representative of the Commission, or by requiring the production of the books by compulsory process, and if need be, through the exercise of the authority of the courts, as provided in the Statute. But it may not be improper for us, in this connection, to say that often as railroad companies have been called upon to exhibit their books in evidence for the inspection of parties in proceedings before us, not one of them has yet failed or refused to do so, nor do we have any cause to believe that petitioner would have any difficulty in obtaining from any of the defendants all material and proper evidence to be found in any of their books, in either of the modes above indicated.

The documentary evidence called for from the books of the defendants, omitting such portions of it as we indicate to be immaterial and unimportant, according to what its import may be, may have a very legitimate bearing upon many, if not all, of the questions involved in these proceedings. They may be the best and only evidence that can be obtained upon some of these issues, and whatever information, if any, they contain upon any of these subjects the defendant carriers ought not to hesitate to furnish, and if they refuse to do this, upon a proper application, they will of course be compelled to do so by due process of law.

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Every purpose, however, that can be reached in these proceedings can be attained by proving the rates actually charged, if there were any such, to certain shippers or consignees, that were different from the published tariff rates, or the preferential facilities, if there were any such, that were furnished by the defendants to some shippers or consignees, and not to others, or the comparative rates on the different commodities named in the complaints, and to designated points. We do not see the necessity or importance of showing, in all the minuteness of detail specified in the application, the innumerable shipments over the various lines that were made for a period of many years before the Act to Regulate Commerce took effect, as well as since that date. We do not see how a vast number of different shipments, and of different rates charged, during a long period of years prior to the Act to Regulate Commerce, are material or important to be considered in these proceedings; nor do we see how it can be material or important who the consignors and consignees were or have been, at so many different points, through long periods of time, from and to whom oil may have been transported over the defendants' lines. It seems to us sufficient for all the purposes of these cases to show the rates published, the rates actually charged, and the facilities furnished, from and to designated points since the Act to Regulate Commerce went into effect, and for whatever light these may throw upon the question of the reasonableness and justness of rates, and the fairness of the facilities afforded, by way of comparison, what these were for a reasonable time—for example, a period of twelve months before the Act to Regulate Commerce went into effect.

In proceedings before us, so well recognized is the importance of having what the books of a defendant railway company may show, having a bearing upon the questions involved, and that witnesses who are officers and agents will be interrogated in reference to them, and their production ordered by the Commission if deemed necessary for any of the purposes of the investigation, that these witnesses usually come prepared with statements taken from them as to what they actually show. Where this is done, examination and cross-examination verifies them, and shows what supplements, if any, they need, and these sworn supplements are furnished, and if all this is not found sufficient then the books may be produced. Where such statements are not brought in the first instance, the actual developments of the investigation point out what is needed, and under oath they are prepared and furnished by witnesses. Practically, thus far, this has, to the satisfaction of parties, answered all the purposes of a production of the books, and with far less burden and inconvenience to the carriers. If it were otherwise, and if the examination of such books to any large extent should be found to be necessary to the ends of justice, the Commission might be disposed to order the hearing to be had, or, at least the testimony to be taken, at such place as would reduce the trouble and inconvenience, for it must be apparent that the mere labor of searching out the entries in these books and getting them together from the vast accumulations of

a railroad office, running through long periods of time, would be enormous, and that their production at a far distant point, for the purposes of a hearing, in indefinite number and quantity, such as are called for by this application, might be unjustly oppressive, as well as very seriously inconvenient.

In proceedings like these, which are judicial in their nature, and fairly governed by the rules and principles of law we have stated, it could not be said to be a sufficient excuse for making a preliminary order at this stage of the proceedings for a general production of books, papers, and documents, such as is here asked for, that petitioner is apprehensive that witnesses might be unfriendly, and refuse to answer proper questions, or to give proper information. It is not to be assumed in advance that any railroad officer or agent, any more than any other witness, will refuse to respond to any question put to him, unless upon the advice of the counsel of the company that the question is improper. The probability would seem to be that the testimony of witnesses (taken at the railroad offices) would be as fully brought out by deposition, as at the open sessions of the Commission, for counsel would know very well that nothing was to be gained by giving improper advice in any spirit of litigious antagonism, and that the very refusal to testify freely might constitute a valid ground for compulsory proceedings, such as in the present state of the case would be unwarranted.

But while the defendants are entitled to have, as they must receive, the protection that the Law affords against oppressive and unwarranted orders, for what has not yet been shown to be the necessary production of their books and papers in these proceedings, it is only proper to state that the petitioner who is here challenging an investigation of their rates and methods, in the course of legal procedure, has rights under the Law for the production of evidence, material and necessary, in relation to his complaints, if it exists in their books and records, which are entitled to equal protection and assertion. In obtaining such evidence, if it exists, he is not to be burdened with methods of procedure oppressively expensive to him, and which unnecessarily delay the investigation, for if his complaint should turn out to be warranted to any considerable extent, then all such unnecessary delays cannot be otherwise than ruinously injurious to him, and to others who refine and ship coal oil, as he does, in barrels; nor can the fact be overlooked that if his complaints are not well founded it is peculiarly within the power of defendants who are carriers to show it without any great or expensive delays about it. To any extent that they can fairly and justly save time, labor, or expense to complainant, or to their companies, by giving to him, in response to any calls he may make, statements of facts shown in their books, records, or files, which may probably have importance on the hearing, the officers and agents of the respondents under the direction of respondents ought to give such statements, and ought to do so as promptly as

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may be found reasonably practicable. In other words, they ought to demonstrate a willingness to facilitate the investigation instead of assuming an attitude that may tend at every step to embarrass the proceedings. It seems also to us that in these cases, as in others that have been pending before us, that the influence, efforts, and co-operation of counsel of the opposing parties might go very far to obviate expense and delay in all such matters as the mere production of statements of facts from entries in books and records, about the materiality and competency of which there can be no serious question. Much unnecessary controversy, inconvenience and delay might well be avoided in the first instance, as well as in subsequent stages of proceedings, if carriers would exhibit without technical objection, what their books show in reference to a transaction in question, to any one who calls for the information in good faith, believing, perhaps erroneously, that it is, or may be, important to his interests, and when the application is seasonably and properly made, with a due regard for the convenience of the carrier's agents and officers. The instances are numerous in which it would probably put the controversy at an end, or, if not, that the party would not then trouble the carrier for the production of the books. Such books, made up and kept as we have stated, in so far as they chronicle current rates, facilities furnished, or the general movements of freight, are in the nature of semi-public records.

If parties and their counsel should follow the rules we have indicated, and adopt the suggestions we have made, we have no doubt that the ends of justice will be reached thereby with all proper dispatch, and that much inconvenience, expense, and delay will be avoided; but if this is not done, and a *prima facie* case is made by the complainant for the production of books, papers, tariffs, contracts, agreements, and documents relating to the matters under investigation in these proceedings, they will have to be produced; or, if during the course of these investigations, the evidence adduced shall show that any books, papers, tariffs, contracts, agreements, and documents relating to the matters in controversy in these proceedings are material and competent evidence, and needed for the purposes of the investigation, that itself will be a sufficient showing for their production, and they will have to be produced, unless counsel for the opposing parties shall agree that sworn statements of the facts they contain bearing upon the questions involved may be prepared and used as evidence in lieu of them.

It results from the views we have expressed that the relief sought in this application for the issuance of subpoenas duces tecum for the witnesses named to produce the books, accounts, or, in lieu thereof, the statements called for, cannot now be granted, and for the present must be denied; but this does not preclude the petitioner from renewing his application, as he may be advised, for the production of books and papers, under the rules herein indicated.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI.

UNITED STATES

v.

George K. TOZER.

1. **The transportation by a railroad company to a certain point on its line, of freight received from a connecting carrier, which had reserved the right to forward the property by any carrier it might select, especially where the freight thereon was to be paid at the point of destination by the purchaser, is not a service rendered for the party by whom the through shipment is made, but for the connecting carrier, and therefore, there may be an unlawful discrimination between the charges for such service and for a shipment by the same shipper to the same consignee at the same destination over the local line alone.**
2. **Undue discrimination, within the meaning of the Interstate Commerce Act, § 3, has reference to rates as well as to facilities afforded to shippers.**
3. **An unreasonable adjustment of joint rates for through transportation may constitute an unreasonable discrimination against local traffic.**
4. **Whether the difference in rates for transportation for local traffic and through traffic is reasonable or unreasonable, is a question of fact for the jury.**

(September 30, 1889.)

ON motion for new trial and in arrest of judgment.

See same case, on demurrer to the indictment, *ante*, p. 422 and *note*, and on charge to the jury, *ante*, p. 540.

The facts appear in the opinion.

Mr. George D. Reynolds, U. S. Attorney, and Mr. Charles Claffin Allen, for plaintiff.

Messrs. Thomas J. Portis and Aldace F. Walker for defendant.

Thayer, Dist. J., delivered the opinion of the court:

The defendant having been convicted on the second and third counts of the indictment, for the violation of the third section of the Interstate Commerce Act, forbidding unreasonable preferences, etc. (39 Fed. Rep. 369, *ante*, 540), the case is again before the court, on a motion in arrest of judgment and for a new trial.

The first point demanding consideration is one made by defendant's counsel to the effect that no preference was given in the present case, and that no person or corporation was subjected to an undue disadvantage, because the Hayward Grocery Company, the complainant, made both shipments in question, that is to say, the one from Chicago to Hepler, Kansas, and the one from Hannibal, Missouri, to the same point.

It is said that inasmuch as both services were

rendered for the same person, it cannot be said that any preference or discrimination within the meaning of the law was shown.

Undoubtedly the point is well taken if the service in each instance was rendered for the same party. The facts, as developed by the testimony, are that the Hayward Grocery Company in June, 1887, ordered Randall & Fowler to ship two barrels of sugar from Chicago, Illinois, to John Viets, at Hepler, Kansas, who appears to have been a customer of the Grocery Company. Randall & Fowler were merchandise brokers. They executed the order by buying and shipping the sugar over the Chicago, Burlington & Quincy Railroad, taking therefor a bill of lading in their own name as consignors. Under the head of "marks and consignees" was written "John Viets, Hepler, Kan.," and underneath that the following words appear where rates are usually specified: "From Chicago to Hepler—Tariff." Across the face of the bill of lading was stamped a notice to the effect that the Chicago, Burlington & Quincy Railroad Company expressly reserved the right to forward the property from the terminus of its own road by the road of any connecting carrier whom it might select. At Hannibal, Missouri, it selected the Missouri Pacific Railway to complete the carriage to the point of destination.

The sugar was there unloaded, placed in the warehouse of the Missouri Pacific Railway Company, and thence loaded into one of its cars on June 15, 1887, and carried forward by the latter company to Hepler.

The total freight charge from Chicago to Hepler, Kansas, was paid to the Missouri Pacific Railway Company on the arrival of the property, by John Viets, the consignee, the rate being fifty-one cents per hundred, and of this sum the defendant Tozer, as agent of the Missouri Pacific Railway Company, advanced to the Chicago, Burlington & Quincy Railroad Company, its proportion, on receipt of the property at Hannibal, Missouri.

The Chicago, Burlington & Quincy Railroad Company and the Missouri Pacific Railway Company had a standing arrangement in force at the time of this transaction, whereby the rate on sugar and fourth class freight from Chicago, Illinois, to points on the Missouri Pacific's road in Kansas, Nebraska and the Indian Territory, via the Chicago, Burlington & Quincy Railroad, the town of Hannibal and the Missouri Pacific Railway, was to be ascertained and fixed by adding to the established rate from Hannibal to such points, an arbitrary sum, to wit, five cents per hundred.

The rate from Hannibal, to Hepler, Kansas, over the Missouri Pacific Railway on shipments originating at Hannibal was forty-six cents per hundred on sugar in June, 1887. On the shipment made from Chicago by Randall & Fowler to John Viets, the consignee accordingly paid a rate of fifty-one cents per hundred. Of this sum the Missouri Pacific Railway Company retained, as it appears, thirty-four cents only, and accounted to the Chicago, Burlington & Quincy for seventeen cents per hundred of the alleged joint or through rate.

The other shipment that figures in this controversy was made by the Hayward Grocery Company at Hannibal on June 17th, 1887. On that day the grocery company sold and shipped one barrel of sugar to John Viets at Hepler, Kansas, over the Missouri Pacific Railway and paid the freight charges in advance.

For the latter service the defendant, as agent of the railway company, charged the grocery company at the rate of forty-six cents per hundred from Hannibal to Hepler.

On this state of facts the court is of the opinion that the two services were not rendered for one and the same party, in such sense that there could be no preference or discrimination within the meaning of the law.

The bill of lading, as the court construes it, was a through bill of lading, and bound the Chicago, Burlington & Quincy Railroad Company to carry the property through to the point of destination at tariff rates,—that is to say, at fifty-one cents per hundred. The service rendered by the Missouri Pacific Railway Company as to the Chicago shipment, was a service rendered for the Chicago, Burlington & Quincy Railroad Company, to enable it to complete its contract of affreightment. On delivery of the sugar to the Chicago, Burlington & Quincy Railroad Company, at Chicago, title vested in the purchaser or consignee, subject of course to the right of stoppage *in transitu*, in case of the insolvency of the consignee before actual delivery. Indeed, it does not appear that the Hayward Grocery Company was at all interested in the through rate made by the Chicago, Burlington & Quincy Railroad Company on that shipment, as the freight was to be paid at the point of destination by the purchaser, and it was so paid.

The other service rendered in connection with the shipment originating at Hannibal, was a service rendered for the grocery company, as it both employed the carrier and paid for the service to be rendered in advance.

There was ample evidence in the opinion of the court to support the charge laid in the second and third counts of the indictment, that the defendant charged forty-six cents per hundred for a service rendered the Grocery Company, and a less compensation for a service rendered the Chicago, Burlington & Quincy Railroad Company. In no aspect of the case can the two carriers be regarded as joint contractors with the Grocery Company, for the transportation for it of two barrels of sugar from Chicago to Hepler.

The Chicago, Burlington & Quincy Railroad Company either employed the Missouri Pacific Railway to carry out a contract for through carriage, which it had undertaken, or in the matter of engaging the services of the Missouri Pacific Railway Company, it acted as agent for the consignee of the goods, and it appears to the court to be immaterial, so far as this case is concerned, in which of the two capacities it acted.

It is next insisted that section 3 of the Interstate Commerce Act relates and has reference solely to facilities afforded to shippers, and not to rates, and that no discrimination in rates will constitute an undue "preference or disadvantage," within the meaning of the law.

This point was raised, considered, and over-

ruled at the trial, and it seems hardly necessary to enter upon a discussion of that question again. The intent of the law maker in this section of the Act seems clear enough.

It is declared to be unlawful for a carrier to give "an undue or unreasonable preference" to any person, firm, corporation or locality, or to subject any person, firm, corporation or locality to any undue or unreasonable prejudice or disadvantage "in any respect whatsoever."

After such emphatic language declaring that a preference given in any respect whatsoever shall be unlawful, it seems obvious that courts are not authorized by any principle of construction to create an exception, by saying that an undue preference given in the matter of rates shall not be deemed unlawful, or that if a shipper is put to an unreasonable disadvantage merely in the matter of rates, he shall not be esteemed to have any right of redress under the third section.

But this question has been practically settled by judicial determination of the meaning of the English Statute, from which the third section of the Interstate Commerce Act was borrowed.

The second section of the English "Railway and Canal Traffic Act" of 1854, prohibits undue and unreasonable preferences, and also prohibits railway companies from subjecting persons to any undue or unreasonable prejudice or disadvantage. The settled construction of that Act appears to be that the prohibitions in question include preferences in rates, as well as in facilities. *Colliery Co. v. M. S. & L. R. W. Co.* 3 Nev. & McN. 426; *Denaby v. Manchester etc. R. Co.* L. R. 11 App. Cas. 97; Harper, Law of Interstate Commerce, pp. 66-68, and cases cited.

Very similar to the point last considered is the proposition urged for the first time on the hearing of the motion for a new trial—that no disparity existing between the rate charged on the shipment originating at Hannibal, and the Missouri Pacific's proportion of the rate on the Chicago shipment, can be alleged as a preference or discrimination, and hence as a violation of the third section of the Act.

It is said that the one rate having been fixed by the Missouri Pacific Railway Company alone, between stations on its own line, and the other being its proportion of a joint rate, that the law does not allow any comparison between the two rates for the purpose of establishing a preference, and further that the public is in no wise concerned in the division of the joint rate as between the connecting carriers.

With reference to such contention it will suffice to say, that as the third section of the Act *ex industria* prohibits preferences and discriminations "in any respect whatsoever," it appears to the court that the proposition above stated is not tenable, unless it be a fact that no adjustment of joint through rates with respect to other rates over the lines of the connecting carriers, can operate as an undue preference, or as an unreasonable discrimination against persons and places.

If joint through rates may be, and are, so adjusted with reference to other rates established by the connecting carriers, as to operate as a preference or discrimination against persons and places, and such adjustment is unreasonable,—that is to say is not justified by the cir-

circumstances of the case,—a carrier concerned in making such joint rate, by receiving the portion of the same allotted to him, may be guilty of a violation of the third section.

The decision of the Interstate Commerce Commission in the case of the *Chamber of Commerce of Milwaukee v. F. & P. M. R. R. Co.* 2 Inters. Com. Rep. 399, 2 I. C. C. 570, 571, proceeded clearly on the assumption that the rates charged from Milwaukee to the seaboard by the roads east of Milwaukee, on shipments originating at Milwaukee, might be a discrimination against shippers residing in the latter city and a violation of the third section, by reason of the disparity between that rate, and the percentage of the joint through rate from Minneapolis to the seaboard, which those roads accepted for the haul east of Milwaukee. It is true that in that case no discrimination was found to exist as a matter of fact, the Commission holding that the difference of 2½ cents per hundred was not under the circumstances unreasonable.

It seems evident to the court that it is within the power of the Missouri Pacific Railway Company and other carriers, to unite with roads east of the Mississippi River in establishing joint rates from Chicago to points in Kansas, Arkansas, Nebraska, the Indian Territory, and Texas, which by virtue of their unfair relation to the rates established from St. Louis, Hannibal and other places to such points in the west and southwest, on shipments originating at St. Louis and Hannibal, would operate as an unreasonable discrimination against the latter cities, and as a serious impediment to their trade and commerce.

I would not be understood by what is last said, as intimating that in the opinion of the court such unfair joint rates had been already made, or that the testimony in this case establishes such fact. On that point I express no opinion.

I mention the matter merely in illustration of the point, that carriers clearly have it in their power to so adjust joint rates with respect to other rates, as to operate both as an unreasonable preference given to persons and places, and as an undue discrimination against persons and places. Such grievances, if they in fact existed, could not be redressed under the second section of the Act, because the services would not be rendered under "substantially

similar circumstances and conditions," and there might be no redress under the fourth section of the Act, because the long and short haul clause would not necessarily be violated.

If that kind of preferences and discriminations are not in violation of the third section, then such acts cannot be punished in a criminal proceeding.

The court is of the opinion that Congress did not intend to leave carriers the power to grant undue preferences by any devices, or the power to subject persons, or localities to undue disadvantages by any adjustment of joint rates, without being liable to criminal prosecution under the Act. It accordingly holds that the public has some concern in the division of joint rates as between carriers, and that an adjustment of joint rates with respect to other rates established by the connecting carriers, may furnish adequate ground for a prosecution under the third section.

After a careful review of all the points urged in support of the motions, the court is of the opinion that no substantial error prejudicial to the defendant was committed by the court at the trial.

If the defendant has any reason to complain, it is of the action of the jury in finding that there was an unreasonable disparity between the rate charged on the Hannibal shipment, and the proportion accepted of the joint rate from Chicago. Whether the difference shown in the two rates was reasonable or unreasonable, was certainly a question of fact for the jury in the light of all the circumstances, and not a question of law for the court. *Diphwys v. Festning Ry. Co.* 2 Nev. & McN. 73; *Denaby v. Manchester etc. R. supra.*

And if it be true, as suggested, that the selfishness of men is such that juries will declare any difference in rates to be unreasonable, that operates to the disadvantage, or is supposed to operate to the disadvantage, of themselves or the community to which they belong—that is obviously a criticism of the law, and merely proves that questions of fact such as were tried in this case, which certainly demand for their solution special knowledge, and, above all, impartial consideration—ought to be submitted to some other tribunal than a jury of the locality where the alleged grievances exist.

The motions are overruled.

INTERSTATE COMMERCE COMMISSION.

Abiel LEONARD
v.
CHICAGO & ALTON R. CO.

Logan B. CHAPPELLE
v.
SAME.

(Nos. 178, 179.)

CARLOT RATES ON LIVE CATTLE.

1. A practice had existed on the part of certain carriers of live cattle to make a carload rate irrespective of weight, leaving the shipper to load into

the car as many cattle as he pleased and was able to put into it. **The carriers substituted** for this practice the rule that while naming a carlot rate they prescribed a **minimum weight for a carload and then charged** by the hundred pounds in proportion to the carlot rate **for any excess** over the minimum. *Held*, that this rule was **not unlawful**.

2. *Prima facie* the new rule is more just and reasonable than the practice it supplanted, since the charge is more in proportion to the service rendered.
3. The fact that some **difficulties** are

found to exist in the prompt and accurate weighing of the cattle is not a reason for abolishing the new practice, but rather for improving and perfecting it.

4. **The fact that by the action of certain state commissioners a car is permitted to be loaded by the shipper at discretion without the carlot rate being affected thereby is not a reason for adopting the like rule in interstate traffic if that course is found not to be most just and politic.**
5. **The grant to the federal government of the power to regulate interstate commerce is full and complete and cannot be narrowed or encroached upon by state authority, either directly or indirectly. The fact therefore that one or more States have adopted a particular regulation is not a reason for applying it to interstate commerce, if in itself it appears to be objectionable. State action will always be treated with the highest deference and respect, but cannot be allowed to control in matters within the federal jurisdiction.**

(Complaints Filed March 14, 1889.—Answers Filed April 8, 1889.—Heard May 29, 1889.—Decided September 25, 1889.)

ABSTRACTS of the complaints in these cases appear *ante*, page 416, and of answers *ante*, page 491.

The case is fully stated in the opinion.

Messrs. W. M. Williams and A. F. Rector for complainants.

Messrs. Wm. Brown and A. F. Walker for respondent.

REPORT AND OPINION OF THE COMMISSION.

Cooley, Chairman:

These two cases raise the same questions and were heard together, it being agreed that all the evidence that should be relevant in one case would be equally applicable to the other.

The complaint in the case first entitled recites that complainant is a resident of Saline County, Missouri, and engaged in the business of raising, feeding and shipping stock; that on January 21, 1889, being desirous of shipping nine carloads of cattle over the Chicago & Alton Railroad from Mt. Leonard Station, in said County of Saline to the City of Chicago, he offered for such shipment 180 head of cattle, being under the customary rule nine carloads; that on making such offer complainant was informed by the local agent of respondent that the rate now charged by respondent was 24 cents per 100 pounds in carload lots of 20,000 pounds, and if more than 20,000 pounds were loaded into any car, the excess would be charged for at 24 cents per 100 pounds; that complainant was further informed by said agent that 20,000 pounds constituted a carload of cattle, and the rate to Chicago on the same was \$48; that under said rule and regulation complainant was compelled to load said 180 head of cattle into twelve cars, instead of being permitted to load the same into nine cars, and that respondent charged complainant the sum

of \$590.88 freight thereon, when in fact it should not have charged more than \$450, or \$50 per car for nine cars. Complainant alleges that respondent has made an unreasonable and unjust charge, and should be required to refund \$140.88; that said overcharge was occasioned by the fact that on the first day of January, 1889, respondent adopted the system of weighing cattle, and charging for the shipments at a given rate per 100 pounds; that such system is unjust and inequitable in this, that the weighing is done in Chicago by respondent in its own way and style, and that the extra time taken to handle the stock after it has arrived at its destination is such as to work an injury to the shipper; that often the delays are such as to prevent the stock being unloaded in time to be put upon the market in proper shape, allowing time to feed and water after unloading, and that such was the case in regard to the shipment made as aforesaid. A refunding of the excess charge is prayed for.

The answer of the respondent denies that complainant was compelled to load any particular number of cattle into cars, or that he was in any way restricted as to the number of head or weight to be loaded into the same, except in so far as he was restricted for the safety and comfort of the animals by the limit to the capacity of the car. Respondent further says that when complainant's cattle were received its regular tariff rate for the transportation of cattle from Mt. Leonard Station to Chicago was 24 cents per 100 pounds and the minimum charge was for 20,000 pounds per standard 30 ft. car; that complainant was charged the regular rate and no more; that the distance from Mt. Leonard to Chicago is about 415 miles, and the charge is in all respects just and reasonable, being less than $1\frac{1}{2}$ of a cent per ton per mile for a service which is attended with great risk on the part of the carrier, and which requires special attention and the greatest care and watchfulness to secure prompt movement and prompt and safe delivery; that the rate on an average is less instead of greater than the old rate of \$50 per car; that the rules in force on respondent's road protect the shipper from excessive charges, and also allow him a reasonable deduction for shrinkage in weight, the charge for weight transported, if in excess of the minimum, being always less than the actual weight as shown in the account sales.

Respondent further says that the change from the old method of charging so much per car for the transportation of cattle—a method which gave the shipper an incentive to overload the cars, as well as increased the liability of the carrier—to the present method of charging by the 100 pounds, was made not only for the protection of respondent but in the interest of the shipper. Under the present method the shipper has no incentive to overload the cars, and the animals will not be as likely to reach the market in a distressed or damaged condition, as under the old method; the carrier's liability is thereby lessened, and it receives compensation based on actual weight carried. Respondent denies that the system of weighing cattle in force on its road is unjust or inequitable, or that it causes damaging delay.

The allowance for shrinkage is 500 pounds.

per car, and respondent states as follows the considerations that led to the adoption of the system of weighing cattle and charging by the weight:

First. Many abuses had obtained under the old system, and inequalities in charges could not be avoided without an entire abandonment of the system. When cattle cars were first constructed, and up to a short time ago, the 27½ or 28 ft. car was generally in use, and it was estimated to carry comfortably 20,000 pounds of cattle. Cattle by the carload were shipped almost exclusively eastwardly, and in practice it was found that the 28 ft. car was not adapted to profitable back-loading, as the freight which could be profitably and safely shipped in cattle cars consisted chiefly of lumber and iron or steel rails, hence cars of greater length were gradually introduced, until various lengths of car, varying from 27½ ft. to 39 ft. were in use, with the consequent result that much greater loads could be carried in the longer cars than in the shorter ones. Whereupon shippers were always desirous of procuring the longer cars, and from the necessity of the case an unavoidable discrimination resulted, since there would be a very large variation between the load drawn for the shipper having the short cars and the shipper having the long cars.

Second. Experience proved that some shippers, prompted by cupidity, would greatly overload and crowd the cars, to save the difference in freight. The result of this practice was, that the companies would not receive the same compensation for the same service from different individuals, and would often suffer great delays, necessarily resulting from overloading; for example, if a single car in a train or twenty cars should be overloaded, the stock therein would have to "get down" and the train would have to be stopped from time to time "to get up the downs," which necessitated unloading and reloading, thereby delaying the whole train of properly loaded cars and entailing loss of time to the carrier and all other shippers, and resulting in large and frequent claims, both from the shipper in fault and those not in fault.

Third. The shipper of large fatted cattle would have a great advantage over the shipper of lighter cattle, in that he could and would, oftentimes, load as high as 30,000 pounds in a single car, whereas the shipper of light cattle would not be able to put in an average car more than 20,000 pounds.

Fourth. Variation of the sizes in cattle cars, on the several roads, and the willingness of some shippers and the unwillingness of others to overcrowd the cars, together with the practice of treating a carload as a carload irrespective of weight, led to great variations and discrimination in carloads through what is in effect underbilling, which is believed to be unjust and unlawful. In some cases one car would be found to contain from one third to one half more pounds than another, the difference being caused by the condition and size of the cattle. Thereby a gross injustice was worked to the shipper having the lighter load, and it was impossible to equalize and adjust the variations with substantial justice to all concerned, though efforts were made to do so.

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Respondent avers that the system of weighing adopted by the several railroads works no wrong or injustice to the shipper, but on the contrary results to his advantage in this: the weighing is done at the destination of the trip, after all shrinkage has taken place, and before the watering and feeding which is furnished after unloading, and the cars are weighed in motion to save delay and almost invariably weigh less than when placed standing still on the scales, the draught having a small tendency to lift the cars drawn. Also 500 pounds in addition to the 20,000 is allowed to the shipper on each car without charge, to make assurance of justice to him. Respondent avers on belief that in no instance has a carload of cattle weighed as much when weighed for the purpose of fixing the amount of freight to be charged as when weighed by the shipper to the purchaser, and respondent would gladly accept the weights by which the cattle are sold by the shippers if shippers and their salesmen or commission merchants would furnish the same.

Respondent further says that the system of collecting freight upon cattle by the carload in force prior to January 1, 1889, was about that time changed to the system now in use, under which freight is collected by the 100 pounds; that this change was made contemporaneously by all or nearly all the lines operating west and southwest of Chicago; that the former system was obviously unjust, and was claimed to be illegal, and that it was not practicable to avoid the evils attending it, except by an abandonment of the carload system and the adoption of the 100 pound rate.

The pleadings in the second entitled case were substantially the same as in the first, and the abstract above given is sufficient to present the issues in both. Much evidence was given on the hearing, but we do not think it necessary to abstract it for the purposes of an opinion. The questions in dispute it will be seen are few in number, and in discussing them, as we shall, with brevity, the evidence will be stated so far as may seem to be essential.

First. It is contended on the part of complainant that the rate now charged by respondent, of 24 cents per 100 pounds, is excessive and therefore illegal. This the complainant seeks to establish, not by offering proof directly tending to that end, but by showing that the former charge by the car appears to have been satisfactory to respondent, and must therefore be deemed to have been sufficiently remunerative, and that the charge by the 100 pounds upon the consignment made by him, was in the aggregate very much above what would have been the charge by the car under the old system had he been allowed to load the cars as he desired and requested. He argues, therefore, that the change in method is a great increase in the rate, which having been presumptively remunerative and satisfactory before, is by the very fact of increase now shown to be excessive.

Respondent meets this charge with the allegation that in point of fact there has been no increase; that its books show that it receives no more now upon all the cattle transported in proportion to weight, than it did formerly; the charges being more in some cases and less in

others only because they are more equally and justly imposed. Some evidence is offered tending to prove this allegation.

Upon this branch of the case we have only to say, that except as it bears upon the question whether the abandonment of the system of charging by the carload was justifiable, the evidence offered on the part of complainant is too inconclusive to form the basis for just conclusions. It is not shown except in the inferential way above mentioned that the charge made by the 100 pounds is too high, nor is the inference that the present rate is an increase over the former sufficiently established by the evidence. The fact may be as the complainants have alleged, but the evidence is inadequate to justify a finding that either party has sustained its allegations on this branch of the case by proofs. We are therefore compelled to leave it out of consideration in such opinion as we shall express upon the matters in controversy.

Second. It is objected to the rule of charging by weight that the weighing is inaccurate, and necessarily attended by damaging delays, and that the practice for those reasons should be held to be inadmissible. The like objections might undoubtedly be made in other cases where the carriers refuse to make rates for carloads irrespective of weight, and if they are held to be valid, the effect must be to overrule the action of the carriers in respect to many other articles of traffic which are now taken on carlot rates, but with a maximum weight and a charge for all excess. But surely there can be no insurmountable difficulties in the way of a prompt and accurate weighing of carloads; it must be possible to provide methods that shall be unexceptionable; and if those now in use are defective, it does not by any means follow that we must for that reason conclude that the practice of charging by weight is illegal and must be abandoned. If the practice is right in itself, the fact that it does not now operate perfectly and without friction is a reason for improving, not for abolishing it, and the attention of parties concerned should be given to the subject with a view to removing the incidental causes of complaint. Nothing in the evidence submitted in these cases tends to show that a weighing which shall be at once reasonably accurate and reasonably prompt is not entirely practicable.

Third. The leading question in the case to which all others are subordinate, is whether the rule of prescribing a limit by weight when the carlot rate is given, and charging by the 100 pounds for all excess, is legal and admissible. If it is, and the carriers have established it, we cannot order it abolished, even though we might think the former practice to have been equally admissible. We do not undertake to decide between methods, either of which would in point of law be unobjectionable; and we must therefore in the controversy submitted to us be able to show that the new rule in its practical operation results in some injustice, some inequality, some discrimination, in short, in some illegality, before we can order the restoration of the system which the carriers have abandoned.

Respondent in its answer has set out with some fullness the reasons for the change.

Among these is the fact that under the old system the shipper was tempted to overload the cars in order to make a saving in the carrier's charges, and that this resulted in injuries to the cattle through their getting down and being unable to rise. The carrier was in consequence, it was said, subjected to delays and also to claims for damages. This allegation was met by the testimony of witnesses for the complainant, that the cattle were carried most safely when closely packed, being then less liable to get down and less likely to be injured by a vicious use of horns. It was also said in argument that the interest of the shipper was sufficient security against injurious overloading. We do not understand, however, that under the present system the shipper is precluded from packing the car as closely as he may think best. When the minimum weight for a carload is in, he may add to it to any extent that he may think safe and prudent, and may pack his cattle as closely as he may deem desirable. But as he must pay by the 100 pounds, he is not tempted to go beyond the bounds of safety and prudence in order to make a saving in the carrier's charges. If therefore one shipper thinks close packing best, he may pack closely, but if another thinks that method cruel and unsafe, he will not be charged out of proportion because he declines to adopt it. The shipper being thus left to exercise his own judgment in the manner of loading, it might be conceded that a close storage of the cattle in the cars is wholly unobjectionable, and even desirable, and yet that fact would afford no ground for abolishing the practice of charging by weight, for it would not show or tend to show that such a practice was either unjust or unreasonable.

Prima facie the system of charging by weight is more just than any other. It is the only system whereby the charge is made proportionate to the service rendered. It is the only system whereby inequalities as between shippers, resulting from differences in the size of cars, can be obviated. As long as those differences exist, there is always room for favoritism, unless the carload charge is accurately apportioned to the size of car; and this we think has never been attempted, for the reason, doubtless, that because of the great diversities it was seen to be impracticable. The reasons ought to be very imperative which would require the abolishment of the rule which excludes favoritism to make way for another which not only admits of but invites it.

We are pointed to no such reasons in this case. The charge by the 100 pounds is not only *prima facie* most just, but it is in accord with the general practice of the carriers in making rate sheets for other commodities. The general rule is to charge by weight where weight can be a proper measure, and when a carlot rate is prescribed, to fix a minimum for the load to be taken as the carlot and to charge by the 100 pounds for any excess, just as is now done in respect to cattle by this carrier. The cases must be very few in which it would be deemed reasonable or admissible to allow the shipper of general merchandise to load up a car at discretion, without the quantity being taken into account in determining the carrier's charges.

Upon the hearing it was shown that by state law or by the rulings of state commissions the shipper in Kansas or in Missouri of cattle consigned to a point within the State would be entitled to load the car at discretion without the charge being increased thereby. It was said that the rule was the same in some other States, and it was urged that the Commission should conform thereto, not only because the state action must be held *prima facie* just and right, but also because the interstate shipper would otherwise be placed at a disadvantage relatively to the shipper whose consignment did not cross a state boundary.

The Commission will always in the discharge of its duties pay the highest deference and respect to state action. It appreciates as fully as anyone possibly can the importance of all laws and all action on the subject of railroads and their work being harmonious. The Commission cannot ignore the fact, however, that the people of the United States in framing their Constitution conferred upon Congress the power to regulate commerce between the States. The power was not restricted in the grant, or made subject to any condition whatever; it is therefore full and complete, and any state action that would limit or hamper it would obviously be an encroachment upon the domain of federal authority. Neither of the States named would make any question of this; nor would their public authorities prescribe any rule or make any order that should in express terms apply to interstate commerce. This being the case, it can hardly be reasonably urged that state regulations of local commerce should be rules for the regulation of interstate commerce also. If it were conceded that they should be, and the concession should be acted upon, the federal power to regulate commerce would to that extent be surrendered and the state authorities would do by indirection, and perhaps without intending it, what they would claim no right to do by direct action. The mere statement of the result to which the argument of complainant leads is its sufficient refutation. It is to be remembered also, when the question of conforming to state action in the regulation of interstate commerce is under consideration, that the policies of different States on railroad subjects are by no means certain to be the same; they may be identical, but they may also be diverse, so that the attempt to come into conformity with them might add to confusion instead of producing harmony. Such may not be the case in this instance, but it is quite likely to be in some other.

These are reasons why state action cannot in any case be accepted as conclusive in itself when a regulation of interstate commerce is to be made. It is entitled to respect, and we should examine it in any case in the expectation of finding ourselves in full accord with it. It is always possible, however, that local policy might be found to have resulted in regulations that the Commission believed could not be applied generally with good results; and in such a case the better regulation should be made. Such a case we have here. We think the action of the carriers in prescribing rates for the transportation of cattle by weight instead of by the carload is not in itself illegal or

unjust. Instead of being so, we find it to be in harmony with what in our opinion should be the general practice, not only in respect to this article of commerce, but to the subjects of transportation in general whenever weight is the proper measure for the carrier's charges.

It follows that the order applied for cannot be granted in either of these cases on the evidence as it stands. The question whether the rates charged are reasonable is not passed upon for the reason above stated, and in respect to that question the cases are retained for such further action, if any, as the complainants may see fit to take.

PENNSYLVANIA COMPANY, Operating
Jeffersonville, Madison & Indianapolis Railroad,

v.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO.

(No. 213.)

CHICAGO, ST. LOUIS & PITTSBURGH R. CO.

v.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS R. CO.

(No. 214.)

1. **The Commission does not give opinions on abstract questions.**
2. **Where a case involving the reasonableness of rates has been disposed of by the carrier assenting to the rates demanded no opinion will be expressed on the rates which have been abandoned, even though the parties request it.**
3. **Such a course is particularly advisable and proper when it is apparent that other parties than the one complained of are interested in the question and have not had the opportunity to be heard upon it.**

(Filed Sept. 17, 1889.)

SEE abstract of complaints *ante*, 571, 572.

MEMORANDUM:

By the Commission:

In these two cases unjust discrimination in respect to mileage tickets was charged against the respondents. When the cases were called for hearing, counsel representing all the parties stated to the Commission that such charges had been made by the respondents as removed the cause of complaint. They stated further, however, that the question whether that which had been complained of was in law justifiable was one of importance as well as of doubt, and as precisely the same thing might hereafter be done by the same or other carriers, unless it was adjudged to be illegal they would be glad to have the Commission consider and pass upon it now, as it would have been required to do had the controversy continued.

The Commission, however, held that there being no longer a controversy in these cases upon which judgment could be pronounced, the question which had been in issue had now become abstract, and might never again be of practical importance; if it did become important by reason of someone insisting upon and assuming to exercise the right to do the supposed illegal act, such person would be expected to defend it and present the reasons in its favor.

At present no one was making practical assertion of the right. It was obviously, therefore, a dictate of prudence as well as of propriety to decline to consider the question now. It will be more in accordance with sound principle to assume that if the conduct complained of was illegal, and the parties guilty of it have ceased to violate the law, and are now observing it, they will continue in their observance from this time on. See *Re Order of Railway Conductors, Re Traders & Travelers Union*, 1 Inters. Com. Rep. 18, 1 I. C. C. 8; *Re Iowa Barbed Steel Wire Co.* 1 Inters. Com. Rep. 605, 1 I. C. C. 17; *Re St. Louis Millers' Asso.* 1 Inters. Com. Rep. 22, 1 I. C. C. 20; *Re Inmates of National Homes*, 1 Inters. Com. Rep. 75, 1 I. C. C. 23; *Bishop v. Duval, ante*, 514, 3 I. C. C. 128.

On the same day there was called for hearing the case of *The American Wire Nail Co. v. The Queen & Crescent Fast Freight Line* * (No. 233) and others, in which unjust discrimination in rates on cut over wire nails was charged. In that case, counsel stated that the only respondent which had actually made the discrimination had now so changed its rate sheets as to do away with it. It was further stated, however, that the discrimination resulted from the classification of the Southern Railway & Steamship Association, and they desired to have the Commission pass upon the question whether the classification, as it related to the traffic in question, was justifiable. The Commission replied that this would be improper, for the double reason that it was no longer claimed that the respondent who had made the obnoxious discrimination was persisting in it, and also that the classification which it is desired to assail only came in question in the case incidentally, and the parties who may be supposed interested to defend it have not been summoned for that purpose, and are not here.

*Abstract of complaint *ante*, 584.

Henry McMORRAN *et al.* Partners as McMorrans & Co.,
v.

GRAND TRUNK R. CO. OF CANADA
and Chicago & Grand Trunk R. Co.

(No. 131.)

RELATION OF LOCAL TO THROUGH RATES SHOULD NOT BE UNDULY DISPROPORTIONAL—WHEN DIFFERENCE IN RATES ON GRAIN AND GRAIN PRODUCTS IS UNREASONABLE.

1. **Though rates are not required to**
2 INTER S.

be made on a mileage basis, nor local rates to correspond with the divisions of a joint through rate over the same line, **mileage is usually an element of importance**, and due regard to distance proportions should be observed in connection with the other considerations that are material in fixing transportation charges.

2. **When rates on the line of a carrier are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them** when challenged.

3. **Grain and grain products classified alike** are presumptively entitled to equal rates, and if a difference is made by a carrier it assumes the burden of sustaining it by satisfactory evidence.

4. **Upon complaint against the Grand Trunk Railway of Canada for alleged unreasonableness** of a rate of eight cents a hundred pounds on grain and ten cents a hundred pounds on grain products from Port Huron to Buffalo, as compared with a through rate of fifteen cents a hundred pounds from Chicago to Buffalo over the line formed by that road and the Chicago & Grand Trunk road.

Held, That though the local rate from Port Huron to Buffalo might be regarded as disproportionate on the basis of distance alone, other considerations are involved, and in view of the terminal and ferry expenses at Port Huron, the Niagara Bridge charges and the Buffalo terminal expenses, all of which are borne by the Grand Trunk Railway of Canada alone upon business originating at Port Huron, **the complaint against the eight-cent rate on grain is not sustained**; but no good reason having been shown for a higher rate on grain products, that portion of the **complaint is sustained**, and the products ordered to be carried at the same rate as grain.

Testimony Taken by Deposition at Port Huron and Chicago, and Case Submitted on the Depositions and Printed Arguments.—Decision Filed September 25, 1889.)

A BSTRACT of complaint in this case will be found *ante*, page 14.

Joint answer herein will be found *ante*, page 19.

The case also appears in the opinion.

Messrs. Stevens & Merriam for petitioners.

Mr. E. W. Meddaugh for defendants.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, Commissioner:

The complaint is, in substance, for unjust and unreasonable rates over the Grand Trunk Railway of Canada from Port Huron, Michigan, to Buffalo, New York, because disproportionate to the through rate from Chicago to Buffalo over the line formed by the Chicago &

Grand Trunk Railway and the Grand Trunk Railway of Canada.

The petition sets forth that the complainants are millers, and dealers in grain, at Port Huron, Michigan, having mills, warehouses and elevators at that place, used in the conduct of their business; that, for a number of years, they have carried on the business of manufacturing flour and feed, and purchasing grain, and shipping the same by rail to Buffalo, New York, over the Chicago & Grand Trunk Railway and the Grand Trunk Railway of Canada, which roads constitute the only outlet by rail between those points; and that when a reasonable rate for carriage has been charged, to wit: from 6 to 7 cents per 100 pounds, which were the rates charged before the Act to Regulate Commerce took effect, they have been able to carry on their business at a profit to themselves in competition with dealers in Chicago and other western points; that the joint rate on flour, feed and grain, made by the Chicago & Grand Trunk Railway and the Grand Trunk Railway of Canada, from Chicago to Buffalo, via Port Huron, is 15 cents per 100 pounds, each being in the sixth class of their published tariff classification; that the rate on said traffic from Chicago to Port Huron, a distance of 335 miles, is 9 cents per 100 pounds, and from Port Huron to Buffalo, a distance of 196 miles, it is on grain 8 cents per 100 pounds, and on the other articles named of the same class 10 cents per 100 pounds, the rate on grain having been, shortly prior to the filing of the petition, reduced from 10 cents to 8 cents per 100 pounds.

The petitioners therefore complain that the said rates charged by the said railway companies from Port Huron to Buffalo are unreasonable and unjust rates, entirely out of proportion to the through rate from Chicago to Buffalo, or from Chicago to Port Huron, and unwarranted by the mileage of said roads, the character of traffic, or service rendered, and that said roads have no right, under the Law, to make different rates on property covered by the same tariff classification, by reason of which the complainants are subjected to undue and unreasonable prejudice and disadvantage, and to that extent are unable to conduct their business at a reasonable profit.

Complainants therefore ask that the said railway companies be required to make a reasonable rate for carriage of said property between Port Huron and Buffalo, and that such rate shall apply to all property coming under the sixth class of their published tariff.

The answer of the defendant companies sets forth that the two roads are separate and independent of each other, and that each makes the rates on traffic over its own road independently of the other, and that through rates between Chicago and Buffalo over the routes of the respondents' roads, via Port Huron, are divided between them as they from time to time agree.

It is further set forth that for many years it has been the practice of the competing railway companies, in prescribing traffic rates between the City of Chicago and the City of Buffalo on the three different routes, to wit: via the Cities of Toledo, Detroit and Port Huron, to make them uniform as between the three routes, and also to make the rates between Chicago and

the Cities of Detroit, Port Huron and Toledo, and the rates between the said three cities last named and the City of Buffalo, the same by each of said routes; and this notwithstanding the difference in mileage between the several places by the different routes; and that it is believed that in no other way, in the absence of statutory regulation in the matter, can a war of rates between said places by said different routes be avoided.

That the rates on flour and feed have been and are the same between Chicago and the Cities of Port Huron, Detroit and Toledo, but that from said last named cities to Buffalo the rate has been 10 cents per 100 pounds.

The answer further sets forth that prior to the taking effect of the Act to Regulate Commerce, the rate from Port Huron to Buffalo, over the Grand Trunk Railway of Canada, was at times as low as 7 and sometimes 6 cents per 100 pounds, but that these rates were enforced by water and other competition, and at the same time that they existed the Grand Trunk Railway Company of Canada was charging and receiving from 8 to 10 cents per 100 pounds on similar traffic from places on its line in Canada easterly of Port Huron to said City of Buffalo; but that the right to charge said higher rate for the shorter haul being against the letter and the spirit of the Act to Regulate Commerce, the Grand Trunk Railway Company of Canada considered itself justified, when said Act became operative, in advancing the rate between said Cities of Port Huron and Buffalo to the existing rate.

Respondents deny that the existing rate complained of is excessive, unjust or unreasonable, or that complainants have any reasonable or just cause of complaint on account thereof.

The following facts appear in evidence:

The distance from Chicago to Port Huron, over the Chicago & Grand Trunk Railway, is 335 miles, and from Port Huron to Buffalo, via Suspension Bridge, over the Grand Trunk Railway of Canada, 196 miles—total distance Chicago to Buffalo by this line, 531 miles; the distance from Chicago to Detroit, over the Michigan Central Railroad, is 285 miles, and from Detroit to Buffalo, over its Canadian connections, 251 miles—total, 536 miles; the distance from Chicago to Toledo, over the Lake Shore & Michigan Southern Railway, is 244 miles, and from Toledo to Buffalo, over the same line, 296 miles—total, 540 miles.

By the tariffs in effect when the petition was filed the rate on grain from Chicago to the Cities of Port Huron, Detroit and Toledo, respectively over the different lines reaching those cities, was 9 cents per 100 pounds, and the rate per ton-mile to Port Huron was $\frac{5.4}{100}$, to Detroit $\frac{6.3}{100}$, to Toledo $\frac{7.4}{100}$. The rates, respectively, from Port Huron, Detroit and Toledo to Buffalo were 8 cents per 100 pounds, and per ton-mile from Port Huron $\frac{8.2}{100}$, from Detroit $\frac{7.4}{100}$, from Toledo $\frac{8.4}{100}$. The through rate by the several lines from Chicago to Buffalo was 15 cents per 100 pounds, and $\frac{5.6}{100}$ per ton-mile.

The three lines named have long been, and still are, active competitors for the through business from Chicago to Buffalo. There are also two other competing lines between Chi-

cago and Buffalo, the New York, Chicago & St. Louis Railroad, or Nickel Plate Line, and the Wabash Line in connection with the Great Western Division of the Grand Trunk Railway of Canada.

The Central Traffic Association, located at Chicago, and embracing a great number of railroad lines, has for several years authorized the tariffs on all eastbound traffic in the territory of that association; and the lines within the territory, and participating in the business, feel under an obligation to accept these tariffs, lest their eastbound connections should refuse to take their business. The Central Traffic Association territory embraces the whole region north of the Ohio River and west of what is called the western termini of the Trunk Lines, viz.: Buffalo, Parkersburg, Salamanca, Cleveland and Toronto. On business from this territory the Chicago basis of rates governs, and, under the system applied by that association, Toledo, Detroit and Port Huron all take the same rates. For westbound traffic entering the territory of the Central Traffic Association the rates are established by the Trunk Lines, and are also based upon Chicago.

The through rate from Chicago to Buffalo, by the line of the defendant roads, is divided substantially upon a mileage basis, the Chicago & Grand Trunk receiving 63 per cent and the Grand Trunk of Canada 37 per cent. On the basis of a 15 cent through rate this gives the Chicago & Grand Trunk 9.45 cents, and the Grand Trunk of Canada 5.55 cents.

There is a terminal charge at Chicago on business originating there of \$1 per car, which is borne by the Chicago & Grand Trunk road alone. There is also a terminal charge at Buffalo for delivery of the freight there, which is participated in by the Chicago & Grand Trunk. The latter road also participates in the terminal and ferry charges at Port Huron upon through business.

The Chicago & Grand Trunk Railway terminates in the City of Port Huron at the station known as the Chicago Junction. The Grand Trunk Railway of Canada owns the tracks from that junction to a station known as Port Gratiot, about a mile and a third from the junction, and located in the northern part of the city. The Grand Trunk Railway of Canada also owns and operates the ferry across the St. Clair River; and the terminal facilities of the company in the City of Port Huron are valuable and convenient.

Upon all freight originating at Port Huron and passing over the Grand Trunk Railway to Buffalo that company pays the Chicago & Grand Trunk \$1.50 switching charge at Port Huron, and bears alone the expense of the ferry and of transportation over the Niagara River bridge and of delivery at Buffalo. At times the expense of delivery at Buffalo has been charged to the consignors or the consignees of the freight, but the rule is now understood to be that these expenses are borne by the transportation company.

For a short period since the petition in this case was filed the through rate from Chicago to Buffalo has been 12½ cents, and when that took effect the charge on grain was reduced, Port Huron to Buffalo, from 10 cents to 8 cents per 100 pounds. The through rate, for a

short period, has also been as high as 17½ cents per 100 pounds, but the prevailing rate has been 15 cents per 100 pounds, and that is understood to be the rate in effect at the present time.

The Grand Trunk Railway of Canada has also a line from Detroit to Port Huron upon which the same rates are charged to Buffalo as from Detroit over the Michigan Central line and from Port Huron to Buffalo.

As a rule the through rate on freight traffic from Chicago to the seaboard has prevailed at all points on the line of the Chicago & Grand Trunk as far east as Battle Creek, Michigan; east of Battle Creek to Lansing it was 95 per cent of the Chicago rate; east of Lansing to the Chicago & Grand Trunk Junction it was 92 per cent of that rate. At Port Huron proper it was 78 per cent, the same as at Detroit and Toledo. When the 12½ cent rate from Chicago to Buffalo was in effect, it applied as far east as the Chicago & Grand Trunk Junction. The local rate of 8 cents from Port Huron to Buffalo is 53½ per cent of the through rate from Chicago to Buffalo. The Port Huron rate is charged at some more eastern stations on the Grand Trunk Railway in Canada. The foregoing facts are sufficient for the purposes of the case.

The petition claims substantially proportional rates for an intermediate station on a through line between Chicago and Buffalo. It is claimed that the rates on the products in question from Port Huron to Buffalo are unjust and unreasonable as compared with the through rate from Chicago because they are not more nearly upon a mileage basis.

This question of proportional rates is not new for the first time presented. It has been before the Commission at different times and in different cases, and certain general principles have been laid down and discussed that do not seem to demand discussion again upon the facts of this case.

It has been said, and it is obvious on the facts shown, that the through rates eastward from Chicago are not wholly subject to the volition of the carrier. Those rates are fixed under the pressure of competition, both by rail and by water, and are doubtless lower than any one of the lines would be willing to accept if the business could be carried on independently of such competition. The responsibility for the through rate is therefore, to a very slight extent, due to these defendants, but is the result of agencies and forces which they are powerless to control.

For these reasons, as has often been said by the Commission, the through rate, and the divisions of such through rate between the carriers in the line of transportation, furnish no fair or just criterion for the intermediate local rates on the same line of transportation. It by no means follows that rates from intermediate points to the same destination are unreasonable or unjust because they may not be made upon a mileage basis as the divisions of joint rates are usually made. There are other considerations besides mere mileage that may legitimately be taken into account. The general principle is that all rates must be reasonable, but, as was said in *Re Chicago, St. Paul & Kansas City R. Co. ante*, 149, 2 I. C. C. 265, "It is not the

theory of the Act to Regulate Commerce that the reasonableness of rates can be separately and independently determined. On the contrary, it is assumed in the Act that persons, corporations and localities are interested, not only in the rates charged to them, but in the rates which are charged to others also; and while the Act does not require all rates to be proportional, it nevertheless makes the element of proportion an important one when the rates for any locality are to be determined. No rates can therefore be reasonable in and of themselves within the contemplation of the Act, which are made regardless of proportion." The importance of recognizing this principle, and of giving it practical application by only a reasonable difference between the sums of locals and through rates have been perceived by some of the railway associations in a spirit of prudent conformity to public sentiment and to the tendency of rulings by commissions and courts; and as appears by their published action, steps have been taken in that direction.

In the present case it cannot be claimed that the local rates from Chicago to Port Huron and from Port Huron to Buffalo are at all proportional upon the basis of mileage. The mileage from Port Huron to Buffalo is a little over one half of the distance from Chicago to Port Huron, and the rates on grain are nearly equal, being only one cent lower from Port Huron to Buffalo than from Chicago to Port Huron, while on grain products from Port Huron they are one cent higher. If there were no other considerations than mileage these proportions would apparently be inequitable, and could not be sustained; but mileage, though a factor, is by no means the only consideration in making these rates.

The cost of railway transportation is made up of the expense of the two terminals, and the intermediate haul and the terminal expenses are the same whether the haul be long or short. A few miles, or even a considerable number of miles, of additional haul may in some instances of long distance transportation be practically of very little importance, and the ratio of tonnage cost per mile diminishes with distance.

While the rate made from Chicago to Buffalo of 15 cents per 100 pounds may be regarded as a low rate, the local charge from Chicago to Port Huron of 9 cents per 100 pounds is also a low rate, but is probably all that can be charged in view of the existing competition, and of the general circumstances and conditions of the transportation. Under these tariffs Port Huron has the same rate from Chicago as Detroit and Toledo, although the distance to Port Huron is considerably greater than to the other points.

On grain shipments from Chicago to these cities Port Huron suffers no prejudice on account of its greater distance, but has all the advantages of the same rate for the traffic with 50 miles longer haul than Detroit and 91 miles more than Toledo. The proportion of the through rate from Chicago to Buffalo received by the Grand Trunk Railway of Canada of about $5\frac{1}{2}$ cents per 100 pounds leaves a margin of $2\frac{1}{2}$ cents per 100 pounds between its proportion of the through rate and its local rate of 8 cents per 100 pounds on grain from Port Huron to Buffalo, and $4\frac{1}{2}$ cents margin between it and the 10 cent rate on grain products.

This standing alone, it might be assumed, could scarcely be justified, but the other facts in evidence are confidently claimed by the respondents to justify the local rate. These are, in the first place, the terminal charge of \$1.50 per car for carloads, and of 3 cents per 100 pounds for less than carloads, paid by the Grand Trunk Railway Company of Canada to the Chicago & Grand Trunk Railway Company for switching charges upon all business originating at Port Huron and going eastward. The evidence on this point is not very satisfactory, but leaves the matter of this alleged terminal charge in a rather vague and uncertain state. The tracks on which the terminal service is rendered belong to the Grand Trunk Railway of Canada; the engines used for the service appear to be quite as often those of the Grand Trunk Railway as of the Chicago & Grand Trunk; and the business reason for the allowance of this charge was not made distinctly to appear. But the other facts are entirely free from doubt. The Grand Trunk Railway of Canada has its valuable and expensive terminals at Port Huron to maintain, and its clerical force and other employees for the conduct of its business; it has the expense of the ferry across the St. Clair River, and the bridge expense across the Niagara River, and the terminal charges for delivery at Buffalo. These are all borne exclusively by the Grand Trunk Railway of Canada upon the business originating upon its line at Port Huron and eastward. The evidence does not show with any precision what these several expenses are, either in the aggregate or what would be a fair distribution of them per carload or per 100 pounds of freight. The defendants assume in their brief that the burden of showing these expenses was upon the petitioners; but this assumption is altogether erroneous. It would impose on persons conceiving themselves aggrieved by carriers a difficult and onerous rule of evidence. It would be impossible for the petitioners to show such facts otherwise than by the defendants' agents, and it was clearly the province of the defendants to make them appear. No presumption arises that a rate is reasonable from the mere fact that it has been put in effect; and when it is *prima facie* disproportionate or relatively unequal, the onus is on the carrier to justify its charges when challenged on those grounds. The knowledge of the justifying circumstances and conditions relied on is peculiarly in possession of the carrier. In the absence of evidence of this character the Commission cannot determine with any degree of exactness how much additional charge the Grand Trunk Railway is reasonably entitled to make for these expenses. It is obvious, however, and entirely equitable, that some allowance is proper and necessary for this purpose, and it is not manifest that the rate in effect is excessive. But, though there may be some doubt on the evidence as to the extent of a just allowance for these additional expenses, it seems reasonably clear to the Commission that a charge of 10 cents per 100 pounds from Port Huron to Buffalo on grain or grain products, while a 15 cent through rate is in effect from Chicago to Buffalo, is not supported by the evidence and is apparently disproportionate and unreasonable.

The petitioners claim that the local charge

from Port Huron to Buffalo should not exceed $6\frac{1}{2}$ or 7 cents per 100 pounds, and refer to tariffs that were in effect prior to the date of the Act to Regulate Commerce, in support of their contention. Rates made prior to that date, however, which were supposed not to be governed by legal constraints, and were often unduly preferential at particular points, are not a fair test for rates that must be maintained under the Act, with its restrictions against the greater charge for the shorter haul and against all unjust discriminations and undue preference and advantage to persons and localities.

When those rates were in effect a greater charge was made from Canadian points east of Port Huron to Buffalo than from Port Huron.

The respondent concedes that this is against the letter and the spirit of the Act to Regulate Commerce, and claims that it was justified in making some advance at Port Huron to bring rates on its line generally in conformity to the Act.

Advances induced by this consideration and made only to a just extent, at points where disproportionately low rates had existed, rest on a reasonable basis. So far as this rule was observed by the respondent it furnished no just ground for complaint.

Upon the case as presented the Commission is not satisfied that an 8 cent rate on grain and grain products from Port Huron to Buffalo is unreasonable, nor is it satisfied that a higher rate than 8 cents on grain and grain products is reasonable and just.

Grain and grain products are in the same class, and the rates on both are equal from Chicago to Port Huron. At Port Huron a distinction has been made in the rates, grain being 2 cents a 100 pounds lower than grain products. The only reason assigned for this difference is that there exists water competition in the carriage of grain from Port Huron and not to any great extent in the carriage of grain products. If the water competition were in fact controlling in respect to the rate it might justify the difference. But that was not made to appear, and similar competition by water exists from Chicago. Why it should be more effective from Port Huron than from Chicago was not shown.

The petitioners insist, and ask a ruling by the Commission, that it is unlawful to charge different rates on property in the same class. *Prima facie*, property classified alike would seem to be entitled to the same rate, but the point is one that need not now be determined. Upon the showing in the case the articles in question are embraced in the same class, and are carried at equal rates from Chicago, and no adequate reason having been shown for a difference at Port Huron it would seem that equal rates should prevail from the latter place.

It is not deemed necessary in this case to discuss the relation of the Port Huron rates to the Detroit and Toledo rates. That has been done in another case (*Detroit Board of Trade v. Grand Trunk Railway*, ante, 199, 2 I. C. C. 315), and the same principle has been considered in other cases. The reasons for not disturbing a rate not essentially unjust, that affects several lines of road and many interests in a large territory, that has been established to put competing lo-

calities on a substantial equality and to prevent rate wars, have been fully set forth in other cases and need not be repeated. If the Port Huron local rate were clearly unreasonable, and resulted in injustice to the business interests of that city, those considerations would be inoperative to prevent such action respecting them as might appear to be appropriate. But that is not the case. The evidence does not show that any material injury results to the business interests of Port Huron from an 8 cent rate to Buffalo. In fact, it appears affirmatively that the competition from Chicago with grain products from Port Huron is very slight and unimportant.

The decision of the Commission is that an 8 cent rate per 100 pounds upon grain and grain products from Port Huron to Buffalo, while a 15 cent through rate from Chicago to Buffalo is in effect, is not unreasonable; and that a rate from Port Huron to Buffalo in excess of 8 cents per 100 pounds, while such through rate from Chicago is maintained, is unreasonable.

Hervey BATES and H. BATES, Jr.,
v.

THE PENNSYLVANIA R. R. CO. and
The Pennsylvania Co.

(No. 231.)

A BSTRACT of complaint filed Aug. 29, 1889.

Complainants are engaged in the business of milling at Indianapolis, Indiana, operating and carrying on the mills known as the Indianapolis Hominy Mills.

The above named defendants persist in a serious and ruinous discrimination against the business of the complainants, and to the corresponding advantage and profit of all millers making the same, or similar goods, at or near the seaboard, or in the various cities at or near the eastern termini of said railroads, viz.:

Said defendants now charge and collect as freight to New York City, at the rate of $18\frac{1}{2}$ cents per hundred pounds weight, at the same time, and under similar conditions, charging and collecting as freight charges on ground-corn and corn-meal, grits and hominy, and the refuse, or offal from the manufacture of said ground-corn, cracked-corn, corn-meal, grits and hominy, viz.: feed, at the rate of 23 cents per hundred pounds weight, thereby affording and giving a direct and immediate advantage to the millers at or near the eastern termini of said defendants' railroads of $4\frac{1}{2}$ cents per hundred pounds.

The goods manufactured by the said Indianapolis Hominy Mills are largely and mostly sold in New York and other eastern cities and the business has grown to its present large proportions, nurtured through many years by a freight tariff from Indianapolis to the seaboard always equal to and no more than the tariff on the whole grain, and it is but recently that mills making similar goods have been established in the eastern part of the country.

The amount of such discrimination is ruinous in the extreme, wherefore they "ask the protection of the Commission under the laws of the United States."

JAMES & ABBOTT

v.

THE EAST TENN., VA. & GA. R. CO.
et al.

(No. 173.)

REASONABLE RATES ON LUMBER.

1. **Greater charge for a shorter distance,—when combined competition by rail and water do not justify it.** The presence of combined rail and water competition at a longer-distance point does not justify a greater charge for a shorter distance while the carrier maintains the shorter-distance rate, where such competition is of greater force and more controlling than at the longer-distance point.
2. **Nor does the fact that the freight is lumber which has paid a local rate** over the roads of the defendants or of other railroad companies to the longer-distance point justify such greater charge for a shorter distance.
3. **Nor is such greater charge justified** by the fact that the lumber business of the roads of a connecting line or any of them was done in cars which carried machinery to the longer-distance point, **when profitable return loads were not always to be had.**
4. **Nor does a difference in the bulk and value of lumber justify such greater charge** when the carriers in their published rate sheets put the lumber in the same class and at the same rate.
5. **Distance is not always the controlling element** in determining what is a reasonable rate, but there is ordinarily no better measure of railroad service in carrying goods than the distance they are carried. And where the rate of freight charges over one line, on similar freight carried from neighboring territory to the same market, is considerably greater than over other lines for distances as long or longer, such **greater rate is held to be excessive and should be reduced.**

(Complaint filed February 18th, 1889.—Answers filed separately, the last April 19th, 1889.—Heard May 2d, 1889.—Decided Sept. 25th, 1889.)

COMPLAINT in this case will be found *ante*, 436.

Separate answers will be found on pages 490 and 491.

The case also appears in the opinion.

Mr. A. B. Paine for complainants.

Mr. William M. Baxter for The East Tenn., Va. & Ga. R. Co. and other defendants.

Mr. Enoch Totten for The Pennsylvania R. Co.

REPORT AND OPINION OF THE COMMISSION.

Morrison, Commissioner:

This is a complaint of the transportation charges on lumber carried from Johnson City, Tennessee, to Boston, Massachusetts.

2 INTER S.

The rate of which complaint is made is 36 cents per 100 pounds of lumber in the carload for a distance of 911 miles, though from the more distant point of Atlanta, Georgia, 1240 miles, a lower rate of 34 cents is charged, which is alleged to be in violation of the fourth section of the Act to Regulate Commerce. From Macon, Georgia, to Boston, the freight charge is the same as from Johnson City, 417 miles the shorter distance over the same line.

The complainants aver that said railroad companies form, under joint traffic arrangements, one connecting through line, and in carrying lumber at these rates perform for others a much greater service for the same compensation and for others again a much greater service for less compensation than is exacted and received from the complainants as shippers from Johnson City. They further aver that the rate so exacted from them restricts and injures their business, that their reasonable request for its reduction has been refused and they are obliged in their trade to ship over said roads. They therefore complain and ask that the Johnson City rate may be so reduced as to bear a just relation to the rates charged from Macon and Atlanta, and that they may be granted such other relief as may be found on investigation to be reasonable.

The defendant railroad companies, answering separately, admit that the rates charged and the distances are the same as stated in the complaint, and aver that said rates are made by the East Tennessee, Virginia & Georgia Railway Company, the initial or sending company, and that as forwarders the other companies are not responsible for the rates so made. Defendants deny that the rates on lumber carried over their roads are unjust or unreasonable, and aver that the reasons justifying the said rates of 36 cents and 34 cents per 100 pounds, respectively, from Macon and Atlanta, distant 1328 and 1240 miles from Boston, as compared with the rate of 36 cents per 100 pounds for the shorter distance from Johnson City to Boston, are as follows:

"a.—That the rates in the State of Georgia are fixed and controlled by the railroad commissioners of that State, that commission fixing the charges for transportation to coast cities from mills in the State of Georgia."

"b.—The fact of water competition from Brunswick, Georgia, on the Atlantic Ocean to Boston and other North Atlantic points; that, adding the rate from the mills to Brunswick, as fixed by the railroad commissioners of Georgia, to the rate given by the coast-line water carriers to Boston, the aggregate is less than the amount charged, as aforesaid, upon the tariffs of the respondents on their through railroad carriage from Macon and Atlanta to Boston."

"c.—A large amount of freight is received at Atlanta and Macon from eastern cities, including Boston, the cars containing which would have to return empty in large part, but for the fact that they can be returned loaded with lumber."

"d.—The reason why the Atlanta charge is the same as that from Macon [the Atlanta charge is 2 cents lower] arises from the fact that lumber shipped from Atlanta is manufac-

tured at mills a considerable distance from that city, and transported there over local roads before being marketed."

"e.—That the lumber shipped from Johnson City is for the most part poplar lumber, while that which goes from Georgia territory is exclusively Georgia pine; and that the rate per 100 pounds per mile for hauling poplar, by reason of its greater bulk, should reasonably be greater than that for hauling pine."

The amended answer of the East Tennessee, Virginia & Georgia Railway Company states that the rate from Macon, Georgia, to Boston is 2 cents higher than from Atlanta to Boston, the statement in its original answer that the rate was the same being a mistake—and for further answer:

"That poplar lumber is of much greater value than the yellow pine lumber of Georgia, and upon that ground also it should bear a higher rate than yellow pine."

The rate of charges and the distances to which the charges apply are admitted to be as stated in the complaint, and additional facts are found on investigation, viz:

I. The complainants are lumber merchants and have in connection with their business invested a considerable sum at Johnson City, Tennessee, where they buy poplar lumber and ship it over the defendants' roads to Boston, the complainants' place of business. The lumber is there sold in competition with similar lumber carried to that market at lower aggregate rates.

Some of the points from which the competing lumber is shipped are:

| | | Miles. | Rate. |
|----------------------------|---------------------------------|--------------|----------------------|
| Parkersburg and Kanawha. | West Va., distance from Boston, | 860, | 26 cts. per 100 lbs. |
| Milton and St. Albans. | | 1,000, | 29 " " |
| Asheville and Hot Springs. | N. C., | 935 and 973, | 33 " " |

II. The defendants' several lines form a through and connecting line over which lumber and other property are carried to Boston and other northeastern points from various places in the States of Tennessee, Georgia, Alabama, and Mississippi on the lines of the East Tennessee, Virginia and Georgia Railway Company, including Johnson City, Tennessee, and Atlanta and Macon, Georgia, on one and the same line. Such through line extends from Boston southwesterly to Cleveland, Tennessee, and from there curves southeasterly to the coast at Brunswick, Georgia. Defendants have another line, being the same as that described above, from Boston to Cleveland, and from there extends through Chattanooga, Tennessee, Decatur, Alabama, Corinth, Mississippi, and to the Mississippi River at Memphis, Tennessee.

III. The charges complained of were in force in 1885, when complainants commenced shipping lumber from Johnson City. Of the Atlanta rate, 34 cts., the East Tennessee, Virginia & Georgia Railway Company receives $8\frac{3}{10}$ cts. for the haul over its line to Bristol, and the other defendants 25 $\frac{1}{10}$ cts. for the haul over their lines east of Bristol. The Johnson City rate, 36 cts.,

is divided, 4 cents to the East Tennessee, Virginia & Georgia Railway Company for the haul to Bristol, and 32 cts. to the lines east of Bristol. The 4 cts. which goes to the East Tennessee, Virginia & Georgia Railway Company is arbitrary and would be the same under the traffic arrangement of defendants if the through rate were reduced or increased. The local rate from Atlanta to Johnson City is $12\frac{1}{2}$ cts. per 100 pounds.

The defendants' rates on goods of the 1st class are:

| | Miles. | Per 100 lbs. |
|-----------------------------|--------|--------------|
| Between Boston and Atlanta, | 1240, | \$1.14 |
| " " " Macon, | 1328, | \$1.09 |
| " " " Moore's Mills, | 1251, | \$1.33 |
| " " " Holton, | 1318, | \$1.33 |
| " " " Bullard's, | 1343, | \$1.33 |
| " Memphis " Johnson City, | 527, | \$1.08 |
| " " Bristol, | 552, | \$0.92 |

IV. The railroad commissioners of Georgia are authorized to establish maximum rates in that State and have established rates on lumber in the carload of 24,000 pounds, viz.:

| | Between | Miles. | |
|------------------------------------|---------|---------|--|
| Atlanta and the coast at Savannah, | 295, | \$24.00 | |
| " " " Brunswick, | 279, | \$23.00 | |
| Macon " " Savannah, | 192, | \$20.00 | |
| " " " Brunswick, | 189, | \$19.00 | |
| Atlanta and Macon, | 90, | \$13.00 | |

The rates to the coast combined with the ocean rate usually prevailing from coast points make, nominally, a lower rate by rail and water route from Atlanta and Macon than the all-rail rates charged by the defendants. The Southern Railway & Steamship Association, composed of the principal lines of transportation, both rail and water, between eastern cities and points in the southeastern States, assumes to

adjust rates from and to certain designated association and competing points in the southeastern territory, including Atlanta and Macon, Georgia. In such adjustment the right is conceded to the water routes to take a rate below the all-rail route, ranging from 8 cts. per 100 pounds on goods paying the highest rates to 2 cts. on goods paying the low rates usually imposed on lumber. In practice these adjustments are not respected and lumber is carried by coast routes from Atlanta to Boston as low as 26 cts. per 100 pounds. The all-rail route has the advantage in time required for delivery, in risk, in expense of handling and in being less damaging, especially to the better qualities of pine flooring.

V. Georgia lumber is largely manufactured at mills near the coast and goes to Boston and other north Atlantic points by the part rail and water route through Brunswick or Savannah at rates not above 22 cts. From these mills or some of them the all-rail route is 1,400 miles long, and from others longer.

VI. For Atlanta and Macon business to the coast the East Tennessee, Virginia & Georgia Railway Company, defendant, which reaches

the coast at Brunswick, competes with the Central of Georgia reaching the coast at Savannah.

For Boston business, all rail, the defendants compete at Macon with the Central of Georgia and connections. From Atlanta defendants' chief competitor, all rail, is the Richmond & Danville R. R. and connections. The several all-rail routes, including defendants', make the same rate from crossing and competing stations to north Atlantic cities, and all charge higher rates for shorter distances from and to intermediate places in Georgia and adjacent States. For Johnson City business the defendants have no competitor.

VII. It is in testimony that the lumber business of the East Tennessee, Virginia & Georgia road from Georgia last year was largely in cars which carried machinery to that State. The entire tonnage north and south over that road is not stated for any year or series of years. The tonnage over the line of the Norfolk & Western Company is about the same in both directions. No testimony was offered as to the tonnage in either direction over the other defendant roads.

VIII. The lumber shipped from Atlanta is first shipped there over the East Tennessee, Virginia & Georgia or some other railroad. The Johnson City lumber is poplar. Georgia lumber is yellow pine, part kiln-dried flooring and part plank and dimension stuff used for car construction and house building, for which purposes poplar is not used. In Boston the selling price of kiln-dried yellow pine is \$40, of other yellow pine \$20, and of poplar \$30 per thousand feet. At Atlanta, pine is worth from \$4 to \$14, and the selling price of poplar is greater than pine. Poplar is lighter, but more is loaded, and the freight is more on the carload at the same rate per hundred. In the defendants' published classification of lumber yellow pine and poplar are classed together and given the same rates. They are so classed and rated as a rule by the carriers of the country.

The provision of the Act to Regulate Commerce which makes the greater charge for the shorter distance unlawful declares:

"Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

That the charges complained of are in violation of this section of the Statute if the transportation from both Atlanta and Johnson City is done under substantially similar circumstances and conditions is not questioned. The defendants deny that it is so done. They contend that they and other carriers of traffic by all-rail routes north to north Atlantic points compete for such traffic at Macon and Atlanta with carriers by rail and water, by rail south to the coast, thence by sea to such north Atlantic points; that no such competition exists at Johnson City; and that the presence of this competition at the former two places and not at the lat-

ter makes the circumstances of the traffic dissimilar and justifies the higher rate for the shorter distance. This contention is based on the supposition that the competition by the coast route compels the acceptance of 34 cents from Atlanta, and that 34 cents is less than what may be reasonably charged from Johnson City.

The expense of handling and carrying the various classes is so unequal that any effort to fix the cost of moving any particular class of freight must be satisfied with an intelligent estimate. The average for all classes over the road making this rate was last year 5 $\frac{1}{10}$ mills per ton per mile. Lumber is inexpensive freight and very much below the average in cost of transportation. This cost is so important an element in determining what transportation charges may lawfully be that the difference in charges on the several classes indicate something like the relative difference in the cost of carrying each.

The fact that railroad charges are two, three, or more times as high on the mass of freights carried and lower on none, practically, than on lumber, shows how very much below the average cost on all freights the cost of carrying lumber must be. But, comparatively low as the transportation expense is, it is still questionable, when the lumber is of a kind not subject to injury from carriage by water, whether or not carriers by all rail can share in the Boston traffic, from the productive lumber regions near the Georgia coast, without imposing some part of the burden on shorter distance freight shipped from more interior stations. Such carriers to take part in this traffic from stations nearer to the coast than to Atlanta and Macon must accept less than 4 cents per ton per mile for the haul to Boston.

The defendants' rate of charges from Atlanta and Macon is scarcely 5 $\frac{1}{2}$ mills per ton per mile. This is not claimed nor believed to be higher than is reasonable for the service, and some greater charge from these places might be legal. But, moderate as this charge may be, its long continuance must be taken as proof that it is profitable to the roads.

Yet with this all-rail rate in force lumber is largely carried by the part rail and water route, the all-rail route chiefly relying on orders for shipments to be made immediately, or from the interior of Georgia, or to interior eastern points and on shipments of a kind not safely made by water. It thus appears that the competition is such that to share in this business the defendants must accept a rate proportionally lower than what might be reasonable for all their business of a like kind from all their stations, but it by no means follows that the rate accepted is below what would be reasonable from Johnson City, the shorter distance by 329 miles.

Competition at longer-distance points with coast-route carriers which might warrant the making of a rate proportionally lower than what might be reasonable on all the business of a road cannot lawfully operate to increase the charges for shorter distances. Nor could such competition have that effect if it were such as to justify a higher rate for some shorter distance. In either case it might have the effect of lowering one or the other reasonable rate, or both, to avoid unjust discrimination or

*1 Inters. Com. Rep. p. 4.

prevent undue advantage to some particular traffic, locality, or person. For instance, we may assume the Johnson City and Atlanta lumber rates should be less disproportionate, and that the reasonable rate would be from the former 33, from the latter 37, and from Rice City, half way between the two, 35 cents. Dissimilar circumstances which might justify a reduction of the Atlanta rate from 37 to 34 cents could not increase the reasonable rates for the two shorter distances.

The ascertained facts taken in connection with the rates in dispute do not establish defendants' contention that the rail and water or coast-route competition is so controlling as to compel the all-rail lines to accept the lower rate from Atlanta. The Georgia Railroad Commissioners' maximum rate from Macon to the coast is lower by \$4 on the carload than the Atlanta rate to the coast, and the through rate by the coast is lower from Macon than from Atlanta. If the low cost of the part rail and part water route could compel the low rate of 34 cents from Atlanta, it would force a still lower rate at Macon, instead of admitting the higher rate of 36 cents maintained there. The position of the defendants,—that coast-route competition forces and justifies a lower rate from Atlanta than from Macon and Johnson City,—is contradicted by the higher rate at Macon, from which the coast-route is shorter, less expensive, and at which the competition is more controlling.

To avoid its effect or to explain this contradiction in their rates the defendants state the fact that lumber shipped from Atlanta is first carried there by railroad and has paid a local rate from the mills, and this fact is pressed as a reason why the charge from Atlanta should be lower than from Macon.

When freight is offered to the defendant companies for shipment it is their duty to take it for what they can get, not above a reasonable compensation for the service to be performed by them and not below a rate which will yield them a profit. The duty of equalizing rates beyond their through line is not imposed on them as receivers of freight for shipment. What concerns them relates to the transportation of the goods and the charges for the service. The origin of the goods or the fact that lumber comes to their roads from the mill over some other railroad or over a wagon road is not an element which enters into the question of what they may reasonably demand for the transportation services they are to render. This equitable rule is not altered in the case under consideration by the statement of the traffic manager of one of the defendant companies who, as a witness, said: "We have already brought that lumber from the local cities to Atlanta." When freight is taken up at Macon or elsewhere and delivered at Atlanta for sale, or other purpose not incident and necessary to through transportation, the shipment is complete, and when such freight is forwarded the carriage from Atlanta is a new undertaking. The character of a local shipment between the cities or between the mills and cities of Georgia is the same when made by the defendants or some one of them as if made by some other railroad company, and whether made by one or the other it can not legally

have the effect of raising or lowering the charges for transportation of the freight when reshipped.

The investigation shows that the Atlanta Lumber Company, doing business at Atlanta, owns sawmills at Amoskeag, Georgia, on the East Tennessee, Virginia & Georgia road, nearer the coast than Atlanta or Macon. The rule insisted upon by the defendants permits the lumber company to bring its lumber through Macon to Atlanta for sale, and if that market is not satisfactory, then the lumber may be reshipped to Boston or other markets 2 cents lower, because it has once paid a railroad charge. No such preference is offered to the lumber company or other shippers who would test the Macon market. When that market has been tried without success the property may be reshipped, but at no lower rate in consideration of the freight having paid a local charge over a railroad to Macon; that preference and advantage is given to Atlanta alone. The rule contended for makes unjust discrimination easy and encourages undue preference to particular towns and cities to the unreasonable disadvantage of others. The distance to Atlanta from Amoskeag is greater than to Macon, but the rule insisted upon applies as well to freight carried the same distances to both places, when carried by railroad. It was shown that there are no mills at Atlanta, and that lumber is not manufactured there. The same could be shown, and is true, as to Macon, but the fact does not affect the question.

The defendants further urge in justification of their rates what is stated in the testimony of one of their officers. He says, "We carry a good deal of machinery into Georgia, and lately have been carrying a great many iron rails;" and again, "almost our entire lumber business during the past twelve months has been brought from Georgia in cars that went there loaded with machinery." This was said by the traffic manager of the East Tennessee, Virginia & Georgia Railway Co. of that road and its lumber traffic in the past year, but gives us no information as to the tonnage of the road other than lumber. We are without information as to the aggregate of its tonnage in different directions, while over the Norfolk & Western, which connects with the East Tennessee, Virginia & Georgia, traffic north and south is nearly equal. That the defendants have carried freight to Georgia in cars for some of which profitable return loads were not always obtainable will hardly be disputed. But there is nothing in this fact nor does the investigation show anything to warrant the conclusion that the freight over defendant's line is exceptional in the direction of movement or varies from the rule applicable to roads generally that at one period or season of the year more freights go in one direction; at another season more in the opposite direction. The rates in question are not casual and the result of a condition of things first existing in the last twelve months. They were permanently established and substantially the same before the Act to Regulate Commerce was passed. When the preponderance of freight is so largely in one direction that the supply of empty cars exceeds the demand for return loads at full rates, it is not unlawful to encourage business by affording transportation

on less profitable terms. Such a policy of business prudence applied to the case we are considering does not make it necessary to receive any greater compensation for the shorter distance. The receipts would be the same and the expenses less if the empty cars were drawn to Johnson City and there loaded with lumber at the same rate obtainable for the longer distance.

Next it is urged in justification of the rates made that the Johnson City "rate per 100 pounds per mile" should be greater because the poplar is of greater bulk, and also that it is of much more value, and on these grounds should bear a higher rate than the yellow pine. The space required is rightly taken into account in the adjustment of freight charges, when the bulk is so considerable in comparison with weight as to occupy space which if taken up by heavier freight would yield larger receipts. This is not such a case. Here it is shown that Georgia pine lumber is of such a character and manufactured in such lengths and shapes that the carload is lighter and the freight charges less at the same rate per 100 pounds than on the carload of poplar. It thus appears the expense to the carrier is not greater for the poplar. The ascertained facts show that the difference in the price at the place of shipment, with the transportation charges added, and the price in the eastern market leaves the larger profit on the pine. The service is therefore worth more to the dealer in pine. Some varieties of pine are worth double as much as others, both in Georgia and in Massachusetts markets. In Boston the poplar is worth \$10 per thousand less than some qualities of pine and \$10 more than other varieties. The defendants have in their published rate sheets classed all descriptions of pine and poplar lumber together and named the same rate on each. We think they are correctly so classed and rated.

The disproportion in the charges on lumber made by defendants is found in greater degree in their charges on goods classed and rated higher. The Boston rate from Atlanta on goods of the first class is \$1.14. From Moore's Mills, 10 miles farther south, it is \$1.33. From Macon, still nearer the coast, it is \$1.09. From both Holton, 10 miles farther from the coast, and Bullard's, 15 miles nearer to the coast than Macon, the rate is \$1.33. The alleged existence of coast-route competition by rail to the coast, thence by ocean carriage, is urged as a justification for this system of transportation charges. But we find the same system prevailing where the influence of the Georgia Commission regulation and the coast-route competition is not felt. Over defendants' Memphis line the rate between Memphis and Bristol is 92 cents. Between Memphis and Johnson City, the shorter distance, it is \$1.08. And while the local Georgia rates to the sea and the low cost of ocean transportation are influential in fixing lumber and other rates, these relatively unequal rates are largely the result of a vicious system under which carriers too frequently exact unreasonably high rates at places where there is no other carrier to take the freight.

A further complaint is, that in carrying lumber at the rate named the defendants perform for some of their customers greater service for the same compensation, and for others greater

service for less compensation, than is demanded and received from the complainants. The relative inequality of the charges made as compared with the service rendered is here presented and urged by the complainants as affording evidence that the rate charged from Johnson City is unjust and unreasonable and should be reduced. Practically, the only matter of interest to the complainants is how much they are to pay and to the defendants how much they are to receive for carrying lumber from Johnson City to Boston. The complainants aver that their business is injured, its growth and development prevented, by these freight charges. Whatever may be the effect of the disputed rates on the complainants' business, it will hardly be questioned that long-distance transportation charges on lumber make so large a part of its price that any considerable disadvantage in the rates paid prevents that fair competition in which the public has an interest.

The transportation charges on lumber from Johnson City to Boston are considerably more in the aggregate than they are from West Virginia stations on the Baltimore & Ohio Road nearly as distant, or from West Virginia stations on the Chesapeake & Ohio Road more distant, or from North Carolina stations on the Richmond & Danville Road more distant. Distance is not always the controlling element in determining what is a reasonable rate, but there is ordinarily no better measure of railroad service in carrying goods than the distance they are carried. Asheville and Hot Springs, North Carolina, are practically in the same territory with Johnson City and on a line over which, in the absence of evidence to the contrary, we must assume freights are no more steady or in no larger volume than over the line of the defendants. Unexplained, these lower rates are not without significance, for in comparison with them the Johnson City rate is excessive. In the division of the Atlanta rate $25\frac{1}{10}$ cents per 100 pounds (\$60.24 on the carload) is the part accepted by the other defendant companies for the haul over their roads east of Bristol, the terminus of the East Tennessee, Virginia & Georgia Road. The fact that it is accepted and yields a profit tends to establish the fact that their portion of the Johnson City rate, which is 32 cents (\$76.80 on the carload) for the same service, is excessive, and that some lower rate would be reasonable.

Under the defendants' traffic arrangements any reduction made in the through rate will be borne by the lines east of Bristol, and a reduction to 33 cents, which would equalize the charge from Johnson City, Asheville, and other points in adjacent territories, would leave to the roads east of the East Tennessee, Virginia & Georgia $29\frac{1}{2}$ cents per 100 pounds, or \$9.36 more on the carload than they accept for the same service on Atlanta business.

The traffic manager gave it as his expert opinion, and, we doubt not, honestly enough, that 36 cents from Johnson City was a reasonable rate. Opinion as to what is a reasonable rate is so largely ideal that it needs the support of convincing facts which are mainly in possession of railroad companies. The only fact offered for this purpose was the statement that operating expenses of his road, the East Tennessee, Virginia & Georgia, for freight of all

classes, were $5\frac{5}{10}$ mills per ton per mile. The operating expenses of the Norfolk & Western were less than 4 mills, which is exceptional; but it has been already shown how low in comparison with the average on all freight must be the expense on such freight as lumber. The difference in cost of transportation of various classes of freight is so variable that the average on all affords little assistance in ascertaining what is reasonable for carrying the very low grades which are moved so much below the average cost.

The claim that the charges the complainants are made to pay are excessive is sustained by facts so numerous and of such a character as to be convincing. Twenty-nine cents for the haul east of Bristol on Johnson City business will, in our opinion, be full compensation to the roads which receive but $25\frac{1}{10}$ cents for the same service on business from Atlanta. The highest rate paid from the poplar-producing territory adjacent to Johnson City on like traffic destined to the same market is 33 cents per 100 pounds, and any higher rate than 33 cents from Johnson City is, as we believe, unreasonable and should be reduced.

PROCTER & GAMBLE

v.

CINCINNATI, HAMILTON & DAYTON
R. CO. *et al.*

(No. 235.)

A BSTRACT of complaint, filed Sept. 12, 1889.

After alleging partnership of complainants, and that defendants are common carriers subject to the Act to Regulate Commerce, they allege:

That defendants adopted "Official Classifications Nos. 5 and 6," now upon the files of this Commission. That said classifications contain six general classes of articles, numbered therein from one to six. That upon said classes defendants have and do fix and maintain decreasing rates in their numbered order; and that the rate fixed for the sixth class therein is about one sixth less than, or $83\frac{1}{3}$ per cent of, that established upon the fifth class.

That the defendants, in common with the other railroads in the large territory covered by said official classification, have wrongly placed and maintain common soap in carload lots in said fifth class, instead of said sixth class, where it properly belongs, and where the railroads lying in the larger territory covered by the so called "Western" and "Southern Classifications" practically place the same. That the principal articles in carload lots in said fifth class and the traffic therein, between which and common soap and the traffic in common soap there is any basis of comparison, to wit: candles, canned fish, fruits and vegetables, washing crystals, soap powders and liquid soap, are less analogous or similar thereto in point of price, bulk, weight, risk of loss and deterioration in handling and carriage, cost of handling and carriage, tonnage, necessity to consumers, and to life and health, and in point of other qualities, characteristics, considerations

2 INTER S.

and conditions, which belong to said articles and affect the traffic therein, and do and of right ought to determine classification, than the corresponding principal articles and the traffic therein in carload lots in said sixth class are, to wit: coffee, fish, pickled, salted or smoked, in boxes or packages, glucose, rice, rice flour or meal, starch in barrels or boxes, sugar, cerealine, corn meal, cracked wheat, farina and flour.

That with some of the articles named in said fifth class, common soap comes into competition in trade, to wit: with soap powders and liquid soap, and that by classification therewith, said soap powders and liquid soap being of higher price, greater bulk, less weight, less tonnage, of greater risk of loss and deterioration in handling and transportation, have an undue advantage in competition over common soap.

That they have protested and requested a sixth class rate for their goods but have been denied.

Wherefore they pray that defendants be required to desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

PROCTER & GAMBLE

v.

CLEVELAND, CINCINNATI, CHICAGO
& ST. LOUIS R. CO. *et al.*

(No. 236.)

COMPLAINT filed Sept. 12, 1889, similar in all respects to the preceding.

SAME

v.

Orland SMITH and H. C. Yergason, Receivers of the Cincinnati, Washington & Baltimore R. Co. and the Baltimore & Ohio R. Co.

(No. 237.)

COMPLAINT filed Sept. 12, 1889. This is also similar to No. 235.

E. M. RAWORTH

v.

THE NORTHERN PACIFIC R. CO.; The Oregon Railway & Navigation Co.; The St. Paul, Minneapolis & Manitoba R. Co.; The Union Pacific R. Co. and The Southern Pacific R. Co.

(No. 240.)

A BSTRACT of complaint filed Sept. 25, 1889.

Complainant is and long has been a wholesale grocery merchant at the City of Fargo, Territory of Dakota.

The Northern Pacific Railroad Company and

The Oregon Railway and Navigation Company, above named, are common carriers, and under a common management, for continuous carriage, engaged in the transportation of passengers and property, partly by railroad and partly by water, between San Francisco in the State of California and St. Paul in the State of Minnesota, and said City of Fargo.

The St. Paul, Minneapolis & Manitoba Railway Company, The Union Pacific Railroad Company and The Southern Pacific Railroad Company above named, are common carriers and under a common management, for continuous carriage or shipment, are engaged in the transportation of passengers and property, wholly by railroad, between San Francisco and St. Paul and Fargo.

Fargo is situated on the main through lines of said Northern Pacific Railroad Co. and said St. Paul, Minneapolis & Manitoba Railway Co.,

and is about 275 miles west of said City of St. Paul; and the distance between San Francisco and Fargo, via said last named carriers, is about 275 miles shorter than, and is included in, the distance between San Francisco and St. Paul via said last named railroads; and all property shipped from San Francisco to St. Paul, over said last named railroads, passes through Fargo, and all the circumstances and conditions of transportation between San Francisco and Fargo and St. Paul are identical except as to distance.

Defendants charge and receive, for the transportation of all sugars, in carload lots, from San Francisco to St. Paul, 65 cents per hundred pounds, and no more; and said defendants charge and receive for the transportation of all sugars, in carload lots, from San Francisco to Fargo 97 cents per hundred pounds.

Relief is prayed.

SUPREME COURT OF MISSISSIPPI.

LOUISVILLE, NEW ORLEANS &
TEXAS R. CO. *Appt.*,

v.

STATE.

1. **The Mississippi statute of March 2, 1888, § 1, requiring all railroads carrying passengers (other than street railroads) to provide equal but separate accommodations for the white and colored races by providing two or more passenger cars for each passenger train, or by dividing the cars by a partition, is not invalid, as an interference with interstate commerce, as it refers only to the carriage of passengers between points within the State.**
2. The above Act was not repealed by the Act of March, 14, 1888, § 3.
3. Transportation of persons is as much commerce as transportation of property.

(Decided June, 10, 1889.)

APPEAL from a judgment of the Circuit Court of Tunica County. J. H. Wynn, Judge. The defendant company was indicted for omitting and neglecting to provide separate accommodations on its trains for white and colored persons, as required by Act of March 2, 1888. From a judgment of conviction defendant appeals.

The further facts and a copy of the statute appear in the opinion.

Messrs. W. P. & J. B. Harris and Yerger & Percy for appellant.

Atty-Gen. Miller for the State.

Cooper, J., delivered the opinion of the court:

On the 2d of March, 1888, the Legislature of this State passed an Act entitled "An Act to Promote the Comfort of Passengers on Railroad Trains," which is as follows: "Section 1. That all railroads carrying passengers in this State (other than street railroads) shall provide equal but separate accommodations for the white and colored races, by providing two or

more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

"Sec. 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car, or the compartment of a car (when it is divided by a partition), used for the race to which such passenger belongs, and should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railroad company shall be liable for any damages in any court in this State.

"Sec. 3. All railroad companies that shall refuse or neglect, within sixty days after the approval of this Act, to comply with the requirements of section one of this Act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars, and any conductor that shall neglect or refuse to carry out the provisions of this Act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense."

On the first day of August, 1888, the appellant was indicted in the Circuit Court of Tunica County for failure to comply with § 1 of the Act above, and in defense, pleaded that it owned and operated a continuous road running from the City of Memphis, in the State of Tennessee, through and across the State of Mississippi and to the City of New Orleans, in the State of Louisiana, carrying on its passenger trains passengers of both the white and colored races from Memphis and other points in the State of Tennessee destined to New Orleans and other points in the State of Louisiana, and other States in the United States, and so carrying passengers of both races from New Orleans and other points in the State of Louisiana destined to Memphis, Tennessee, and other points in the State of Tennessee, and elsewhere throughout the United States; "that it doth now, and hath at all times, and on all occasions, provided equal but not separate accommodations for passengers of the white and colored

racess; that to provide separate accommodations for the two races would greatly increase the cost of carrying the interstate passengers aforesaid, and greatly hinder, delay, and obstruct the defendant in making its interstate connections with other carriers of passengers, and that it hath not since long prior to the first day of May, 1888, carried any passengers in the County of Tunica, or within the limits of the State of Mississippi, save only upon its trains regularly engaged and operated in the interstate carriage of passengers aforesaid, and in all instances actually carrying such interstate passengers; the right, privilege and immunity of doing which, free from any governmental regulation or control thereof, save by the Congress of the United States, the defendant doth plead and claim under article 1, § 8, of the Constitution of the United States, and this the defendant is ready to verify; wherefore," etc. To this plea a demurrer was interposed by the State, which was sustained by the court, and thereupon, a plea of not guilty being filed, there was trial and conviction, and the defendant appeals.

It is assumed by counsel for appellant that the Act under consideration was intended to regulate, not only the transportation of passengers taken up and set down within the State, but those taken up within the State to be carried without, those taken up without to be brought within, and those taken up without to be carried across the State and into other States. An examination of the record shows that the omission for which the indictment was found was the neglect to provide the "separate" accommodations required by § 1 of the Act, and not for failing to assign to such separate car or compartment interstate travelers upon appellant's train. We are not, therefore, called upon to determine whether the legislation in question would be valid if applied to persons other than those taken up within the State to be set down within it.

Confining our attention to the question necessarily involved, it being also the distinct issue presented by the plea of the company, the inquiry is whether the State is precluded from requiring separate accommodations for purely domestic travelers of different races, because to furnish the same would impose a burden upon the carrier, or because the requirement affects interstate travel upon the trains of the company. Upon this question, this court sustains the relation of an inferior tribunal, and, without regard to the opinions of its members, must conform to the decisions of the Supreme Court of the United States, by which court only can an authoritative decision be made. Without attempting to argue for or against any conclusions reached by that court, we shall endeavor only to deduce from them the principles proper to be applied to the decision of the question involved.

The development of an immense interstate commerce, with its incidental multitude of phases and ramifications, has disclosed to the generation of this day the magnitude of the power delegated to the federal government by that clause of § 8, art. 1, of the Constitution, by which Congress is given power "to regulate commerce with foreign nations and among the States, and with the Indian tribes." It is not

surprising that the recognition of its extent has been of gradual growth in the court called upon to construe it, nor that in judicial utterances there have been inconsistent and conflicting expressions. It does not lie within our province to point out or criticize real or supposed inconsistencies, but taking the more recent decisions of that court, where they have limited or overruled prior cases, to apply the principles, as we understand them to be now announced, to the cause before us. But it does not follow that we are to treat decisions not clearly overruled as not longer binding because remarks are to be found in later cases which somewhat extended, may be thought to be applicable to the facts here involved.

We consider it to be settled, as stated by counsel for appellant, that transportation of persons is as much commerce as transportation of property, and as a corollary, that the interstate transportation of persons is interstate commerce, and that the State may not regulate such commerce, since it is national in character, and requires uniformity of regulation. It may also be conceded that absence of legislation by Congress on the subject is indicative of its will that such commerce shall be free and untrammelled. The question returns, whether the Act under consideration is a regulation of interstate commerce, and upon its solution hinges the controversy. The cases of *Hall v. De Cuir*, 95 U. S. 485 [24 L. ed. 547], and *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244], are relied upon as decisive against the validity of the statute. We do not so understand them. *Hall v. De Cuir*, was a case in which the validity of a statute of the State of Louisiana was involved. The statute in effect, required all persons engaged within that State in the business of common carriers of passengers to admit all persons traveling on the conveyance employed in the business to equal privileges in all parts of the conveyance, without discrimination on account of race or color, and a right to recover actual and exemplary damages was given to any person injured by the refusal of the carrier to comply with the law. *De Cuir*, a passenger from one point to another within the State, was refused access to the cabin reserved for white passengers on a steamer engaged in interstate business on the Mississippi River, and brought suit against the owner of the boat to recover damages. The statute was held unconstitutional by the Supreme Court of the United States, as being a regulation of interstate commerce. As observed by this court in *Stone v. Yazoo & M. V. R. Co.* 62 Miss. 607, the State of Louisiana had no relation to or control over the instruments by which the commerce was conducted. It was an attempt to regulate an interstate carrier, acting under license from the United States and plying the navigable waters of the same. The State had no control over the way, the boat, or the owner. It was an attempt to regulate that which it did not create or license, and which it might neither control nor destroy.

The language of the court, as applied to the facts of this case, is compatible with a liberal exercise by the State of power over its own corporations, which live and move and have their being by virtue of its laws. It is urged, however, that in *Wabash, St. L. & P. R. Co. v.*

Illinois, supra, it has been held equally incompetent for the State to regulate interstate commerce, conducted over artificial ways created by the State, or under its authority, as to regulate commerce on the navigable waters of the United States. In that case the only question presented or decided was whether a state statute, controlling the rates to be charged by the common carrier for transportation of freight within the State, could be applied to a contract for continuous transportation from a point without to a point within the State. It was held that it could not, since the contract was for interstate commerce, and as such not within state regulation or control. In delivering the opinion of the court, Miller, *J.*, reviews the cases of *Munn v. Illinois*, 94 U. S. 114 [24 L. ed. 77]; *Chicago, B. & Q. R. Co. v. Iowa*, 94 U. S. 155 [24 L. ed. 94]; and *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164 [24 L. ed. 97], and declares much that was said in them to have been decided without sufficient consideration. His criticism of those cases was, however, confined to so much thereof as affirmed the right of the State, in the absence of legislation by Congress, to regulate the transportation of property or persons from points within to points without the State.

We are not warranted in extending the effect of the decision so as to include denials of the right of the State to regulate domestic transportation, though conducted by carriers engaged in interstate commerce. Indeed, the express language of the court excludes such conclusion, for the majority opinion declares that "if the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid."

The question here is a different one from either of those involved in these cases. It is more nearly akin to that decided in *Stone v. Farmers Loan & Trust Co.* 116 U. S. 307 [29 L. ed. 636], in which the right to regulate domestic commerce was considered and upheld. It is a matter of common knowledge that there are, at present, many state commissions for the regulation of state commerce, and one by the general government for the regulation of that between the States. Each occupies a field from which the other is excluded, and each is essential, or deemed so to be, to full control of the commerce of the country. By what authority can the transportation of domestic travelers be controlled if not by that of the State? Congress has no jurisdiction over the subject, it being confined to commerce "with foreign nations, and among the States, and with the

Indian tribes." Suppose Congress should deem it advisable to enact a law similar to our statute for the regulation of interstate transportation of passengers, could it be contended that it controlled as to passengers taken up and set down within a State? But how does the statute interfere with interstate commerce, if it be true that it has no application save to those traveling wholly within the State?

It is manifest from the plea that the statute is resisted because it imposes a burden, not on commerce, but upon the carrier. The addition of a car at the state line to each of its trains may impose additional expenses on the company, but how it is a burden or obstruction to commerce it is difficult to perceive. We do not know of any decision in which the supposed burden of commerce, easily obviated by the act of the corporation, has been held to invalidate a statute in the interest of the carrier. The United States have no concern with the policy, merely, of domestic state laws. It may be that they are harsh, or unfair, or unjust. Admit it, and what follows? Surely not that they are invalid, but only that they should be repealed by that power having jurisdiction of the subject. It would seem to follow that since the transportation of passengers and of property stand upon the same footing, regulations of property within state limits being valid, regulations touching passengers of the same character, *i. e.*, domestic travelers, are also valid.

We do not think the Act under consideration was repealed by section 3 of the Act of March 14, 1888.

The judgment is therefore affirmed.

Campbell, J., concurring:

I am of the same opinion. The point of fatal objection to the statute of Illinois, as announced in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244], is that it is not a regulation of railroads within the State, but had direct reference to "through transportation" from State to State, and sought to affect it by compelling the adoption in Illinois, for travel and transportation, of the same relative rates charged over the entire route, and therefore it was held to be a regulation of interstate commerce. Our Act is no such thing. Its operation is local. It has no foreign aspect. It does not look across state lines, or attempt to interfere with or affect the carrier outside of this State. It is not an attempt to regulate interstate commerce, but, dealing with its own creatures, which have a local existence, it makes a police regulation operative in Mississippi on the carrier, and easy to be complied with, by the employment for local travel of the cars prescribed.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF NEW YORK.

Re Petition of Nelson MORRIS *et al.* for a Mandamus to the Delaware, Lackawanna & Western R. Co.

1. "Any undue or unreasonable preference or advantage," within the meaning of § 3 of the Act to Regulate Commerce, includes every form of unjust discrimination, not only in rates,

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but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service.

2. A shipper is not entitled to have his cattle carried in cars of a special construction of his selection, belonging to a third party and superior to ordinary cattle cars, by reason of the fact that the carrier transports some cattle in

other cars, available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper by reason of their peculiar construction, can be used in the chief business of the road,—that of carrying coal,—when not in use for cattle. The refusal to use the cars desired by the shipper does not constitute unjust discrimination.

3. **The discretionary power of the court, under the Interstate Commerce Act, to grant a mandamus to prevent unjust discrimination by a carrier, although some question of fact is undetermined, does not apply where no case of unjust discrimination is shown to exist.**

(Decided October 19, 1889.)

MANDAMUS. On demurrer to "return." This cause came on to be heard upon the pleadings, including the petition, order to show cause, alternative writ of mandamus, return and demurrer.

The following is a copy of the alternative writ:

"The President of the United States of America to the Delaware, Lackawanna and Western Railroad Company, Greeting:

"WHEREAS, It appears to us in our Circuit Court in and for the Northern District of New York, by the sworn petition of Nelson Morris and the American Live Stock Transportation Company, that you have lately refused to receive at Buffalo, in the State of New York, certain cattle cars of petitioners, loaded with live cattle, received by you from connecting lines from the City of Chicago, and to transport said cars and cattle, by your road and its connecting lines, to Philadelphia and other seaboard cities, and that you continue so to refuse; and that you are so receiving and so transporting other cattle cars, loaded with live cattle, for other parties, to wit, Schwartzchild and Sulzberger and others, at a certain rate which petitioners have heretofore paid to you and are now offering to pay to you.

"AND WHEREAS, such refusal on your part appears to be an unlawful discrimination and unjust preference against said petitioners, contrary to the Act of Congress entitled 'An Act to Regulate Commerce,' approved February 4, 1887, and amendments thereto, as in said petition stated.

"Nevertheless you, the said Delaware, Lackawanna & Western Railroad Company, have unlawfully refused, as above stated, to so receive and to so transport petitioners' cars and live cattle, as we are informed by said petitioners:

"Now, THEREFORE, We, being willing that full and speedy justice be done in this behalf to the said petitioners, Nelson Morris and the American Live Stock Transportation Company, do therefore hereby command you that, immediately after the receipt of this writ, you, the Delaware, Lackawanna & Western Railroad Company, do receive at

"Buffalo, in the State of New York, the said petitioners' Improved Palace Stock Cars, loaded with live stock at the Union Stock Yards at the City of Chicago, that have been transported to Buffalo, and to transport said cars, loaded with live stock, over your line of road and its connecting lines from Buffalo to the Cities of Philadelphia, Jersey City or Boston, according to the destination of each train of said cars, upon the same and as favorable terms and conditions as are given by you for like traffic, under similar conditions, to the said firm of Schwartzchild & Sulzberger or to the Lackawanna Live Stock Express Company, or to any other shipper; and that you discontinue and cease from giving any undue or unlawful preference or advantage to any other person or shipper in respect to similar traffic in receiving and transporting cattle cars and live cattle;

"Or, that you show cause to the contrary thereof before our said circuit court, at a special term thereof, to be held at the United States Court House in the City of Utica at 10 A. M. on the 30th day of July, A. D. 1889, lest complaint shall again come to us by your default; and in what manner you shall have executed this our writ, make known to our said circuit court to be held at the time and place aforesaid.

"WITNESS, the Honorable Melville M. Fuller, Chief Justice of the Supreme Court of the United States of America, at the City of Utica, this 11th day of July, in the year of our Lord one thousand eight hundred and eighty-nine.

"W. S. DOOLITTLE,
"Clerk. [L. s.]"

The substance of the return sufficiently appears in the opinion.

Upon the third of August, 1889, counsel for the respective parties met in court, pursuant to agreement, instead of on the 30th of July; and upon the coming in of the return, the following motion for the peremptory writ, in the nature of a demurrer, was duly filed in open court:

"And now come the petitioners, by their attorney, J. C. Clayton, in open court, and upon the coming in now of the respondent's return to the alternative writ of mandamus herein, do now move this Honorable Court for the immediate granting of a peremptory writ of mandamus, according to the prayer of the petition, and the tenor of the said alternative writ; this motion being of the nature of a demurrer to the return, for its manifest insufficiencies.

"J. C. CLAYTON,
"Attorney for Petitioners."

The petitioners charge sundry violations of the Interstate Act of February 4, 1887, and the Amendments thereto of March 2, 1889; and bring this action as well under their common-law rights, as under the special provisions of section 10 of the Statute of March 2, 1889, which see in Appendix II.

The petitioners own 500 improved patented cattle cars, so constructed as to enable live cattle to be fed, watered and rested *in transitu*, without stoppage, or breaking of bulk, in the journey between Chicago and New York, or other seaboard cities. These cars contain appliances

for giving food and water to the cattle, and are also provided with springs and air brakes, thus enabling the cattle to be transported in those cars with great comfort to the cattle, and great advantage to the shipper. By means of these improved cattle cars, live cattle are transported to the seaboard cities more speedily, and with less cruelty, and the cattle arrive at their destination (ships on the Atlantic coast) with less shrinkage, and in better temper and physical condition, than if transported in the ordinary cattle cars.

The petition avers, and the return admits, that by reason of the defective structure of the ordinary cattle cars in general use and owned by railroads, the cattle are badly jammed, bruised and injured in being loaded and transported, and such injuries are increased and multiplied with each unloading and reloading of the cattle for food, water and rest, as is required by the special Act of Congress to be done at least once in every twenty-eight hours, unless they are transported in cars provided with special appliances for feeding, watering and resting them *in transitu*; that when cattle are carried in the ordinary cars, they suffer greatly for the want of food and water, become overheated, feverish and liable to disease for the want thereof while in transit; and that by reason of such defects in ordinary cars, much more time is consumed in transporting live stock to such eastern cities than by the use of petitioners' cars; and that by reason of the use of patented cars of petitioners, large and important advantages manifestly accrue to the shippers, in that the cattle are in much better condition, weigh much more, are less liable to disease, and are in better condition for exportation, upon their arrival at the seaboard cities, after their long journey from Chicago.

Nelson Morris, one of the petitioners, has long been in the habit, as the principal stockholder of the co-petitioning company, and in his extensive and regular business as shipper of live cattle for export, of inclosing or packing live cattle in petitioners' cars, and shipping them from the Union Stock Yards at Chicago, by the railroads of common carriers, and their connecting lines, to Philadelphia, New York and other seaboard cities, for export to Europe. Said Morris has frequently shipped live cattle, so inclosed or packed in petitioners' cars, from said Union Stock Yards at Chicago, over the tracks of the New York, Chicago & St. Louis Railroad Company, for the seaboard; which cars have been received at Buffalo by the respondent, and by it, and its connecting lines, been transported to Hoboken, and other seaboard cities; and that for such service respondent has received its customary freight charges, and has paid to said Morris the customary mileage, or car-service allowance of $\frac{1}{4}$ of a cent per mile going and returning.

In April, 1889, an agreement—in the nature of an unlawful combination, as petitioners charge,—was made at a certain meeting between the executive officers of thirteen railway companies, to the effect that they would “discontinue the use of private stock cars except for horses;” that (see return) “in view of, and pursuant to the action of such meeting, and the agreement so reached, the defendant instructed its agents not to receive the cars of the peti-

tioners for transportation, and that such instructions and the refusal made in consequence thereof are the identical acts in such petition referred to, or intended so to be.”

On June 23, 1889, one McCarty, agent of the petitioner Morris, accompanied twelve of the petitioners' improved cattle cars, containing 403 live cattle, over the New York, Chicago & St. Louis Railroad, from the stock yard at Chicago (consigned to the steamship *Indiana*, at Philadelphia), to Buffalo, New York; on June 24, said cars were delivered to the agent of respondent, at its stock yards in Buffalo; on the same day the following written tender (not denied) was made by said Morris through his agent McCarty:

“BUFFALO, N. Y., June 24, 1889.

“L. A. MATTICE, Esq.,

“Agent Delaware, Lackawanna & Western

“R. R. Co.,

“Buffalo, New York.

“Dear Sir:

“I have twelve (12) of my improved palace “stock cars, loaded with my cattle, upon your “track at the yards, consigned to myself, Care “S. S. *Indiana*, Philadelphia. Cars are “marked ‘American Live Stock Transportation “Company’, and numbered 245, 406, 557, 561, “523, 344, 554, 324, 358, 581, 320, 596. Please “take charge of these cars *immediately* and for- “ward them to their destination.

“Yours truly,

“NELSON MORRIS.”

After the arrival of said cars in Buffalo, about 9 A. M., June 24, the person there in charge of the defendant's office was told of the arrival of said cars. Thereupon they were taken to the stock yard of respondent. The agent Mattice was then requested by McCarty, to have said cars go through to Philadelphia, at once. He said, “No, I can't do it. My orders are not to run them through on our road, and you know it.” Mattice, subsequently, on the same day, read the said written tender which was delivered to him by McCarty. The said cattle were kept in petitioners' cars for twelve hours after their delivery to respondent, on respondent's side track at Buffalo. Respondent's servants then unloaded said cattle from said cars and put them in respondent's own stock cars, and the next afternoon, about five o'clock (a delay of thirty-two hours), loaded them into thirteen of respondent's own cars, and carried them over its own and connecting lines to Philadelphia, refusing to carry them in petitioners' cars which were left standing on respondent's side tracks at Buffalo. Respondent subsequently returned petitioners' said cars to the New York, Chicago & St. Louis Railroad Company.

Respondent admits that a corporation known as the Lackawanna Live Stock Express Company has constructed 200 improved cattle cars with feed racks and ventilating roofs and certain other improvements (not, however, containing appliances for watering the cattle, *in transitu*).

Also, that under a subsisting contract dated June 27, 1888, between respondent and the Lackawanna Live Stock Express Company, respondent agreed to transport such cars over its road, and pay mileage therefor, as if such cars

were furnished by a connecting railroad company.

It is admitted that the firm of Schwartzchild & Sulzberger, with other stockholders, organized said Lackawanna Live Stock Express Company, for the purpose of transporting live stock between Chicago and other western points, and the seaboard; and that Schwartzchild & Sulzberger are dealers in live stock, and have a place of business at the Union Stock Yards in Chicago, and are engaged in shipping the same from Chicago, over the railroad of respondent from Buffalo to New York, *via* Hoboken, without change of cars, and that such cars belong to the Lackawanna Live Stock Express Company.

It is also admitted, that the tracks of the New York, Chicago & St. Louis Railroad Company connect with the Union Stock Yards of Chicago, and that such last mentioned company receives at such stock yards cars and trains loaded with live stock, and transports them to Buffalo, where certain thereof are delivered to this defendant, by which they are transported to Hoboken or to some point upon its line where connections are made with the lines of some other carrier. It is also admitted that $\frac{3}{4}$ of a cent per mile is a customary mileage rate for the use of cars belonging to others.

Mr. Joseph C. Clayton, for petitioners:

In the case of the *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co.* 2 Inters. Com. Rep. 102, it was held by Cooley, *Commissioner*, that—The Bridge being a common carrier engaged in interstate commerce, the railroad company had no right to refuse freight which had passed over the bridge. Schoonmaker, *Commissioner*, filed a dissenting opinion, in which he held that the bridge company was not a common carrier. Upon appeal to the United States Circuit Court of Kentucky, *Judge Jackson* overruled *Commissioner Cooley*, upon the ground that the bridge company was not a common carrier, but recognized that the railroad company would have been obliged to receive and transport freight which had passed over the bridge, if the bridge company had been a common carrier.

In *Keith v. Kentucky Cent. R. Co.* 1 Inters. Com. Rep. 601, 1 I. C. C. 189, it was held that "a common carrier of live stock is subject to the legal duty to provide reasonable and proper facilities for receiving and discharging from its cars such live stock as is offered for transportation, free of all except the customary transportation charges."

Burton Stock Car Co. v. Chicago, B. & Q. R. Co. 1 Inters. Com. Rep. 329, 1 I. C. C. 132, was a case in which the complainant was the owner of certain patented stock cars, but complainant was not a carrier and was not a shipper, and, being neither carrier nor shipper, the court held that it was not entitled to receive the customary mileage. But this case has no direct bearing upon the issue here, for it is stated in the report that "there is no charge that the defendant companies, or any of them, refuse to receive and haul the complainant's cars (which is the gravamen of this case), but the complaint is directed solely to the refusal to pay mileage and to the extra charge made shippers as above stated."

See the case of the *Central R. & Bkg. Co. of*

Georgia v. Logan, 2 R. R. & Corp. L. J. 160. In this case, based upon the Georgia statutes, it was held:

"These two sections give a right of action 'for the nondelivery of goods to a connecting road by a road intrusted with their carriage, which goods are consigned to a point or points beyond its limits or terminus; and a like action for the refusal of a connecting line to receive the goods, and in discriminating in favor of one line and against another.'"

This decision, of course, was based upon the Georgia statutes, which are substantially identical with the Interstate Commerce Act.

In *Indianapolis, Decatur & Springfield R. Co. v. Erwin*, 1 R. R. & Corp. L. J. 30, it was held by the Supreme Court of Illinois that:

"A contract by a railway company with a single shipper whereby he is allowed, upon shipment of his goods at the regular rates, to receive back a special rebate extended to no other shipper, or to not more than one other shipper, is unlawful and void, being contrary to sections 2 and 3 of the Illinois Act of 1873 against extortionate and injurious discrimination."

Chicago, B. & Q. R. Co. v. Burlington, C. R. & N. R. Co. 34 Fed. Rep. 481, is an instructive case, directly in point. In that case, *Love, J.*, held that:

"The duty imposed upon railroad companies in Iowa, by the laws of that State and by the Interstate Commerce Act, of receiving from connecting roads freight and passengers, is one which the federal courts, sitting in that State, will enforce by mandatory injunction, where the injury resulting from this nonperformance is continuing."

A mandatory injunction was granted against the defendant and its chief officers as prayed for. This case was decided March 3, 1888, nearly a year before the passage of the Act of March 2, 1889, especially conferred power upon the circuit and district courts to issue writs of mandamus for the same purpose, and clearly shows that the respondent has violated petitioners' common-law rights.

In *Beers v. Wabash, St. L. & P. R. Co.* 34 Fed. Rep. 247, it was said by *Judge Gresham*:

"Although the property of the Wabash Company is in the custody of the court, it is operated by the receiver as a common carrier. His rights and duties are those of a carrier. He is bound to afford to all railroad companies whose lines connect with his equal facilities for the exchange of traffic."

In *Hays v. Pa. Co.* 12 Fed. Rep. 309, it was held by *Judge Baxter* that:

"The defendant is a common carrier by rail. This road, though owned by the corporation, was, nevertheless, constructed for public use and is, in a qualified sense, a public highway. Hence, everybody constituting a part of the public for whose benefit it was constructed, is entitled to an equitable and impartial participation in the use of the facilities it is capable of affording. Its use by the corporation is in trust, and as well for the public as for the shareholders; but its first and primary obligation is to the public."

In *Mich. Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318 (21 L. ed. 297), it was decided that a connecting carrier should

carry safely and deliver to the next carrier in the route beyond, and that public policy would not allow the carrier to escape responsibility by storing the goods at the end of his route without delivery, or an attempt to deliver to the connecting carrier. Respondent, after receiving petitioners' cars from one connecting carrier, refused to carry and deliver them to the next connecting carrier in the route.

In *Pratt v. Grand Trunk R. Co.* 95 U. S. 43 (24 L. ed. 336), it was held that the liability of a carrier commences when the goods are delivered to him or his authorized agent for transportation.

See also *Commercial Union Teleg. Co. v. N. E. Teleph. & Teleg. Co.* 5 L. R. A. —, 6 R. R. & Corp. L. J. 147; *Southern Exp. Co. v. Memphis, etc. R. Co.* 8 Fed. Rep. 799; *Samuels v. Louisville & N. R. Co.* 31 Fed. Rep. 57; *McCoy v. C. I., St. L. & C. R. Co.* 13 Fed. Rep. 3; *Shepard v. Milwaukee Gas Light Co.* 6 Wis. 539; *People v. Manhattan Gas Light Co.* 45 Barb. 137.

Our insistence is:

1. Nelson Morris, as a shipper, is entitled to have his freight—live cattle—transported in petitioners' cars, without stoppage, break of bulk, or change of cars, over respondent's road and its connecting lines, at the customary freight charges for live stock.

2. He is entitled to the reasonable and customary mileage and compensation for the use of the cars furnished by him.

3. The *quantum meruit*, or amount of such mileage is $\frac{1}{2}$ of a cent going and coming, being the amount paid to Lackawanna Live Stock Express Company for the use of their cattle cars, and customarily paid by all roads for the use of cars belonging to others.

4. The "agreement" between the railroads not to use private stock cars, is unlawful.

5. The peremptory writ should be granted instant.

Messrs. Rogers, Locke and Milburn, Attys. and Mr. John G. Milburn, of counsel, for defendants:

A ground for overruling the demurrer to the petition is that the petitioner has not established a clear and specific legal right to the relief he seeks. That this is essential is elementary.

High, Extr. Leg. Rem. § 9; *U. S. v. Bank of Alexandria*, 1 Cranch, C. C. 7.

The defendant has violated no duty which it owes the petitioners; in other words, a railroad company is not bound to take the cars of a private corporation and haul them over its railroad. Its function is to provide itself with adequate equipment, and this is a duty imposed upon it by law. If its rolling stock is inadequate, as compared with other rolling stock in existence, the law has provided remedies for the correction of that evil. But it has never yet been held that private parties can provide themselves with rolling stock for use in their private business and compel a railroad company to haul that rolling stock over its railroad. On the contrary, the very reverse has been held.

Burton Stock Car Co. v. Chicago, B. & Q. R. Co. 1 Inters. Com. Rep. 329, 1 I. C. C. 132.

Instructive on this point also are the *Express Cases*, in which the United States Supreme Court held that railroad companies are not re-

quired to transport the traffic of independent express companies over their lines.

Express Cases, 117 U. S. 1 (29 L. ed. 791).

In view of these decisions,—and of the fact that it has never been held by any court that it was the duty of railroad companies to transport the rolling stock of private parties, and that it has been held by many courts that it is their duty to provide adequate equipment for the freight seeking transportation over their railroads,—it is a bold claim to make that the right of the petitioners in this matter is clear and specific.

Wallace, J., delivered the opinion of the court:

The jurisdiction invoked by the relators is founded on that section of the "Act to Regulate Interstate Commerce," as amended March 2, 1889, which authorizes the court to issue a writ of mandamus upon the relation of any person alleging the violation by a common carrier of any of the provisions of the Act which prevents the relator from having interstate traffic moved by the carrier "at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper."* The unjust discrimination alleged in the petition upon which the alternative writ was granted consists in the refusal of the respondent to transport cattle for Morris, a shipper of cattle, in cars of a special construction belonging to the American Live Stock Transportation Company, superior by reason of their improvements to ordinary cattle cars, whereas it transports cattle for other shippers in cars having some, but not all, of such improvements belonging to the Lackawanna Live Stock Express Company. The American Live Stock Transportation Company, the correlator with Morris, is a corporation organized for the purpose of transporting live stock and other merchandise, and its presence would seem to be superfluous unless it is here to obtain the benefit of an adjudication that the respondent is bound to accept its cars, whenever tendered with cattle for transportation, and allow to it the mileage of $\frac{1}{2}$ of a cent per mile for the use of the cars which the relators aver is allowed by the respondent to the Lackawanna Live Stock Express Company. The return by the respondent to the alternative writ, besides denying in general terms the charge of unjust discrimination, sets forth that it has entered into a contract with the Lackawanna Live Stock Express Company for the term of five years by which that company agrees to furnish at least 200 of its improved stock cars to run on the railway of the respondent; that such cars are not used exclusively by any one shipper of live stock, but are available to all shippers; that the cars, unlike those of the American Live Stock Transportation Company, are so constructed as to permit of the carriage of coal, which is the principal business of the respondent, when not loaded with live stock; and that in consideration of the special contract the defendant agreed to use the cars upon its road and pay mileage therefor as if such cars were furnished by a connecting company; and it also alleges that

*Appendix II., p. xlvii, right column (*new section*).

after entering into such agreement the respondent and several other trunk line railroad companies entered into an agreement to discontinue hauling private stock cars, except for horses, for reasons which are particularly set forth. The relators have demurred to this return, and move for a peremptory mandamus, insisting that the return does not allege facts which justify the refusal of the respondent to transport the cattle of Morris in the cars of the American Live Stock Transportation Company.

The jurisdiction of this court, conferred by the Interstate Commerce Act, to compel by mandamus the observance by common carriers of the provisions of the Act, is restricted exclusively to the prevention of unjust discrimination by such carriers. The question for consideration, consequently, is whether, if the facts alleged in the return are true, the respondent has been guilty of any unjust discrimination between Morris and the shippers for whom it carries cattle in the cars of the Lackawanna Live Stock Express Company.

Unjust discrimination is prohibited by sections 2 and 3 of the Interstate Commerce Act. What constitutes unjust discrimination may be ascertained from the language of these sections as well as of the section which authorizes the circuit court to redress it by mandamus. By section 2 it consists in charging one person a different compensation than is charged another for doing "the like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." By section 3 it consists in giving "any undue or unreasonable preference or advantage" to any particular shipper or subjecting him to any undue or unreasonable prejudice or disadvantage "in any respect whatever." The former relates to unjust discrimination in rates. The latter is comprehensive enough, standing alone, to include every form of unjust discrimination, not only in rates but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service; and such is the judicial construction in England of the term "undue or unreasonable preference or disadvantage" as used in the English "Railway and Canal Traffic Act"* (17 & 18 Vict. c. 31, § 2). It is provided in section 2 that all the common carriers subject to the provisions of the Act "shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." This provision refers only to facilities between connecting lines at terminal points for the interchange of traffic and passengers; and the term "facilities" does not embrace car equipment for the transportation of freight over the carrier's own road. *Scofield v. Lake Shore & M. S. R. Co.* ante, 67, 76, 2 I. C. C. 90, 116.

These sections, by declaring the specified

acts of discrimination unlawful, qualify materially in some respects the common-law rights and obligations of the carriers mentioned. By the common law, although public carriers are not permitted to make unreasonable discrimination in performing the services which they undertake between those whom it is their duty to serve, the discrimination which is unreasonable is such only as inures to the undue advantage of one person, or class of persons, in consequence of some injustice inflicted upon another. The carrier is not obliged to treat all who patronize him with absolute equality. Thus it is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them. *Menacho v. Ward*, 27 Fed. Rep. 530. That privilege can no longer be exercised, under the Interstate Commerce Act, by the carriers subjected to its provisions, in the transportation of a like kind of traffic under substantially similar circumstances and conditions. Again it is no part of the common-law obligation of railway companies to furnish the same facilities or instrumentalities of transportation to all alike, and while it is unquestionably their duty to furnish suitable and adequate facilities for all reasonable necessities of the business they engage in, they may nevertheless choose their own appropriate means of carriage. This was the doctrine of the *Express Cases*, 117 U. S. 1 [29 L. ed. 791], in which it was held by the supreme court that railroad companies are not required by usage, or by the common law, to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled. But the Interstate Commerce Act requires them to treat all impartially, and if one shipper is subjected to any undue or unreasonable prejudice or disadvantage because a railway company permits another shipper to use his own cars for carrying traffic over its road, their right to choose their own appropriate means of carriage is to that extent curtailed.

It is unnecessary to decide in the present case whether the respondent would be guilty of unjust discrimination towards the American Live Stock Transportation Company, or indirectly toward Morris, if it should refuse to enter into such an arrangement with that company as it has made with the Lackawanna Live Stock Express Company. The respondent does not prevent either relator from transporting cattle over its road in the cars furnished to it by the Lackawanna Live Stock Express Company; and, if the facts set forth in the return are true, the cars belonging to the Lackawanna Live Stock Express Company differ so in construction from those of the American Live Stock Transportation Company, as well as from those of ordinary private stock cars, that the respondent can use them more profitably and conveniently than the others because they can be used for its ordinary coal traffic when not in use for carrying cattle. So also, if the facts in the return are true, the contract made with the Lackawanna Express Company secures to the respondent the advantage of having a definite number of cars always at its disposal for use in its general business, an advantage which it could not have by using the cars of the Ameri-

*1 Inters. Com. Rep., Appendix III. p. 844.
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can Live Stock Express Company, or the cars of any other shipper, in the absence of such a contract. Thus there are reciprocal rights and obligations arising from the contract between the respondent and the Lackawanna Live Stock Express Company, and special circumstances in their relations affecting the question of compensation, which are not present in the conditions of the service which the relators demand. In short there is no unjust discrimination towards the relators as to rates because the respondent does not refuse to carry traffic for them under substantially similar circumstances and conditions to those of its service for the Lackawanna Live Stock Express Company; and for the same reason it does not give the latter any unreasonable preference or advantage over the relators, but only such a preference or advantage as it may fairly give, because of the difference in cost, expense and the exceptional character of the service. The case of *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329, 1 I. C. C. 132, is instructive upon this point. See also *Nicholson v. Great Western R. Co.* 4 C. B. N. S. 366; *Cooper v. London & Southwestern R. Co.* 4 C. B. N. S. 738; *Oxlade v. Northeast R. Co.* 1 C. B. N. S. 454.

The section which authorizes the court to

grant a mandamus confers the discretionary power, when any question of fact as to the proper compensation of the carrier is raised by the pleadings, to issue the writ "notwithstanding such question of fact is undetermined upon such terms as to security, payment of money into court, or otherwise, as the court may think proper, pending the determination of the question of fact." Relying upon this language of the section the relators insist that the peremptory mandamus should be allowed and the question of proper compensation for the respondent be reserved. This contention ignores the consideration that until a case of unjust discrimination is shown to exist the court is not authorized to award any relief whatever. If it were shown that the respondent refuses to receive traffic in the cars of the American Live Stock Transportation Company while receiving it for another in substantially the same way then it might be competent to decide that the relators are prevented from having their traffic moved upon like favorable terms or conditions, and the question of compensation might be determined at a later stage in the case. Until this shown however they do not make out a case for the intervention of the court.

For these reasons the return is held to be sufficient.

INTERSTATE COMMERCE COMMISSION.

THE AMERICAN MINING AND SMELTING COMPANY, THE ARKANSAS VALLEY SMELTING COMPANY, THE HARRISON REDUCTION WORKS, AND THE MANVILLE SMELTING COMPANY

v.

THE DENVER & RIO GRANDE RAILROAD COMPANY.

(No. 241.)

PETITION filed October 1, 1889.

Your petitioners complain against the defendant upon the following facts:

1st. That the said railroad company is a duly incorporated railway company, owning and operating a line of railroad from the City of Denver, in the State of Colorado, to the west boundary line of said State, a distance of 461 miles. That the Town of Salida is a station on said road, and that said railroad company also owns and operates, as a part of said line of railroad, a railroad from Salida to the City of Leadville, a distance of 60 miles; that said lines of railroad are wholly within the State of Colorado.

2nd. That said Denver & Rio Grande Railroad, at its terminus at the west boundary line of the State of Colorado, connects with The Denver & Rio Grande Western Railroad, running from said State line to the City of Salt Lake, a distance of 274 miles, and wholly within the Territory of Utah.

3rd. That petitioners are corporations and associations duly organized and created, and are severally engaged in the business of the smelting and reduction of ores of the precious metals at the said City of Leadville, Colorado, and their address is said City of Leadville, and have

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been so engaged in said business for several years last past, continuously. That the output of bullion by the petitioners is, and has been for several years last past, in amount as follows: By the Arkansas Valley Smelting Company, an average of about 1,100 tons per month, by the American Mining and Smelting Company, an average of about 900 tons per month, by the Harrison Reduction Works, an average of about 600 tons per month, and by the Manville Smelting Company, an average of about 400 tons per month, which bullion has been, and is now being by your petitioners, shipped to Kansas City and other points on the Missouri River, over said Denver & Rio Grande Railroad, and over different roads connecting with said road at Denver and running thence eastwardly and forming a through line, upon through rates of shipment from Leadville to such points of destination.

4th. That said Denver & Rio Grande Railroad Company make a through rate of \$16.00 per ton on all bullion shipped from Leadville to any point on the Missouri River, reached by any of said connecting lines running out of Denver to the Missouri River, and which rate is demanded and received from petitioners, and whichever of said connecting lines transports such bullion upon such through shipment, it receives of the through rate of \$16.00 per ton the sum of \$8.00 per ton for such transportation.

That at the City of Salt Lake, in the Territory of Utah, various companies, corporations and individuals are also engaged in the smelting and reduction of ores of the precious metals, and have been so engaged for several years last past, continuously and that the output of bullion from said smelters is about 1,000 tons per month, which said bullion is, as peti-

tioners are informed and believe, nearly all shipped to Kansas City, and other points on the Missouri River, and from thence to points beyond, over the said Denver & Rio Grande Western Railroad and the said Denver & Rio Grande Railroad via the said Town of Salida to Denver and eastwardly beyond.

That said Denver & Rio Grande Railroad Company makes a through rate of \$13.00 per ton on all bullion shipped from Salt Lake City to any point on the Missouri River reached by its railroad through its connections at Denver, and that whichever of the lines from Denver to the river transports such bullion, upon such through shipment, it receives of the through rate of \$13.00 per ton the sum of \$8.00 per ton for such transportation.

5th. That on such through shipment from Leadville the Denver & Rio Grande Railroad Company transports such bullion over 277 miles of its railroad, for which services it demands and receives the sum of \$8.00 per ton for such transportation, and on such through shipment from Salt Lake, such bullion is transported over 461 miles of the road of said company and over 274 miles of the Denver & Rio Grande Western Railroad, making a total transportation of 732 miles, for which service the sum of but \$5.00 per ton is demanded and received. That petitioners have no knowledge or information how the said sum of \$5.00 is divided between said Denver & Rio Grande Railroad Company and the said Denver & Rio Grande Western Railroad Company. That such bullion whether shipped from Leadville or from Salt Lake goes over that portion of the Denver & Rio Grande Railroad between Salida and Denver. That the bullion shipped at Leadville goes over the road from Leadville to Salida direct on a down grade for the entire distance. That the bullion shipped at Salt Lake is taken over one range of mountains on the line of the Denver & Rio Grande Western Railroad Company and over another range of mountains on the line of the Denver & Rio Grande Railroad before reaching Salida, and nearly the entire lines of said railroad from Salt Lake to Salida are successions of steep grades and heavy curves and are in locations requiring unusually heavy outlays of money to keep the same in running order. That Salida is the point from which all the bullion shipped from Salt Lake and Leadville, by through shipment over the Denver & Rio Grande Railroad is transported over the same portion of the Denver & Rio Grande Railroad to Denver. That the distance from the western terminus of the Denver & Rio Grande Railroad at or near the western boundary line of the State of Colorado to Salida is 244 miles, and the distance from Leadville to said Town of Salida is but 60 miles. Petitioners state, upon information and belief, that the cost of constructing, keeping in repair and operating that portion of said road between the state line and Salida, was and is very much greater per mile than was or is the cost of construction, keeping in repair and operating that portion of said road between Leadville and Salida.

WHEREFORE, petitioners charge the Denver & Rio Grande Railroad Company with violations of the Interstate Commerce Act, as follows:

1st. That the charges made by the said railroad company for the transportation of bullion from Leadville to points on the Missouri River, and beyond are unjust and unreasonable.

2nd. With unjust discrimination, in demanding and receiving of and from petitioners, as shippers of bullion from Leadville to points on the Missouri River and beyond, a greater compensation than is demanded or received of or from shippers of bullion from Salt Lake City, in the Territory of Utah, for a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

3rd. In giving to the shippers of bullion from Salt Lake City an undue and unreasonable preference and advantage over the shippers of bullion from Leadville, to the undue and unreasonable prejudice and disadvantage of petitioners.

Your petitioners therefore pray that your Honorable body will take such immediate action in the premises as shall seem just and equitable, and as is provided for by the Interstate Commerce Act, etc.

The American Mining & Smelting Co.
The Arkansas Valley Smelting Co.
Harrison Reduction Works.
The Manville Smelting Co.

W. S. KING & CO.

THE NEW YORK, NEW HAVEN & HARTFORD, AND THE NEW YORK & NEW ENGLAND RAILROAD COS.

(No. 243. Filed Oct. 10, 1889.)

THE petition of the above-named complainant respectfully shows:

I. That we are flour dealers at 115 State Street, Boston.

II. That the defendants above named are common carriers, and under a common control, management, or arrangement, for continuous carriage or shipment, are engaged in the transportation of passengers and property wholly by railroad (in this case) between New York City, in the State of New York, and Boston, in the State of Mass., and as such common carriers are subject to the Act to Regulate Commerce.

III. That the New York, New Haven & Hartford and the New York and New England Railroads on Sept. 11th, 1889, charged us freight on flour from Pier 50 New York City, their regular all rail terminal, to Readville, Mass., on the line of the New York & New England Railroad, and a shorter haul than to Boston, eighteen (18) cts. per hundred: Whereas their published tariff rate all rail from Pier 50 New York City over the same roads to Boston is but nine (9) cts. per hundred being the rate we have paid for several years and are now paying to Boston. We formerly shipped to Readville over the same roads at Boston rate and, it being a shorter haul than to Boston over the same line, we consider it an unjust discrimination, etc.

THE ANDREWS SOAP CO.

v.

THE PITTSBURGH, CINCINNATI &
ST. LOUIS RAILROAD *et al.*

(No. 242.)

A BSTRACT of petition filed October 5, 1889. Complainant is a corporation doing business in Cincinnati, Ohio, engaged in the manufacture of toilet soaps.

Defendants, common carriers and under a common control, are unjustly discriminating against complainant in receiving and shipping as common soap (fourth class) toilet soaps known as white soaps.

The American Castile is unjustly placed in second class with soaps of much higher value. American Castile in cost of production, selling price and package is the same as an ordinary good laundry soap, which is placed in fourth class, and it should be placed in same class as laundry soap.

Relief is prayed.

THE HARVARD COMPANY

v.

THE PENNSYLVANIA COMPANY *et al.*
(Eleven other Co.'s.)

(No. 244.)

THE petition of the above named complainant, filed Oct. 12, 1889, respectfully shows:

First. That the complainant is a corporation duly organized and doing business under the laws of the State of Ohio, with its principal office and place of business at the City of Canton in the County of Stark and State of Ohio, and is extensively engaged in the manufacture, sale and shipment of surgical chairs from one State of the United States, by continuous carriage, to other States of the United States, over the various lines of railroad severally owned and operated by said defendants.

Second. That the defendants above named are common carriers, engaged in the transportation of passengers and property wholly by railroad, by continuous carriage and shipment, from one State of the United States to other States of the United States; and that the defendant, The Grand Trunk Railway Company, is also engaged in the transportation and carriage of passengers and property partly by railroad and partly by water, from one State of the United States to an adjacent foreign country, and from one place in the United States through a foreign country to places in other States of the United States.

The Valley Railway Company conducts its said interstate commerce freight and passenger business under a traffic arrangement with the above named Lake Shore and Michigan Southern Railway Company; and the said defendants severally as such common carriers, are subject to the Act to Regulate Commerce; and the subject matter of this complaint involves and charges substantially the same violations of law by the several defendants.

Third. Said chairs are made mostly of iron, are heavy, and are compactly packed, wrapped

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and crated for shipment over the lines of railroad of said defendants, and occupy when so prepared for shipment, less than three feet by three feet floor space, standing less than three feet high and weighing 225 pounds. Most of said freight is shipped primarily over the lines of railroad severally operated by said The Pennsylvania Company and the Valley Railway Company, and thence over the lines of other railroads above named.

Said The Pennsylvania Company and said The Valley Railway Company severally on or about the first day of January of each year, require of this complainant that it execute to them written releases, releasing them severally and all lines of railroad over which this complainant's chairs via their roads are transported, from any and all liability on account of breaking, chafing or damage thereto, and notify this complainant that unless such release is signed, they, the said Railroad Companies will not accept this complainant's freight. And this complainant did, on or about the first day of January each year since 1885, execute to said The Pennsylvania Company and The Valley Railway Company, severally, written releases, the last ones of which are still in force, releasing the several railroad companies over whose lines said freight is transported, from any and all liability on account of rubbing, breaking or chafing said chairs. And this complainant avers that the said chairs are shipped as aforesaid, at owner's risk.

Yet said defendants classify the said chairs when so shipped, as double-first-class freight, which is unjust to this complainant and its customers, and unreasonable; and this complainant avers that according to a just and reasonable classification said chairs ought not to be rated, as they are packed for shipment, above second-class freight.

Wherefore this complainant prays that the defendants may be required to answer the charges herein, etc.

JAMES & MAYER BUGGY CO.

v.

C. N. O. & T. P. R. R. CO. *et al.*

(No. 245.)

A BSTRACT of petition, filed Oct. 18, 1889. Complainants manufacture buggies, carriages, etc., in the City of Cincinnati, Ohio.

The first-class rate of freight as published in the tariff of the C. N. O. & T. P. R. R. Co., from Cincinnati, Ohio, to Atlanta, Ga., the distance being about 477 miles (more or less), is \$1.01 per hundred pounds.

The first-class rate of freight from Cincinnati, Ohio, to Augusta, Ga., over the same lines of railroad, the distance being about 648 miles (more or less), is also \$1.01 per hundred lbs.

The first-class rate of freight from Cincinnati, Ohio, to Social Circle, Ga., over the same lines, the distance being about 525 miles (more or less), is \$1.31 per hundred lbs.

That the complainant above named, shipping vehicles to Atlanta, Ga., ought not to be compelled to pay the same rate of freight, as when shipping to Augusta, Ga., a point 171 miles further distant on the same lines.

The complainant above named in shipping vehicles to Social Circle, Ga., ought not to be compelled to pay a rate of freight which is 30 cts. per hundred lbs. higher than when shipping to Augusta, Ga., a point 120 miles (more or less), further distant along the same lines.

The above named defendants are violating Section 4 of the Act to Regulate Commerce, in charging a greater sum for a shorter distance, than for a longer distance in the same direction over the same lines.

Relief is prayed.

WILLIAM L. RAWSON

v.

NEWPORT NEWS & MISSISSIPPI VALLEY CO., B. & O. R. Co., and L. Boyer's Sons.

(No. 161.)

Argued and submitted June 20, 1889.—Decided November 13, 1889.

1. **Where a tariff complained of was abandoned** by the carriers for a long period of time before the complaint was made and shortly after the tariff was put in force, the **Commission will not make an order** requiring the carriers to cease and desist from enforcing such tariff, because such an order would be vain and useless.
2. **The Amendment of March 2, 1889,** expressly provides that it shall have **no application to pending proceedings,** and as this proceeding was pending at that time, no reparation can be awarded, and the remedy of the petitioner is in the courts.

PROCEEDING on complaint alleging violations of sections 3 and 6 of the Act to Regulate Commerce. *Dismissed.*

For the issues see complaint *ante*, p. 311, and answer *ante*, p. 448.

Messrs. Garland & May for petitioner.

Mr. W. D. Guthrie for Newport News & Mississippi Valley Co.

Mr. H. L. Bond, Jr., for Baltimore & Ohio R. Co. and L. Boyer's Sons.

REPORT AND OPINION OF THE COMMISSION.

Bragg, C.:

After the original complaint had been filed in this proceeding and answered by the defendant, the Newport News & Mississippi Valley Company, the petitioner by leave of the Commission was permitted to file an amended complaint, in substance the same as the original, except that additional new parties were made.

The complaint alleges violations of the 3d and 6th sections of the Act to Regulate Commerce, and charges, in substance, the following facts:

For some years previous to and during the spring and early summer of 1887 there existed a tariff on the Chesapeake & Ohio Railway for the transportation of lumber from various points on its lines to New York City, which included delivery without any charge for lighter-

age to any point within the known lighterage limits of New York Harbor. The rate prevailing at the time last mentioned was 24 cents per hundred pounds and the routing was via the Richmond, Fredericksburg & Potomac Railroad from its junction with the Chesapeake & Ohio Railway; and during this period, and by this route, and at this rate petitioner shipped a number of cars of lumber to New York City.

On or about the 10th day of August, 1887, the agent of the petitioner at Covington, Va., Mr. Braxton, loaded with lumber car No. 14,532 of the Newport News & Mississippi Valley Company, which lumber had been sold to Mr. J. P. Stockdale, of No. 78 Wall Street, New York City. Mr. Braxton made out, as he had been doing theretofore, a bill of lading and duplicate for billing and routing the car, and handed the same to the agent of the Newport News & Mississippi Valley Company at Covington to have weights inserted and to sign and return. The car was taken out of the yard and away as usual. Some two or three days after it had gone, the agent of the Newport News & Mississippi Valley Company handed to Mr. Braxton, not the bill of lading as originally made out and given to him by Mr. Braxton, but another and substituted bill of lading, routing the car via Staunton and The Baltimore & Ohio Railroad Company, which incurred an additional charge of not less than five cents per hundred pounds to be exacted for the delivery by lighter from Communipaw to destination within lighterage limits.

The substituted bills of lading were received by the petitioner on August 13, 1887, and were enclosed on the 15th day of that month in a letter of the petitioner to General William E. Wickham, then Second Vice-President of the Newport News & Mississippi Valley Company at Richmond, Va., wherein it was stated that the petitioner had not received notice of the change of routing and increase of rate thereby to New York City by the additional charge of five cents or more for lighterage. Nor were these rates published for the information of the public at the offices of the Newport News & Mississippi Valley Company in Richmond and Covington, nor at several other stations where these rates should have been displayed for public information, which were examined by the petitioner.

That upon investigation the petitioner ascertained and was shown a circular printed on light tinted paper, issued in June or July of the year 1887, from the office of the General Freight Agent in Richmond, Va., of instructions to agents at stations of the company, which was intended for their information, and theirs solely, and which circular it is beyond the power of the petitioner to exhibit. This circular was not posted at any office examined by the petitioner, for public information. By this circular agents were instructed as to the change of routing and to bill freight to Communipaw at 24 cents per hundred pounds, lumber in lots of one car, but to bill to New York City, lighterage free, lumber in lots of five cars at 24 cents per hundred pounds. These instructions, petitioner claims, were in violation of both sections 3 and 6 of the Act to Regulate Commerce, inasmuch as a discrimination was made in favor of a shipper of five cars at a

lower rate than a shipper of one car of the same commodity. It is also claimed to be a violation of the 6th section, inasmuch as without any notice whatever to the public a change of routing and increase of rates of five cents per hundred pounds to a total of 29 cents were made for delivery at the same destination as compared with the previous rate of 24 cents. During the month of September following and subsequently petitioner made various efforts to have this matter adjusted with the chief officers of the lines carrying the freight, but without success. General Wickham, who was receiver of the Newport News & Mississippi Valley Company, died shortly after, September, 1887.

The prayer of the petition is that the defendants shall be required to cease and desist from the violations of law complained of and to make reparation for the injury done to petitioner.

The Newport News & Mississippi Valley Company answered the complainant, in which it states that it is a corporation created and organized and existing under and by virtue of the laws of the State of Connecticut, authorized to lease and operate railroads, and that at and prior to the taking effect of the Interstate Commerce Act, so called, as well as subsequently thereto until the 27th day of October, 1887, was the lessee of and operated the Chesapeake & Ohio Railway in the States of Virginia and West Virginia.

It is not now operating said railway and has not operated the same at any time since the 27th day of October, 1887, when the receiver of said railway was appointed by the courts of Virginia and West Virginia; at the termination of said receivership said railway was redelivered to the Chesapeake & Ohio Railway Company, which has since been operating the same.

It respectfully submits that the Interstate Commerce Commission has no jurisdiction of the claim made in this petition.

It respectfully submits that in and so far as the said Rawson by his complaint claims the amount of, or compensation for, or repayment of the value of the lumber referred to in said petition, the said Interstate Commerce Commission is without jurisdiction as to that complaint.

It admits that previous to the taking effect of the Interstate Commerce Act and for a short time thereafter, as it believes, there existed an arrangement between the Chesapeake & Ohio Railway Company and the Pennsylvania Railroad Company by which lumber could be shipped from Covington, Va., to the City of New York, at a rate of 24 cents per hundred pounds, the routing being by the Richmond, Fredericksburg & Potomac Railroad from its junction with the Chesapeake & Ohio Railway, which included delivery, lighterage free, to any point within the lighterage limits of New York Harbor; and it admits upon information and belief that the said Rawson had shipped a number of cars of lumber to New York City according to such routing and rate; but it avers that the major part of the transportation involved in such carriage of merchandise was not upon the lines of or in any wise controlled by the Chesapeake & Ohio Railway or the Newport News & Mississippi Valley Company, but upon the lines owned and controlled by or in the interest

of the Pennsylvania Railroad Company; practically, in respect to the carriage of merchandise by rail from Covington, Va., and similar points to the City of New York, the Chesapeake & Ohio Railway Company is, and the Newport News & Mississippi Valley Company operating the Chesapeake & Ohio Railway was dependent either upon the Pennsylvania Railroad Company or the Baltimore & Ohio Railroad Company or the lines controlled by them respectively.

The rate above referred to was made by authority of the Pennsylvania Railroad Company and the free lighterage offered thereby was a privilege granted by the Pennsylvania Railroad Company, and with respect to the granting or the withholding of which the Chesapeake & Ohio Railway Company and the Newport News & Mississippi Valley Company had no control whatsoever. Shortly after the Interstate Commerce Act went into effect the Pennsylvania Railroad Company declined further to continue the transportation above referred to at the rates and in the manner above prescribed, and the most favorable arrangement which the Chesapeake & Ohio Railway Company or the Newport News & Mississippi Valley Company, as lessee of the Chesapeake & Ohio Railway, could secure, was an arrangement with the Baltimore & Ohio Railroad Company and the lines controlled by it, through and by means of which arrangement the Newport News & Mississippi Valley Company secured to shippers of five cars for the same consignee and the same point of delivery, free lighterage within the lighterage limits of the Harbor of New York. But the Newport News & Mississippi Valley Company was unable to secure the privilege of free lighterage for any less amount. It in no wise controlled or could control the question of whether free lighterage should be granted in any cases, or in what cases such lighterage should or should not be granted. It was wholly subject to the directions and control in that regard of the railroad companies controlling the ultimate line and the lighterage in the Harbor of New York. The Newport News and Mississippi Valley Company was wholly dependant on such other companies in respect of lighterage and rates therefor, and the most favorable terms to shippers which it secured was by the Baltimore & Ohio Railroad, which involved lighterage free for five cars and a charge for lighterage of a smaller amount.

In accordance with the arrangement so made in regard to shipments by its lines to New York, the Newport News & Mississippi Valley Company, under date of July 2, 1887, and on or about that day, issued to its agents along its line instructions as to manifesting and routing property to eastern points, and by which it was prescribed that property forwarded by all-rail to New York should be forwarded via Staunton, Va., and The Baltimore & Ohio Lines, and by which it was expressly prescribed that freight so forwarded, except live stock, would be subject to the following lighterage regulations:

"If in lots of five carloads for the same consignee and the same point of delivery, it will be lightered free to any point within the lighterage limits of New York Harbor; if not in compliance with the above, extra lighterage

charges will be made and collected. Agents must not sign bills of lading granting lighterage free except in accordance with the above, and in that case must note on each way bill that it covers the part of the lot of five cars, giving on each the initials and numbers of the other four."

And by such circular the lighterage limits in New York Harbor are expressly prescribed. Such arrangements were made for routing property to New York and such instructions issued to the agents of this company at points along the line of the Chesapeake & Ohio Railway because the same were the best arrangements in the interest of the shippers that this company could effect for such routing and carriage of merchandise.

It denies that it ever undertook, or agreed, or became in any wise bound or liable to carry the merchandise referred to in the petition herein, either by the Pennsylvania route or at the rate of 24 cents per hundred pounds, or that it ever undertook, or agreed, or became bound to afford to the shipper free lighterage in the Harbor of New York, or ever undertook to control or direct in respect to the lighterage thereof, except in accordance with the circular of July 2, 1887, above mentioned.

It is unable to admit or to deny the particular statements in the complaint with respect to the circumstances connected with the shipment of and issue of bills of lading for the lumber referred to in the complaint; but denies absolutely as to itself, and upon information and belief as to its agents and servants, that any bill of lading for the carriage of such merchandise by the Pennsylvania line or involving free lighterage delivery thereof or any lower rate than 24 cents per hundred pounds and lighterage in addition was ever accepted or approved, or assented to by or on its behalf. Instructions were issued to its several agents on or about July 4, 1887, as above stated, expressly describing the mode and manner in which, and the terms upon which such transportation could be conducted; and it avers upon the best of its knowledge, information and belief that such instructions were followed and obeyed, and that no one on its behalf ever undertook, in respect of the merchandise complained of, transportation in any other way or upon any other terms than are embodied in such instructions.

It avers upon the best of its knowledge, information and belief that its agents then conducting its transportation business fully informed the petitioner as well as his agent at Covington, Va., as to the mode and manner and the terms upon which such transportation had to be conducted.

It denies upon information and belief that the Baltimore & Ohio Railroad Company ever received payment for performance of any instructions of Stockdale or any one else as to the delivery of said lumber from Communipaw; but, on the contrary, it avers that the compensation paid the said Baltimore & Ohio Railroad Company in respect thereto only covered the charge for carriage thereof to Communipaw.

Upon information and belief it denies that General Wickham ever stated to the petitioner that in his opinion, or in the opinion of Mr. Henry T. Wickham, the action of the company was any violation of the Interstate Commerce

Law. It is unable to state whether General Wickham ever received any such letter as "Exhibit E" to the complaint, as no such letter has been found or returned in connection with this matter.

It is unable to answer with greater particularity in respect to the particular facts connected with this shipment as the organization of the defendants, so far as the Chesapeake & Ohio Railway is concerned, is entirely broken up, its agents who were concerned in conducting its business on said railway being in other employments and no longer in the employment of this defendant, and General Wickham being dead.

It denies that it was ever under any obligation to post or to conspicuously display the terms and arrangements which it was from time to time able to make with other lines for the transportation of merchandise to the City of New York. Nevertheless, it avers that it took every pains to communicate the facts in relation thereto to persons engaged in such shipments, and never in any wise concealed or declined to disclose the same, and the same was entirely open to all interested therein and to the public.

It denies that its instructions above referred to were in violation of the 3rd and 6th sections or any section of the Interstate Commerce Act, or that in respect to any of the matters referred to in said petition it has in any wise violated or disregarded the provisions or requirements of said Act. And it prays that the petition may be dismissed.

The answer of the Baltimore & Ohio Railroad Company states that it has no knowledge of the matters and facts set out in the petition except that it received the carload of lumber mentioned in the petition at Staunton, Va., from the tracks of the Chesapeake & Ohio Railway; that the same was transported over its lines and those of its connections to Communipaw, N. J., where the lumber was delivered to L. Boyer's Sons, a firm engaged in the lighterage business and then acting as agents of the defendant, to be transported by lighter to the point of delivery to the consignee; that previous to the receipt of this shipment at Staunton, as aforesaid, to wit, on the 22nd day of March, 1887, this respondent had notified the Chesapeake & Ohio Railway Company and all companies operating over its railway that on and after April 4, 1887, a lighterage charge of five cents per hundred pounds, to be paid by the consignees, would be charged on lumber and forest products for delivery within the lighterage limits of New York Harbor over and above the rate for the rail transportation to Communipaw, which notification was given by a circular letter, a copy of which is hereto attached, marked "Respondent's Exhibit B. & O. No. 1," that the Chesapeake & Ohio Company or any other company operating its lines had no authority from this respondent to deliver lumber or forest products to this company for transportation to Communipaw and delivery at New York on any other terms than those set forth, and this respondent agreed to accept freight from said lines only on those terms; that this respondent had no contract with the petitioner and no contract for the transportation of the lumber mentioned other

than that made with the company then operating the Chesapeake & Ohio Railway under the circular notice above mentioned.

The respondent says that the charge of five cents per hundred pounds for delivery by lighters in the Harbor of New York over and above the rail-tariff rate for transportation to Communipaw only, is just and reasonable and was made in order to meet actual lighterage expenses.

The answer of L. Boyer's Sons, a firm composed of Charles H. Boyer and Frank W. Boyer, states that they are engaged in lighterage and transportation by steam lighters and barges; that in the year 1887 they were acting under a contract with the Baltimore & Ohio Railroad Company as the agents of that company in delivering by lighters in the Harbor of New York such freight as that company delivered to them for that purpose; that on or about August 24th, 1887, they received on one of their lighters a carload of lumber consigned to J. P. Stockdale, which they believed to be the carload of lumber referred to in the petition; that on August 25th they sought to deliver that lumber to said Stockdale, first calling for the lighterage charges thereon, but said Stockdale refused to receive the same and continued so to refuse up to September 1st, when these respondents stored the said lumber on Tebo's dock and notified said Stockdale.

These respondents know nothing more about the matter alleged in the petition.

We find the material facts in this proceeding to be that for about twelve years petitioner has been a dealer in and shipper of lumber from points in the State of Virginia, and for a part of that time over the line of the Chesapeake & Ohio Railway, of which the Newport News & Mississippi Valley Company was the lessee, and of its connecting lines to points in other States. For a considerable period prior to April 5, 1887, these shipments to northeastern points, such as New York, had been over the line of the Newport News & Mississippi Valley Company via the Richmond, Fredericksburg & Potomac Railroad and the Pennsylvania Railroad, this being his only route for such shipments; and by this route the rate was 24 cents per hundred pounds from Covington, Va., to New York City, which included lighterage free to all points within the lighterage limits of the Harbor of New York.

Shortly before April 5, 1887, the Pennsylvania Railroad Company gave notice to the Newport News & Mississippi Valley Company, lessee of the Chesapeake & Ohio Railway, that it could no longer make this arrangement and give this rate with lighterage free on these shipments by this route after April 5, 1887, and proposed another route for these shipments, but which was so circuitous that the Newport News & Mississippi Valley Company found it impossible or undesirable to do the business by this last-named route. Some time after that the Newport News & Mississippi Valley Company entered into an arrangement with the Baltimore & Ohio Railroad Company to make these shipments to New York via Staunton at a rate of 24 cents per hundred pounds, but under this arrangement there was to be a lighterage charge of five cents per hundred pounds on all less than lots of five cars to

the same consignee and at the same point of delivery. This was the arrangement proposed by the Baltimore & Ohio Railroad Company and accepted by the Newport News & Mississippi Valley Company.

On the 2d day of July, 1887, a circular of instructions bearing that date, setting forth all the rates under this arrangement, was issued by the Baltimore & Ohio Railroad Company and the Newport News & Mississippi Valley Company and placed in the hands of their agents for billing and routing such shipments. This was a joint rate and the law at that time did not require publicity to be given to such a rate except to the extent and in the manner that should be ordered by the Interstate Commerce Commission.

On the 21st day of June, in the year 1887, the Interstate Commerce Commission published an order to all carriers of interstate traffic under the statute, the Baltimore & Ohio Railroad Company and the Newport News & Mississippi Valley Company being among the number, to give publicity to all their joint rates on interstate traffic in the following manner:

"Joint tariffs of rates, fares, or charges, established by two or more common carriers for the transportation of passengers or freight passing over continuous lines or routes, copies of which are required by the sixth section of the 'Act to Regulate Commerce' to be filed with the Commission, shall be made public so far as the same relate to business between points which are connected by the line of any single common carrier required by the first paragraph of said section to make public schedules of its rates, fares, and charges. Such joint tariffs shall be so published by plainly printing the same in large type of at least the size of ordinary 'pica,' copies of which shall be kept for the use of the public in such places and in such form that they can be conveniently inspected, at every depot or station upon the line of the carriers uniting in such joint tariff where any business is transacted in competition with the business of a carrier whose schedules are required by law to be made public as aforesaid."*

The course of making these lumber shipments by the petitioner was for him to look after the rates and routes and to give instructions to his agent, Mr. Braxton, at Covington, Va., and the latter attended to making the shipments. The manner in which this was done by Mr. Braxton was for him to make out the bills of lading, stating the route over which the lumber was to go, and to hand these bills of lading to the agent of the Newport News & Mississippi Valley Company at Covington for the latter to insert the weights and sign and return them to Mr. Braxton. In the early part of August, 1887, petitioner being absent from the State of Virginia on other business, left or sent instructions to Mr. Braxton to ship a carload of lumber from Covington, Va., to J. P. Stockdale at New York City. A day or two prior to August 10, 1887, Braxton loaded the car with lumber to ship to Stockdale and went to Coverston, the agent of the Newport News & Mississippi Valley Company at Covington, and handed to the latter bills of lading which specified the routing of this car over the line

*See 1 Inters. Com. Rep. 598, 599.

of the Newport News and Mississippi Valley Company, the Richmond, Fredericksburg & Potomac Railroad and the Pennsylvania Railroad to New York, as the previous shipments had been made by the petitioner, and inserted in the bills of lading "lighterage free." At that time neither the petitioner nor his agent, Mr. Braxton, had any actual notice of the change of routing, billing and rates that had been made by and between the Newport News & Mississippi Valley Company and the Baltimore & Ohio Railroad Company, or that the Newport News & Mississippi Valley Company had ceased to make such shipments via the Richmond, Fredericksburg & Potomac Railroad and the Pennsylvania Railroad; and the strong preponderance of the evidence is, and upon it we find the fact to be, that at that time neither the petitioner nor his agent, Braxton, had any constructive notice of these changes.

On the 10th day of August, 1887, Mr. Coverston, the agent of the Newport News & Mississippi Valley Company at Covington, Va., made out new bills of lading, routing this carload of lumber via the Newport News & Mississippi Valley Company to Staunton and thence via the Baltimore & Ohio Railroad Company to New York City, in which there was no statement that there was lighterage free, and signed and returned these new bills of lading to Braxton on that day. He did not return the bills of lading to Braxton, which the latter had made out and handed to him. The car of lumber at that time had gone forward to New York. Braxton then ascertained from Coverston, for the first time, of the change of routing and billing, and rates, that had been made by the Newport News & Mississippi Valley Company from the Richmond, Fredericksburg & Potomac Railroad and the Pennsylvania Railroad, to that of the Baltimore & Ohio Railroad; and on the 11th of August, 1887, Braxton wrote to petitioner, who was then in Philadelphia, what had occurred. On the 15th day of August, 1887, by letter of that date, petitioner wrote concerning this matter to General William E. Wickham, then second vice-president and general manager of the Newport News & Mississippi Valley Company, in New York, complaining of what had occurred and protesting against it.

The car of lumber went forward to New York, and it was lightered by L. Boyer's Sons, lighterage agents of the Baltimore & Ohio Railroad Company, and by them tendered to Stockdale. These lighterage agents made a charge of five cents per hundred pounds for the lighterage, amounting to about \$20, which Stockdale refused to pay, and the petitioner would not pay, and the lighterage agents then stored the lumber for a considerable period of time and held it for lighterage charges. The evidence does not show that they sold it, but the inference is that they did for lighterage charges. The value of this carload of lumber was from \$260 to \$280.

The bills of lading in this instance provide for the carriage of lumber from Covington to New York at a rate of 24 cents per hundred pounds. There is nothing in the bills of lading about any charge for lighterage or that lighterage is free. According to the tariff of

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rates existing between the Newport News & Mississippi Valley Company and the Baltimore & Ohio Company at the time of the shipment, the lighterage charges on this carload of lumber would have been five cents per hundred pounds. The rule of the lighterage companies in New York at that time was, if there were as many as five carloads for one consignee and at the same point of delivery, that then the lighterage was free as to the shipper or consignee, but the railroad company paid the lighterage, which was sixty cents per ton, out of the transportation rate received from the shipper or consignee; if there was less than five carloads to the same consignee and at the same point of delivery, then the lighterage charge was one dollar per ton and the shipper or consignee had to pay it. This difference in the amount of the lighterage charges was based upon the additional time it required and the cost of service in delivering by lighter five cars when all were delivered to the same consignee, and one or more cars, less than five, delivered to different consignees.

The claim of petitioner was pending before the officials of the Newport News & Mississippi Valley Company from August, 1887, until the fall of 1888, when it was finally decided against him, and shortly afterwards he filed his petition for relief before the Interstate Commerce Commission. He paid the transportation rate of twenty-four cents per hundred pounds upon the lumber from Covington, Va., to New York, as soon as he was notified that Stockdale had refused to pay it, but neither he nor Stockdale have paid any part of the lighterage charge, nor has he or Stockdale ever received the lumber or any part of the proceeds of its sale if it has been sold. The rates complained of have long since been abandoned and discontinued by the defendant.

The foregoing statement embraces a summary of the material facts as we find them in this proceeding.

In the view we are constrained to take of this case under the statute, we can express no opinion as to its merits. The tariff complained of has long since been abandoned and discontinued by the carriers. It ceased to exist in the early part of the fall of 1887; and therefore there is nothing we can do in the direction of ordering the carriers to cease and desist from enforcing it.

As to the reparation claimed, prior to the amendment of the 16th section of the Act to Regulate Commerce of March 2, 1889, we held in several cases, that as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at common law and where more than twenty dollars was involved, we could award no reparation in consequence of the provisions of the Seventh Amendment to the Constitution of the United States. The amendment of the statute of March 2, 1889, was made to cover this feature of the statute, but the amendment expressly provides that it shall have no reference to proceedings pending at the time the amendment was adopted; and this proceeding was pending at that time. The amendment to this effect is found in the proviso in section 22 of the statute as amended, and is in the following lan-

guage: "Provided that no pending litigation shall in any way be affected by this Act."* The statute, therefore, leaves the petitioner to enforce his claim for reparation in the courts as he may be advised, and accordingly *this petition is dismissed without prejudice.*

JOHN LIVINGSTON, President of the Railway Shareholders' Association,

v.

THE NEW YORK, LAKE ERIE AND WESTERN RAILWAY COMPANY.

(No. 238.)

MILAGE TICKETS.

COMPLAINT filed Sept. 12th, 1889.

John Livingston, Petitioner in Person, Campville, Tioga County, New York.

To the Honorable the Interstate Commerce Commission:

The petition of the above named complainant, John Livingston, of the City of New York, and of Campville, Tioga County, New York, President of the Railway Shareholders' Association, an organization incorporated under the laws of the State of New York, on the 24th day of November, one thousand eight hundred and eighty-three, respectfully shows:

I. That the New York, Lake Erie and Western Railroad Company is a corporation existing under the laws of the State of New York, its general offices being at No. 21 Cortlandt Street, in the City and State of New York, whence it has connection by its steamboats with the eastern terminus of its main line in Jersey City, in the State of New Jersey, where its General Superintendent has offices, those of the Superintendents of its several divisions being located at sundry places in the States of New York, New Jersey, Pennsylvania and Ohio.

II. That the defendant, as owner or lessee, operates 1804 miles of track, comprising the railroads of thirty-nine separate corporations now unified and managed under its control for the continuous carriage of passengers, and shipment and transportation of property from, into, between and through the four States above mentioned, the said several railroads constituting what is known as the "Erie System," as stated upon pages 289 and 290 of your Honorable Commission's Report for 1888, where each of the several companies comprising such system is correctly designated.

III. That during the period of the last ten years, the defendant has been, and now is a common carrier engaged in the transportation of passengers and property wholly by its said railroad, or partly by railroad and partly by water, from, into and between nearly all the States of the United States under arrangements for a continuous carriage or shipment, and is, as to such interstate transportation, amenable to the Act to Regulate Commerce, and subject to the jurisdiction and authority vested in its Commission, which in and by its twelfth sec-

tion,* is authorized and required to enforce the provisions thereof.

IV. For a first cause of complaint against the defendant, your petitioner alleges: That whereas the rates for the transportation of passengers upon all its said lines of railroad are about three cents per mile, the defendant, on or about the 17th day of June, 1889, willfully violated said Act or caused or willingly suffered or permitted the same to be violated by selling, and under a special contract delivering for the use of three persons who were not then, and never have been employés of any railroad, to one Betrand Van Tuyl, then and now in its service at a salary of more than one hundred dollars per month as conductor on its passenger trains running between Jersey City in the State of New Jersey, and Buffalo, in the State of New York, a so-called "employés' 500 mile ticket," good for five hundred miles of travel at any time prior to June 17th, 1890, for Mrs. B. Van Tuyl, Charles B. Van Tuyl and Mrs. C. H. Amerman, upon and over all portions of the railroads so as aforesaid owned by or under the defendant's management or control, at the reduced rate of one half of one cent per mile. That said conductor thereupon paid to the defendant for the so-called "employés' 500 mile ticket" two dollars and fifty cents, for which sum the defendant delivered said ticket to him, whereupon he forthwith surrendered the same to the three persons above named, who have since used it for their own and for the transportation of other individuals over portions of the defendant's railroads between Owego, in the State of New York, and Susquehanna, in the State of Pennsylvania, and to, from and between other points upon the defendant's said lines.

That the following is a copy of that part of said contract between the defendant and said conductor, the original whereof is endorsed upon the first page of the cover of said "employés' 500 mile ticket."

"No. 677

"Employés' 500 mile ticket,

issued to

"Mrs. B. Van Tuyl,

"Buffalo,

"whose signature appears on the last page.

"Good for 500 miles travel and 150 pounds baggage free.

"This ticket has been issued at a special reduced rate, in accordance with an agreement between the New York, Lake Erie & Western Railroad Co., and the employés who purchased the same.

"This ticket must be used prior to the date canceled, if two dates are canceled the ticket is worthless.

"This ticket is good for use only of

"Mrs. B. Van Tuyl,

"Charles B. Van Tuyl,

"Mrs. C. H. Amerman.

"Not good unless stamped and countersigned by issuing agent.

"L. P. Farmer,

"General Passenger Agent,

"Countersigned,

"Jas. A. Calhoun,

"Issuing Agent."

*See Appendix II, page xlvii.

V. That the making and issuing of said contract by the defendant, and its delivery to said conductor with the ticket for five hundred miles of travel at and for the charge and rate of one half of one cent per mile, for the said three persons, none of whom are or are included in any of the classes enumerated in the twenty-second section* of said Act to whom free transportation or transportation at reduced rates is authorized, and willfully suffering or permitting their free carriage as herein stated, was a device of the defendant to evade said Act and to escape its penalties for issuing passes to the wives or families of its employes, and to other persons not within the scope of the said twenty-second section, as the defendant had, theretofore, and since April 5, 1887, unlawfully done on several thousand occasions.

VI. That said Mrs. B. Van Tuyl is the wife, and Charles B. Van Tuyl is the son, of said conductor, said son being employed at a weekly salary of six dollars, in an insurance office in Binghamton, New York; but your petitioner has no knowledge or information sufficient to form a belief as to the place of residence of said Mrs. C. H. Amerman, or whether she bears any relationship towards said conductor, or is a member of his family or household.

That on Saturday, August 17th, 1889, said Charles B. Van Tuyl delivered said "employes' 500 mile ticket" to your petitioner, with remarks to the effect that it could be used for the transportation of any person; that your petitioner upon then inspecting the same, ascertained that tickets for about one hundred miles of travel remained unused, and were attached to the cover thereof.

VII. That since April 5, 1887, pursuant to the evasive purposes above mentioned, more than seven hundred like unlawful contracts have been made by the defendants with its employes for the use and transportation over its railroads, at the rate of one half of one cent per mile, of individuals who were never in the employ of any railroad, nor entitled by said Act to enjoy such transportation free, or at reduced rates, and that similar contracts, with like so-called "employes' 500 mile tickets" and "employes' 1000 mile tickets" thereto attached, have been delivered to and used by such individuals, on different occasions during the whole of said period, while to many other persons, comprising both employes and non-employes, who have applied to the defendant at the same time for similar favors, and for like tickets at like reduced rates, the defendant has declined to issue the same, thereby refusing to perform for them and each of them "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions," and being guilty of unjust and unlawful discrimination.

VIII. For a second cause of complaint against the defendant, your petitioner alleges: That on or about the 12th day of October, 1887, a contract was made, executed, and delivered by and between the defendant and one E. E. Edwards, alias Edgar Edwards, a blacksmith, of Campville, Tioga County, New York, whereby the defendant agreed to give one thousand miles of transportation over its

said lines to said E. E. Edwards, Mrs. E. E. Edwards and Dora Edwards, for and in consideration of ten dollars, or for one cent per mile; that the following is a copy of said contract, the original whereof is endorsed upon the first, second, third and fourth pages of the cover of the mileage strip for 100 miles, said cover and strip thereto attached constituting the so-called "employes' one thousand mile ticket No. 6020," to-wit:

(Upon first page of cover.)

"The top of this cover forms a straight edge for detaching mileage.

"No. 6020.

"New York, Lake Erie & Western Railroad Company,

"1000 mile ticket

issued to

"Mr. E. E. Edwards,

"Susquehanna,

"Whose signature appears on last page,
"Good for 1000 miles travel and free transportation of 150 pounds of baggage on the New York, Lake Erie and Western R. R.

"When officially stamped, and upon the conditions named in the contract attached to and made part hereof.

"This ticket will not be accepted for passage after date canceled in margin hereof, and is worthless if more than one date is canceled.

"Not good unless stamped and countersigned by Issuing Agent.

"L. P. Farmer,

"General Passenger Agent,

"Countersigned;

"J. Matthews,

Issuing Agent."

"Notice to person to whom this ticket is issued.

"Read the contract carefully, and note that conductors will not accept this ticket unless all conditions are fully complied with, and that the contract must be properly signed in ink by the person whose name appears upon the ticket.

"Read all the conditions and notices hereon."

(Upon third page of cover.)

"Conductor will take up and return this cover to the Auditor of Traffic when the Mileage Strip is used up."

(Upon second page of cover.)

"Employes' 1000 mile ticket.

"No. 6020.

"This cover and mileage strip attached constitute a one thousand mile ticket and is good for use of Mr. E. E. Edwards, Mrs. E. E. Edwards, Miss Dora Edwards.

"I hereby agree that this ticket shall not be used by other than the persons named above.

"E. E. Edwards

(Upon fourth page of cover.)

"Notice to Conductors.

"Each numbered horizontal line on enclosed mileage strip represents a distance of one mile, therefore conductors must detach enough lines, counting from the top, to cover the distance to be traveled. Make the detachment in the space between the lines (not on a line).
"The rubber bands used to confine the mileage strip must not be removed to make detachments for passage, as the strip can be

*1 Inters. Com. Rep. 13.

"easily drawn out or back as required while under the bands. A convenient way to handle the ticket is as follows: hold the ticket in the left hand, open the front cover toward you, draw out nearly enough of the strip to cover the trip, then close the cover on the portion drawn out, adjust the straight edge; (on top of front cover) between the lines, evenly, exactly at the place where their detachment is to be made, compress the cover when adjusted, and at the same time carefully draw the strip toward you against the straight edge, and it will be torn easily and smoothly.

"To avoid errors, conductors should be certain before detaching, that the straight edge is adjusted at the proper place.

"Enter on the part detached, station numbers from and to which trip is made, and turn it in with collections.

"Conductors must not honor mileage strips unless attached to cover bearing same consecutive number, nor any portion of a strip if already detached when presented.

"Conductors must promptly report any attempt at improper use of these tickets.

"Conductors will take up and return this cover when the mileage strip is used up.

"Agent Stamp here.

"N. Y. L. E. & W. R. R.

"October 12, 1887.

"Gen'l Passenger Agent."

IX. That the defendant then being a common carrier subject to the provisions of said Act, on or about October 12, 1887, wrongfully and in violation of the second and third sections thereof,* granted and gave special and reduced rates by the device of said contract made with E. E. Edwards, under which the defendant agreed to receive, and did change, demand, collect and receive from him, the sum of ten dollars for said 1000 mile ticket, being a less compensation for services thereafter to be rendered in the transportation of said Mrs. E. E. Edwards and Dora Edwards, neither of whom were ever railroad employes nor comprised in the twenty-second section of said Act as persons to whom free transportation or transportation at reduced rates is authorized, than it demanded and received from other persons for doing them a like and contemporaneous service under substantially similar circumstances and conditions, such other persons being charged the full rate of about three cents per mile, or twenty dollars for a like 1000 mile ticket; and that said defendant was thereby guilty of unjust discrimination which the second section of said Act prohibits and declares to be unlawful.

X. That in and by the making and delivery of said contract and the issue of said 1000 mile ticket for the sum of ten dollars for the use of Mrs. E. E. Edwards and Dora Edwards as aforesaid, the defendant made and gave undue or unreasonable preference or advantage by agreeing to grant them carriage over its railroads for the period of one year, commencing October 12, 1887, to the extent of one thousand miles at the reduced price of one cent per mile, while from other persons the usual rate of three cents per mile for like and contemporaneous service, or

twenty dollars for a like 1000 mile ticket, was charged and received by defendant, thereby subjecting such other persons to undue or unreasonable prejudice or disadvantage in respect to said passenger traffic, which injustice is specifically forbidden and within the inhibition of the third section of said Act.

XI. That at the time of the making of said contract of October 12, 1887, said E. E. Edwards was an employe of the defendant at the Susquehanna depot, in the State of Pennsylvania; that he left its employment about the first of November, 1887, and has not at any time since been, or is he now, in its service.

That there remain unused only thirty-nine miles of said "1000 mile ticket," nearly all the balance thereof having, since said E. E. Edwards left its service, been used by him and by Mrs. E. E. Edwards and Dora Edwards for their transportation between points in the States of New York, Pennsylvania and elsewhere over its lines.

That in September, 1888, said defendant, to the personal knowledge of your petitioner, willingly permitted the use of said 1000 mile ticket for the transportation over portions of its lines between points in each of said States of an individual not therein mentioned.

XII. And your petitioner on information and belief alleges that more than six thousand other like one thousand mile tickets, issued by the defendant since April 5, 1887, at the reduced rate of one cent per mile, have by its permission been used for the transportation over defendant's lines of several thousand persons other than those named therein.

XIII. And your petitioner avers and claims that the issue and sale by the defendant to its employes of the so-called "employes 500 mile ticket No. 677" for two dollars and fifty cents, and of the so-called "employes 1000 mile ticket No. 6020," for ten dollars, for the use of the wives and families of those employed who purchased the same as hereinbefore stated, and the defendant's refusal to issue and sell to other persons at the same time, and for the same price or rate, like mileage tickets, was equivalent to the discrimination forbidden by said Act and therefore unlawful; that such wives and families, as part of the general public, were not under any circumstances entitled to free transportation, nor to transportation at reduced rates, nor to any other advantages at the hands of the defendant from which other individuals were excluded.

XIV. That the use of such employes' 500 mile tickets and 1,000 mile tickets so as aforesaid issued and sold at nominal rates by the defendant was not confined to the persons named therein; that nearly all employes purchasing like tickets derive large perquisites therefrom, amounting in many cases to several hundred dollars per year, by permitting other persons than those therein specified to use the same for transportation over its railroads; and if, as it is claimed, the supply of such reduced-rate tickets, as a discrimination in favor of its employes, is deemed to be part of their compensation, then your petitioner avers that such fact will render impossible the defendant's compliance with the provision in section twenty of said Act, requiring its annual reports to show in detail "the number of employes and the

* 1 Inters. Com. Rep. 3, 4.

salaries paid each class;" and he denies that such Act contemplates or sanctions the compensation of defendant's employes by the elastic and uncertain methods hereinbefore described, and alleges that such discrimination in favor of the families or relatives of railroad employes constitutes one of the forms of injustice which the defendant is forbidden to practice.

XV. For a third cause of complaint against the defendant your petitioner alleges: That since the fifth day of April, 1877, the defendant, in defiance of the National Law, has willingly given and issued, or caused or suffered or permitted to be given or issued, passes for the free transportation over its lines of railroad from one State of the United States into or through another State of the United States to or for the use of a large number of persons claiming to be the wives or members of the families of railroad employes, and that such free transportation was, by the willing permission of defendant, used by such persons between points in different States of the United States, none of such persons being, at the time of such issuing or use, employes of any railroad company, nor included in any of the classes enumerated in section twenty-two of said Act to whom free transportation, or transportation at reduced rates, is authorized; that since April 5, 1887, through its officers, agents or persons acting for and employed by the defendant, it has willingly suffered or permitted such free passes to be used by many thousand individuals other than the wives or members of employes' families, and not by law entitled to free transportation upon and over the defendant's railways between points in different States of the United States, while other persons traveling between the same points over the same lines of railroad at the same time, were charged by and paid to the defendant the full fare of from two to three cents per mile for every mile traveled, or twenty dollars for a thousand mile ticket; that by conveying or suffering or permitting to be carried free of charge, and without the payment of any compensation whatever, such individuals over the defendant's railroads between places in different States of the United States, while from other persons traveling over the same railroads at the same time, between the same places, the defendant charged, demanded, collected and received the full fare of from two to three cents per mile for every mile traveled, or twenty dollars for a thousand mile ticket, and for doing such other persons a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, the defendant was guilty of unjust discrimination which, in and by the second section of said Act, is prohibited and declared to be unlawful, and gave undue or unreasonable preference or advantage to the many thousand individuals last above named, in respect to their free carriage, and subjected the wives and members of the families of those whose husbands and fathers, not being railway employes, were unable to obtain and enjoy like free carriage, to undue or unreasonable prejudice or disadvantage in respect to their being charged by and compelled to pay to the defendant the full fare of from two to three cents per mile for every mile traveled over the same lines between the same points at the same time, or

twenty dollars for a thousand mile ticket, thereby being guilty of such discrimination as the third section of said Act declares to be unlawful.

XVI. For a fourth cause of complaint against said defendant, your petitioner alleges: That in violation of the provisions of the second, third, and tenth sections* of said Act, and of the Laws of the State of New York, especially of chapter 261 of its Laws of 1878, chapter 370 of its Laws of 1880, and of section 426 of its Penal Code, and in contravention of the rights and interests of the proprietary and creditors of said New York, Lake Erie and Western Railroad Company, as well as of the people of the United States, and to the great loss of human life, the defendant has almost daily, since April 5, 1887, through its officers, agents, or persons acting for or employed by its authority, willfully caused or willingly suffered or permitted large numbers of minors and other persons not employes of any railroad, nor included in any of the classes enumerated in section twenty-two of said Act to whom free transportation or transportation at reduced rates is authorized, nor in any way entitled to free transportation over any portion of the defendant's lines of railroad, to ride upon the freight cars and engines of the defendant's freight trains between or through the States of New Jersey, New York, Pennsylvania, and Ohio, free of any charge whatever, and that through its officers, agents, or other persons employed by the defendant, it willingly omitted or failed to eject or remove from its freight cars and engines such minors and other persons while enjoying such unlawful free transportation, or aided or abetted such omission or failure, while at the same time by refusing to other individuals the like and contemporaneous service of free transportation, and compelling them to travel in the cars of its passenger trains and to pay to the defendant from two to three cents per mile for every mile traveled, it was guilty of the unjust discrimination prohibited in and by the second and third sections of said Act, and declared to be unlawful, and was guilty of such infractions of said Act, or of aiding or abetting therein, as by the tenth section thereof is declared to be a misdemeanor; and having in the manner aforesaid, been also guilty of an unlawful discrimination in its rates, fares or charges for the transportation of passengers, your petitioner avers that the defendant, in addition of the fine not exceeding five thousand dollars for each offense thereinbefore provided for, became liable to the further penalties prescribed in the proviso of the closing sentence of said section ten.

XVII. That as two specific and distinct offenses of the many hereinbefore alleged, your petitioner avers that thirteen persons, none of whom were railroad employes, nor entitled to free transportation, were, on August 27, 1889, by the defendant's permission or sufferance as aforesaid, allowed to ride and did ride free of charge over the defendant's railroad, from Susquehanna, in the State of Pennsylvania, to Owego, in the State of New York, upon the tops of the cars comprising one of the defendant's freight trains, and that upon like trains of the defendant, twelve persons, none of whom

*1 Inters. Com. Rep. 3, 4, 7, 8.

were railroad employés nor entitled to free transportation, were, on the same day, by the defendant's like permission or sufferance, allowed to ride and did ride free of charge over the defendant's railroad from Owego, in the State of New York, to Susquehanna, in the State of Pennsylvania, upon the tops of the cars, while other individuals were refused by the defendant a like and contemporaneous service, and were ejected from said trains, and that on the same day the defendant charged, demanded and received from such other individuals, for their transportation in its passenger trains between said two last above mentioned places the full fare of from two to three cents per mile for every mile traveled, whereby it was guilty of the discrimination prohibited by said Act.

XVIII. For a fifth cause of complaint against the defendant your petitioner alleges: That in October and November, 1888, the defendant issued free passes or gave free transportation to a large number of individuals claiming to be delegates to the convention of a labor organization known as the Brotherhood of Locomotive Engineers which assembled at Richmond, in the State of Virginia, on October 17, 1888, and adjourned on November 2, 1888, some of whom were not at the time employés upon any railroad, and most of whom were not and never had been employés of the defendant, nor included in any of the classes enumerated in section twenty-two of the said Act to whom free transportation, or transportation at reduced rates is authorized; that such passes were issued or free transportation was given by the defendant in respect to interstate traffic, and in most of the cases the passes were issued to and used by the recipients within one of the States of Ohio, Pennsylvania, New York, or New Jersey to points within another of said States or through the same; and when the use of such free transportation was between points within the boundaries of a particular State, the same was given to be used and was actually used on part of an interstate journey, to or from Richmond, Virginia, and constituted in effect the giving of a preference or advantage over other persons not thus favored, and were therefore unlawful.

XIX. That as respects the passes issued and free transportation given by the defendant over portions of its lines to persons claiming to be employés of other railroads, on their journey to or from Richmond, Virginia, none of them were lawfully entitled to such passes or free transportation, nor was the defendant legally authorized to grant the same, for the reason that such persons did not, nor did any other person for them nor for nor upon their behalf present to the defendant nor to any of its principal officers any request of the railroad company or companies by whom they were employed or claimed to be, nor the request of any of the principal officers thereof, for the exchanging of passes or tickets with the defendant for their officers or employés, nor the request of any of such officers that the defendant would issue such passes or free transportation over any portion of its railroads provided by section twenty-two of said Act; and your petitioner avers, claims and insists that such passes or free transportation could not lawfully be

given, issued or granted by the defendant to any officers or employés of any other railroad company, except upon compliance with the provisions of said section authorizing the "*exchanging passes or tickets with other railroad companies for their officers and employés*," that the granting and use of such passes in the manner above alleged,—the perilous procedure of ill-advised or unwise and impolitic railway management impatient to assume the risk of going beyond the restrictions of federal enactments,—was the giving of something of value for nothing in return, and therefore in conflict with the letter and spirit of said Act.

XX. And your petitioner on information and belief alleges that such passes and free transportation were issued and granted by the defendant to many individuals claiming to be employés of other railroads, and to other persons proceeding to or returning from said Richmond convention in October and November, 1888, upon the presentation to the defendant by said individuals and persons of so-called "credentials" from the Brotherhood of Locomotive Engineers certifying that they were delegates to such convention, or upon the production and exhibition of so-called "traveling-cards" issued on behalf of such Brotherhood, and that such passes were used for interstate transportation upon defendant's railroads.

XXI. That by conveying, free of charge, such individuals and persons over portions of the defendant's railroads as hereinbefore stated, while from other persons for doing them a like and contemporaneous service the defendant demanded and received the full fare of from two to three cents per mile for every mile traveled the defendant was guilty of such unjust discrimination as is prohibited and declared to be unlawful by the second section of said Act, and gave undue and unreasonable advantage to these persons thus carried free, whereby others compelled to pay fare were subjected to such undue or unreasonable prejudice or disadvantage as section three of said Act declares to be unlawful.

XXII. And your petitioner further alleges that as to each and every of the above mentioned cases of unlawful discrimination by the defendant in the issuing of passes, or the granting of free transportation, or transportation at reduced or nominal rates through the device of so-called "employés 500 mile tickets" or "employés 1000 mile tickets" to its officers, agents and employés, for the use and benefit of individuals never in the employ of any railroad, nor entitled to free carriage or transportation at reduced rates, the defendant was guilty of unjust discrimination by refusing to grant like passes or tickets to other of its officers, agents and employés, and to other persons who simultaneously applied therefor, thus refusing to do for them and each of them, "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Wherefore, the complainant respectfully asks the Honorable the Interstate Commerce Commission to investigate each and every of the several charges made against the defendant, and that, exercising the right conferred upon it by section twelve of the Act to Regulate Commerce as amended March 2, 1889, to obtain from com-

mon carriers full and complete information to enable the Commission to perform the duties and carry out the objects for which it was created, and to execute and enforce the provisions of said Act it will cause to come before it for examination so many of the defendant's officers, agents and employés as may be deemed proper to ascertain from them the truth respecting all essential matters above alleged in the premises, and full and complete information in regard thereto, and that thereupon the Commission shall determine:

1. That in the particulars in this petition alleged the defendant has violated and is violating said Act to Regulate Commerce.

2. That the granting of passes or free transportation to the wives or any members of the families of defendant's employés, or to those of any other railroad,—such wives and members not being railroad employés, nor comprised in any of the classes enumerated in section twenty-two of said Act to whom free transportation or transportation at reduced rates is authorized,—was such unjust discrimination as is prohibited by the second and third sections thereof, and therefore unlawful.

3. That the issue and sale by the defendant, as herein alleged, to its employés of so-called "employés' 500 mile tickets" and "employés' 1000 mile tickets" at reduced or nominal rates for the use or benefit of the wives or members of the families of such employés, or of any other person not by law entitled to reduced rates or to free transportation was such unjust discrimination as is prohibited by the second and third sections of said Act and therefore unlawful.

4. That by willingly suffering or permitting minors and other persons not employés of any railroad, nor entitled to free transportation, to ride upon the freight cars or engines of its freight trains free of charge, as stated in the fourth cause of complaint in this petition, the defendant was guilty of the unjust discrimination prohibited by said Act, and of an unlawful discrimination in its rates, fares or charges for the transportation of passengers, and is therefore liable to the additional penalties prescribed in the proviso of section ten of said Act.

5. That the granting by the New York, Lake Erie and Western Railroad Company of passes or free transportation to applicants claiming to be officers or employés of any other railroad, or to so-called delegates or members of the Brotherhood of Locomotive Engineers upon the presentation of "credentials" or "traveling cards" issued by such Brotherhood, as stated in this petition, or upon any authority whatever other than a certificate from one of the principal officers of such other railroad company or companies, stating that such applicant was in the employ of such other company or companies, and requesting the exchanging of passes or tickets for their officers or employés as provided by said Act, was a violation of the provisions thereof and unauthorized and unlawful.

6. That the defendant shall communicate to the Commission, or disclose in its answer to this petition, the names and addresses of each and every of its employés to whom passes or free transportation were issued for the use of other persons, with the names of such other persons; also the names and addresses of each and every of its employés to whom "employés' 500 mile

tickets," "employés' 1,000 mile tickets," or other mileage books for the use of other persons have been issued or sold by the defendant at reduced or nominal rates, together with the name of each and every person for whose use the same were so issued or sold, and the price or compensation received for each and every of such mileage tickets or books with their respective numbers and the dates of issue.

7. That the Commission shall make an order commanding the defendant, its officers, agents and employés to refrain, cease and desist from each and every of the violations of the Act to Regulate Commerce herein alleged, and will grant such further or other order or relief in the premises as may seem necessary and in conformity with the requirements of that justice and equality demanded by said Act.

Dated at Campville, Tioga County, New York, September 6, 1889.

John Livingston,
President Railroad Shareholders' Association.
(Verified)

THE ANSWER of the respondent, the New York, Lake Erie and Western Railroad Company, to the complaint of the petitioner, in the above entitled proceeding, filed October 9, 1889, respectfully shows:

First. This respondent avers that the complainant had no right to institute the above proceeding against it, before this Honorable Commission, and that he cannot maintain the same, but that said proceeding should be dismissed.

Second. That this respondent has no knowledge or information sufficient to form a belief whether any money was paid to, or any stock issued by, the Shareholders' Association, under its Act of incorporation, or anything done to organize the Railway Shareholders' Association under its articles of incorporation, or whether the complainant ever was, or now is, the president of said Association, and the respondent demands and requires strict proof of all these matters.

Third. This respondent admits the allegations contained in the first three paragraphs of the petition of the complainant.

Fourth. This respondent denies each and all of the allegations contained in the fourth paragraph of the petition of the complainant, except that it did sell to one of its employés and certain dependent members of his family an employés' five hundred mile ticket, but this respondent expressly denies that in selling such ticket it violated any of the provisions of the original Act to Regulate Commerce which went into effect on the fifth day of April, 1887, or the Act amendatory thereof which went into effect March 2d, 1889.* But on the contrary this respondent avers that its action in selling such five hundred mile ticket, as is mentioned and described in the fourth paragraph of the petition of complainant, was and is sanctioned and authorized by the twenty-second section of the two Acts of Congress above cited. And this respondent further avers that if the above mentioned mileage ticket or any other mileage tickets issued by it, bear any other names than those of the employés and such dependent members of their families as were named therein at the time when such tickets were

*Appendix II. *xli et seq.*

issued, such alterations or additions were made without the knowledge and consent of this respondent, and in fraud of its rights.

Fifth. For answer to the fifth and sixth paragraphs of the petition of complainant, this respondent avers, that all the persons named therein were dependent members of the family of Mr. Bertrand Van Tuyl, the conductor therein mentioned, at the time when said ticket was issued, and this respondent again avers, as hereinbefore stated, that the issuing of the said ticket was not in violation of either of the above cited Acts to Regulate Commerce.

And for further answer to the said sixth paragraph of the petition of complainant, this respondent avers, that it has no knowledge or information sufficient to form a belief, whether on Saturday, the 17th day of August, 1889, the said Charles B. Van Tuyl delivered said employes' five hundred mile ticket to the petitioner, as he has averred, and this respondent requires strict proof of said allegation. And for further answer to the said allegation, this respondent avers that if the same can be proved, then it was done not only without the knowledge or consent of this respondent, but in direct and flagrant violation of the agreement under which said ticket was issued, as set out in the fourth paragraph of the petition of complainant, by reference to which it will appear that the ticket is good for use only of "Mrs. B. Van Tuyl, Charles B. Van Tuyl and Mrs. C. H. Amerman," as the complainant must have known at the time when he received the ticket, if the same was offered to, and received by him, as he has averred.

Sixth. For answer to the seventh paragraph of the petition of complainant, this respondent denies each and every allegation thereof charging it with showing improper preference in issuing the tickets therein mentioned; and on the contrary this defendant avers that in issuing such ticket it treated all persons applying for the same with perfect equality and impartial fairness.

Seventh. For answer to the eighth, ninth, tenth and eleventh paragraphs of the petition of complainant, this respondent avers that the E. E. Edwards named therein was an employé of this respondent, at the time when said ticket was issued, and the other persons named therein were then dependent members of his family, and this respondent avers in making the contract with him as stated in said paragraph this respondent did not violate any of the provisions of the Acts of Congress hereinbefore cited.

And for further answer to the allegations of the eleventh paragraph of the petition of the complainant, in which it is averred as follows: "That in September, 1888, said defendant, to the personal knowledge of your petitioner, willingly permitted the use of said 1000 mile ticket for the transportation over portions of its lines between points in each of said States, of an individual not therein mentioned"—this respondent absolutely denies said allegation and demands and requires strict proof thereof.

Eighth. For answer to the twelfth paragraph of the petition of complainant, this respondent denies each and every allegation thereof.

Ninth. In answer to the thirteenth paragraph of the petition of complainant, this respondent denies each and every allegation thereof.

Tenth. For answer to the fourteenth paragraph of the petition of complainant, the respondent denies each and every allegation thereof.

Eleventh. For answer to the fifteenth paragraph of the petition of complainant, the respondent denies each and every allegation thereof.

Twelfth. For answer to the sixteenth paragraph of the petition of complainant, this respondent denies each and every allegation thereof. And this respondent further saith that if all or any of the allegations of the said paragraph were true as therein stated, and in violation of the Laws of the State of New York, that is a matter with which this Honorable Commission has nothing to do and over which it has no control, as has been heretofore decided by this Honorable Commission.

Thirteenth. For answer to the seventeenth paragraph of the petition of complainant, this respondent denies each and every allegation therein contained. And it further says that if tramps steal rides upon its trains in violation of its rules and regulations, it would be manifestly unjust to hold this respondent legally responsible for the alleged action of persons not in its employ and whose actions it cannot control.

Fourteenth. For answer to the eighteenth and nineteenth paragraphs in the petition of the complainant, this respondent denies that it has any knowledge or information sufficient to form a belief of any of the allegations in said paragraphs contained, except that in October and November, 1888, it admits that it did issue free transportation over parts of its lines to individuals claiming to be delegates to the convention mentioned in said paragraphs, but only to such individuals as were its own employes, or their families; or employes of other railroad companies pursuant to the requests of the proper officials of the companies to which said employes were attached; and this respondent denies that it was guilty of any violation of the Acts to Regulate Commerce, as alleged in the said paragraphs of said complaint.

Fifteenth. For answer to the twentieth, twenty-first and twenty-second paragraphs of the petition of the complainant, this respondent while denying each and all of the allegations therein contained (except as hereinbefore admitted) saith that even if each and all of said allegations were true as therein stated they would not show that this respondent had violated any of the provisions of the Act to Regulate Commerce.

Wherefore. This respondent prays that the said complaint may be dismissed.

(Verified)

The N. Y., Lake Erie & Western R. R. Co.

By J. A. Buchanan, its Atty.

LIVINGSTON

v.

THE D. L. & W. R. CO.

(No. 210.)

MEM. In this case amended complaint was filed October 9, 1889, adding as parties

defendant fifty-six other railroad companies, making one hundred and seventeen defendants in all.

The amended complaint would seem to include all that is contained in the preceding complaint in No. 238.

George RICE

v.

THE UNION PACIFIC R. CO.; The Atchison, Topeka and Santa Fé R. Co.; The Dunkirk, Allegheny Valley and Pittsburgh R. Co.; The Wabash R. Co., and John McNulta, Receiver thereof; The East Tennessee, Virginia and Georgia R. Co.

(No. 247.)

COMPLAINT of discrimination practiced by various railroad companies in the rates of transportation of petroleum and its products and other similar commodities, and order by the Commission allowing other railroad companies than the defendants to become parties.

TO THE HONORABLE THE INTERSTATE COMMERCE COMMISSION.

The petition of the above-named complainant respectfully shows:

I. That your petitioner is a refiner of petroleum at Marietta, Ohio, and a shipper of refined petroleum and other products of petroleum over many of the railroads of the country.

II. That the said several respondents are railroad companies and common carriers of interstate commerce on the several lines of railroad operated by them respectively, between different States of the United States, and as such common carriers are subject to the Act to Regulate Commerce.

III. That in the transportation of petroleum and its products as interstate traffic, shipments are made in the following different methods:

First—By bulk in tank cars.

Second—By bulk in combination tank cars, consisting of two upright tanks in a box car.

Third—By wooden barrel package.

Fourth—By iron barrel package.

Fifth—By cases composed of two five-gallon tin cans in a wooden box or outer case.

IV. That other commodities than petroleum and its products are also carried as interstate commerce in tanks, combination tank cars, barrels, and cases; notably, cotton-seed oil, linseed oil, lard and turpentine.

V. That among the products or varieties of petroleum so transported as interstate traffic aforesaid, are the following: Gasoline, benzine or naphtha, refined petroleum, lubricating petroleum and crude petroleum.

VI. That the Union Pacific Railway Company and the Atchison, Topeka and Santa Fé Railroad Company carry cotton-seed oil, linseed oil, lard and turpentine at a lower classification, and at less rates, than petroleum and its products, although the latter are less valuable than the former, and although the two different classes of freight are shipped under substantially similar circumstances and conditions; and the petitioner avers that petroleum and its products should be carried at a less rate

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or lower classification than cotton-seed oil, linseed oil, lard and turpentine.

VII. That tank cars are of various sizes and capacities, running from sixty-five barrels to one hundred and twenty-four barrels each, and the Union Pacific Railway Company and the Atchison, Topeka and Santa Fé Railroad Company make a charge of ninety-five dollars per empty tank car for returning said tank cars, when empty, from Pacific Coast terminal points to the Missouri River, the said charge being made irrespective of what the size, weight, or capacity of the said tank car is; and the result of such charge, as affecting the cost of shipments of petroleum in tank cars of different capacities, is as follows:

| | |
|---|--------------------|
| For 65 barrels the cost of returning the empty tank car is - | \$1.46 per barrel, |
| For 124 barrels the cost of returning the empty tank car is - | .76 " " |

| | |
|---|---------|
| Discrimination against the smaller shipment | .70 " " |
|---|---------|

VIII. That the Dunkirk, Allegheny Valley and Pittsburgh Railroad Company make a deduction of forty-two gallons per tank car from the actual number of gallons of petroleum and its products carried over its line in each tank car as interstate traffic aforesaid, and make no charge for the said forty-two gallons so carried and transported, although in the transportation of petroleum and its products by other methods than tank cars, the full amount carried is charged for without any deduction corresponding to that made on tank-car traffic.

IX. That the actual weight of the different products of petroleum transported as interstate commerce, is as follows:

| | |
|--------------------------------|---------------------------------|
| Gasoline, naphtha, and benzine | 5 $\frac{3}{4}$ pounds per gal. |
| Refined petroleum | 6 $\frac{1}{8}$ " " |
| Lubricating petroleum | 7 $\frac{1}{8}$ " " |
| Crude petroleum | 6 $\frac{3}{4}$ " " |

And it is assumed by many of the railroads that the average of these weights is 6 $\frac{3}{8}$ pounds per gallon, at which weight it is customary to charge for the transportation of the said several articles. But the Wabash Railroad Company, whose railroad, as your petitioner is informed and believes, is now under the charge of John McNulta as receiver, makes a deduction of twelve per cent of the amount or weight of gasoline actually transported as interstate traffic over its line, and makes no charge upon the amount so deducted, although no such deduction is made upon other products of petroleum transported under substantially similar circumstances and conditions.

X. That petroleum and its products, whether carried in wooden barrels, in iron barrels, or in cases, should be classified alike when carried as interstate commerce—that is, carload lots, whether of one, or all, or any kinds of the said traffic, should be classified alike, and carried over the same lengths of road, in the same direction, at the same rate per hundred pounds. And less than carload lots, whether of iron or wooden barrels, or cases, should be carried over the same lengths of road, and in the same direction, at a fixed rate per hundred pounds, irrespective of whether the shipment is in wooden or iron barrels, or cases. Yet the East Tennessee, Virginia and Georgia Railway Company, although charging alike for

iron and wooden barrels when carried in carload lots at sixth-class rates, charge for case oil in carload lots fourth-class rates, and, when carried in less than carload lots, oil in iron barrels is charged at sixth-class rates, and oil in wooden barrels is charged at third-class rates.

XI. And your petitioner avers that the said several acts of the respective defendants are in violation of the Act to Regulate Commerce, and its Supplements.

XII. Wherefore your petitioner prays that the said several defendants may be required to answer the charges herein, and that, after due hearing and investigation, an order be made commanding them severally to cease and desist from said violations of the Act to Regulate Commerce, and for such further and other order as the Commission may deem necessary in the premises.

(Signed) GEO. RICE.

PHILADELPHIA, November 7th, 1889.

(Verified.)

At a general session of the Interstate Commerce Commission, held at its office in Washington on the 8th day of November, A. D. 1889.

Upon due application in the above entitled case, the following order was made and entered:

ORDER.

WHEREAS, It has been ordered that the petition in the above-entitled cause be filed and served, and,

WHEREAS, It is claimed that the complaint therein involves questions, in the decision of which many, if not all, of the railroads of the country are interested; said questions being as follows:

First. The relative classification of the products of petroleum in comparison with cottonseed oil, linseed oil, lard, and naphtha.

Second. The question of charging the same rate for the return of empty tank cars, irrespective of the weight and capacity of each car.

Third. The question of the right to deduct and carry free forty-two gallons or other quantity of the products of petroleum out of each tank car, without making a similar proportionate deduction in the amount of petroleum and its products carried by other methods than tank cars.

Fourth. The right to deduct and carry free twelve per cent. or other quantity of gasoline, or any one or more of the products of petroleum, without making similar deductions of like proportions of all other products of petroleum carried under similar circumstances and conditions.

Fifth. The question of like rating and classification, respectively, of carload lots, and less than carload lots, of petroleum and its products, irrespective of whether the loading is in iron or wooden barrels or in cases:

Therefore, on motion of the petitioner, in order to give all the railroads of the country an opportunity to be heard in the premises: It is ORDERED.

First. That the following-named railroad companies (Here follow the names of 137 railroad companies not mentioned in the title of the case) be notified of the pendency of said 2 INTER S.

petition by the sending by mail to each of said companies a copy of this order duly attested by the Secretary of this Commission.

Second. That a copy of said petition, on application therefor, be furnished to any of the above-named railroad companies desiring to become a party to said proceeding and be heard therein.

Third. That any railroad company within the United States not named in the above list may also become a party to said cause and be heard therein in the same manner and with the same advantage as if named herein.

A TRUE COPY.

Edw. A. Moseley, *Secretary.*

[Seal.]

STEAMER R. T. COLES

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS R. CO.; The Memphis & Charleston R. Co., and The Louisville & Nashville R. Co.

(No. 246.)

The petition of the above named complainant, filed October 30, 1889, alleges discrimination against it and in favor of the Tennessee River Transportation Steamers in the facilities and rates given to the latter, and specifies numerous instances of the same, and that all are common carriers and subject to the Interstate Commerce Act.

Restraint and restoration are prayed.

OREGON SHORT LINE R. CO.

v.

NORTHERN PACIFIC R. CO.

(No. 216.)

Under the rules of practice issued by this Commission a **replication** to an answer is not required or allowed.

(Filed November 12, 1889.)

FOR abstract of complaint see *ante*, 572.

MEMORANDUM.

By the Commission:

In this case, after the answer to the complaint was filed, the complainant asked leave to file a replication. The Rules of Practice in this Commission* not only do not provide for a replication to the answer, but in effect, though not in terms, exclude it. Rule 4 provides for an answer, unless the respondent sets the case for hearing on the complaint under Rule 5, which provides as follows: "If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint." But when an answer is filed the Rules contemplate that the issue is thereby *joined*. The language of Rule 11 is this: "Up-

*1 Inters. Com. Rep. 841, 1 I. C. C. 1.

on issue being joined by the service of answer, the Commission will assign a time and place for hearing the same." And, again, in 12: "When a cause is at issue on petition and answer, each party may proceed at once to take depositions," etc. The omission to provide for a replication to the answer was not an oversight when the Rules of Practice were drafted and adopted. The view of the Commission then was to simplify the practice as much as practicable. Experience since has not developed any necessity for change in the respect under consideration. Both the letter and spirit of the statute excludes the idea of technicality in its administration. The complaint and answer are sufficient to indicate the substantial controversy. Evidence is admitted with liberality to develop all facts that bear on the issue thus made. Under the practice pursued in the hearing of causes the complainant would gain nothing by filing a replication, and would lose nothing by not filing it. The complainant has leave to withdraw his motion to file a replication.

CIRCULAR LETTER.

Addressed to General Managers of Railroads,
August 1, 1889.

SUBJECT—*Insurance, Eating-houses and Education for Employés.*

Dear Sir:

All facts regarding the relations existing between railway corporations and their employés are always of public interest, and may be of importance in determining questions upon which the interest of the employers as well as of the employed may depend.

The Commission therefore address to you the following inquiries, believing that you will appreciate the purpose of the call, and that you will cheerfully render any assistance that may be within your power to facilitate the gathering of the information which they are designed to elicit:

1st. Is an insurance fund or guarantee fund of any sort provided for the employés of your company on which they have a right to draw in case of sickness or accident, or from which payment may be made to their families in case of death? If such fund exists please state in what manner it was accumulated; how it is maintained; under whose direction it is administered; under what conditions money may be drawn from it, and any other facts respecting it which you may think it important to state. If there are any contracts or other writings or printed documents which will give definite information, and which are in your possession, the Commission would be pleased to receive copies thereof. Please also state the length of time the fund has been established; the reasons which have led to its establishment, and the feeling in respect to it on the part of the employés. If no fund of the sort named exists, please state if any attempt has ever been made to establish one, to what extent, if at all, the attempt succeeded, and why it failed.

2d. Has the company eating or lodging houses for trainmen when away from home, or does it provide reading rooms or other places of resort? If so, full particulars will be duly appreciated.

3d. Is any provision made by your company

for technical education in your shops whereby it seeks to train men for its service? Is there any recognized system of promotion in the service of the company whereby it may be expected the men will be induced to labor for marked efficiency? Are any special rules in force to insure the competency of locomotive engineers and other trainmen?

Should your own information on any of these subjects be defective, please give the names and addresses of any persons connected with your company who may be able to supply any deficiencies.

By order of the Commission:

Edw. A. Moseley, Secretary.

CIRCULAR LETTER.

Addressed to Organizations of Railway Employés, August 1, 1889.

SUBJECT—*Insurance, Apprenticeship, Grades and Promotions.*

Dear Sir:

A knowledge of the facts regarding the relations which exist between the railway corporations and their employés is always of public importance and may be particularly useful to the Commission in some cases in order to enable it to perform its duties in such manner as best to subserve the interests involved. Believing, therefore, that you will willingly cooperate in obtaining the facts, you are respectfully requested to transmit to this office a reply to the following questions:

1st. Is there an insurance fund, guarantee fund, or any other fund from which the members of your order may receive payment in case of sickness, or accidental injury, or from which their families may draw in case of death? If such fund exists please state when it was established, and whether by the railroad corporation or the employés; how it is accumulated; how maintained, and give any other facts that may be important to a full understanding of its history and workings. If no such fund exists, please state if its establishment was ever attempted; if so, to what extent, if at all, the attempt succeeded, and why it failed.

2d. Does your order insist upon any rules of apprenticeship, and if so, what are they? If a foreman or brakeman can only become engineer or conductor after a term of service, please state what that term is.

3d. In the case of engineers and conductors, are their grades of service recognized either by the order to which the employés belong or by the employing company? If so, what are those grades; and what are the conditions for passing from one to the other? In the case of men engaged in shop work, are promotions made from the ranks of the employés or are men brought from the outside to fill the positions of foreman and the like? If no recognized custom exists, please state whether it has been the subject of discussion hitherto, and what have been the impediments, if any, to its establishment. Copies of papers or documents bearing upon these questions and calculated to elucidate the subjects will be thankfully received.

By order of the Commission:

Edw. A. Moseley, Secretary.

INTERSTATE COMMERCE COMMISSION.

Frederick A. WHITE

v.

The MICHIGAN CENTRAL R. CO. and
The Lake Shore & Michigan Southern R.
Co.

(No. 200.)

1. **When a complaint charged that the respondent Railroad Companies,** which were common carriers subject to the Act to Regulate Commerce, were accustomed to make deductions of from five to ten pounds of wheat per load from the true weight when delivered by the farmer to the buyer at the elevators of the respondents, and gave receipt to the farmer for the amount as thus diminished, upon which the latter was paid by the buyer, thereby suffering a loss to the extent of such reduction, but failed to charge that the wheat was delivered for interstate transportation, or, indeed, for transportation anywhere, it was held, that the **complaint was insufficient in substance** to show violation of the Act to Regulate Commerce, and that the respondents were entitled to have it dismissed on their motions to that effect, but that the dismissal should be without prejudice.
2. **An averment that the respondents were interstate common carriers** subject to the Act to Regulate Commerce **was not of itself sufficient** to warrant an inference, under a motion to dismiss a complaint for insufficiency, that wheat delivered at an elevator of the respondents was for interstate commerce.
3. **This case was heard solely upon the respondents' motions to dismiss the complaint for insufficiency of its allegations** to show violations of the Act to Regulate Commerce; but the complainant having filed some depositions taken before the hearing of said motions, the Commission looked into this evidence with a view of seeing what light it shed upon the general claim of unlawful practice by the respondents, and upon the duty of the Commission to proceed against them on its own motion.

(Heard at Chicago September 30, 1889.—Decided December 1, 1889.)

MOTIONS to dismiss. *Granted without prejudice.*

Complaint, filed May 27, 1889, in full, ante, 551; amended complaint charging defendants as interstate common carriers, filed Sept. 30, 1889, by consent; answer of Lake S. & M. S. R. Co. filed July 5, 1889, and motion made on pleadings.

Mr. George S. Clapp for the complainant.

Mr. Ashley Pond for the Michigan Central Railroad Company.

Mr. George C. Greene for the Lake Shore and Michigan Southern Railway Company.

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REPORT AND OPINION BY THE COMMISSION.

Veazey, Commissioner :

The complainant filed an amended complaint in which he charged that he is a farmer engaged in the business, among other things, of raising and selling wheat and grain; that the respondents are common carriers engaged in the transportation of passengers and property by railroad between points in the States of Indiana and Michigan and other States farther east, and as such common carriers are subject to the Act to Regulate Commerce; that they have elevators for the receipt and storage of wheat at their several railroad stations, the Michigan Central Railroad Company at Buchanan and Dayton, Michigan, and the Lake Shore and Michigan Southern at Plainfield and New Carlisle in the County of St. Joseph and State of Indiana, at which elevators of said Companies in said places the complainant has taken and delivered to said Companies different loads of wheat within the last five years; that the respondent Companies have, both of them, a custom in respect to the receipt of wheat into their respective elevators, which the complainant is advised is illegal, to wit: That the Companies do not deal with farmers in storing wheat for shipment; that they contract with the shippers who purchase from the farmers their wheat; that the shipper gives the farmer a ticket in the nature of an order to the Railroad Company to receive the wheat; that the Company then receives the wheat and gives to the holder of the ticket its receipt for the weight of the wheat, and the farmer takes the ticket and receipt to the buyer and gets his pay; but that from each and every load of wheat which the Michigan Central Railroad Company receives into its elevators it retains five pounds of wheat and gives its receipt for the weight of the load less such five pounds; that the custom of the Lake Shore and Michigan Southern Railroad Company is to deduct from each load not more than ten pounds but at least five pounds on each load; that if the odd pounds are more than five it deducts not to exceed ten pounds and retains such excess, giving its receipt to the farmer for the weight, less the amount so detained; that both the respondent Companies have taken these deductions from the complainant within the last five years, and that they insist on the right to so deduct from each load of the complainant and all other farmers depositing wheat in their elevators on their roads.

That in the fall of 1884 the complainant delivered to the Michigan Central Company at its elevator in Dayton, Michigan, forty loads of wheat, and that in every instance said Company deducted five pounds, giving the complainant a ticket for the weight of the wheat less such five pounds; and that the value of the wheat so deducted was about the sum of three and one-third dollars.

Complainant prayed that the Commission require the respondent Companies to refund and pay the complainant for the value of the wheat so retained by each Company, respectively, within the last six years; also that the

Commission require the respondent Railroad Companies to cease and desist from such practice and custom of converting wheat stored in their elevators, and that in the future they give credit to the depositors of wheat in their elevators for the actual amount of wheat received and stored by them; and further prayed for general relief under the Act to Regulate Commerce.

The respondent The Lake Shore & Michigan Southern Railway Company made answer denying that any of the acts complained of in the petition, or the custom therein alleged, were or are in violation of the provisions of the Act to Regulate Commerce, and denying the jurisdiction of the Commission upon the facts stated in the complaint; and second, averring that the amount of wheat deducted from actual weight, alleged in the petition, is barely sufficient to indemnify the Railroad Company against loss by shrinkage in the wheat stored and unavoidable waste in the handling of the wheat, and that the custom of making such deduction is reasonable and just for that reason, as well as for the further reason that wheat is received at said elevators and stored by the Railroad Company, and a certificate is given of the weight, for the benefit and advantage of the party delivering the same, without charge by the Company or cost to the party, other than the said slight deduction from actual weight when received.

The original complaint was filed May 27th, 1889, and was duly served on the respondents. Said answer of The Lake Shore & Michigan Southern Company was filed July 5th, 1889. On the 14th of June, 1889, The Michigan Central Company, instead of filing answer, served notice, under Rule V of the Rules of Practice, for a hearing of the case on the complaint. Subsequently, on July 31st, 1889, the complainant moved for leave to file an amended complaint charging the respondents as interstate common carriers. On August 11th, 1889, the Commission ordered said application for filing an amended complaint to be filed, and that the same be heard and disposed of at the same time that the original complaint should be heard and determined, upon said notice of The Michigan Central Company.

The complainant proceeded to take testimony by deposition in advance of the hearing, under Rule XII of the Rules of Practice.

When the case came on for hearing, pursuant to assignment, on September 30th, 1889, no objection was made to the filing of the amended complaint, but said notice of The Michigan Central Company for hearing on the complaint was, without objection, treated as having been renewed as to the amended complaint, and at the same time The Lake Shore & Michigan Southern Company moved to dismiss the complaint for insufficiency, pursuant to the provision of Rule V when an answer has been filed. Rule V provides that, when notice is served for hearing of the case upon the complaint, the facts stated therein will be taken as admitted.

The case was heard on said motions of the respondents, they having taken no testimony. After arguments the counsel of the complainant stated that he did not wish to file further testimony, and counsel for respondents that

they had no testimony to offer, until their motions to dismiss were disposed of.

The case therefore stands for decision upon the sufficiency of the complaint, taking the facts therein charged to be true.

It is entirely plain that the complaint fails to state that any wheat was delivered to either of the respondent Companies by the complainant or others, at any of the railroad elevators, or was received or stored, for interstate transportation. This, in fact, is so plain that there is no room for discussion as to its proper interpretation. It is urged in reply in behalf of the complainant that, when it is charged in general terms in a complaint that the respondents are engaged in the transportation of passengers and property between points in different States, it is sufficient to warrant the inference that any freight which one of the carriers is charged to have received at any specified point in a State was received to be transported into another State, and that the burden is on the Company to show it was not received; and so here, that wheat delivered at any elevator of the respondents was to be transported beyond the limits of the State wherein it was received. This is clearly not a necessary inference. The fact is just as likely to be the other way, especially in the case of railroads like the respondent roads, which run a long distance through large States. It is to be kept in mind that we are now on the point as to the sufficiency of the complaint. The question is as to what jurisdictional facts it contains.

The proceeding is analogous to a demurrer to a declaration, which is a confession of alleged facts well pleaded, but not a confession of such inferential facts as do not necessarily follow from the alleged facts. The position of the complainant is that, because possibly the grain delivered at the elevators was intended for transportation beyond the State, therefore the Commission should assume it was so intended and received by the Railroad Company. We think it is not a debatable proposition.

But the failure in this complaint goes farther. It does not aver that the delivery of the wheat to the elevators was for the purpose of transportation anywhere. A farmer sells to a buyer, and is to deliver at the elevator. The transaction is solely between those parties. The farmer is not the shipper. The railroad company moves the wheat for the buyer as he may at any time direct. There is no averment as to what is to be done with the wheat as between the buyer and the railroad company.

When this complaint passes the averments as to this custom of the respondents and reaches even specific averments, it fails to charge any instance of the alleged wrong since the Act to Regulate Commerce took effect. Indeed, it puts the delivery to the elevator by the complainant as far back as 1884, more than two years before this Statute was passed, and charges no delivery since; so that, if we were warranted in presuming the delivery was for interstate transportation, no violation within the cognizance of the Commission is charged.

We think that under the most liberal construction known to legal proceedings, the complaint is insufficient.

It need not be stated that, whatever wrongs the carrier may have perpetrated of the nature

charged as to deliveries of wheat for transportation within the State only, they are not within the jurisdiction of this Commission to correct.

The complaint, even as amended, being clearly insufficient in substance to show violations of the Act to Regulate Commerce, the respondents are entitled, upon their motion, to have it dismissed; but even if we look beyond the complaint into the evidence, with a view to see whether that makes out a case for a corrective order against the respondents, we find the facts testified to are very inconclusive and unsatisfactory.

One witness in substance testified to his employment for The Lake Shore & Michigan Southern Railway Company at New Carlisle Station, Indiana, for seven years continuously, previous to and until June, 1889; also to the custom of making deductions in the weight of wheat delivered by farmers at the elevator at that station, substantially as charged in the complaint; also as to the amount that he shipped out of the elevator there to the elevator at Toledo in 1883 and in 1888, these amounts being the excess of wheat over the amount given in receipts to the farmers. He also testified as to what he learned was the amount of such excess shipped from Terre Coupee, which was hearsay, and what he discovered was shipped from Rolling Prairie; also to the fact of shrinkage of weight of wheat in an elevator; also about the scales used and method of weighing, and imperfection in some of the scales. Although not so stated in terms by the witness, we infer and find that the wheat delivered at the elevators at stations in Indiana was shipped by the buyer to points outside that State.

Another witness, a farmer, testified to his sale and delivery of wheat at Dayton, Michigan, in 1882, and to the custom of The Michigan Central Railroad Company to deduct as high as nine pounds and not less than five from every load weighed, and that this has existed for many years.

These witnesses testified to some other facts, but not affecting the force of their testimony on material points. No other witnesses were produced. No claim was made by counsel on this testimony, and it is examined by the Commission, on its own motion, only to enable it to see what the duty is in view of the information which the testimony affords. And in this view it is proper to note what the evidence fails to show as well as what it does show.

It fails to show that the complainant has suf-

fered any wrong under the alleged custom since this Act was passed; or that he has delivered any wheat whatever, for any purpose, to the respondents, since the fall of 1884; or that the wheat then delivered was for shipment beyond the State where shipped; or that it was to be transported anywhere. The evidence shows that deductions from weight were made by the respondent Companies as charged, since this Act was passed; but it is not shown under what circumstances or that it was not pursuant to arrangement or understanding between the parties. So far as shown it would seem to have been a well understood and uncomplicated custom. Not a single farmer who thus sold and delivered wheat since this enactment was produced as a witness to show the fact of a deduction or to complain of it as to him, or as to anybody else, or as a custom. The evidence does show that there is a shrinkage in the weight of wheat while in the elevator.

Taking all the material facts which the evidence of the complainant tends to show, they are, as before stated, inconclusive and fall far short of establishing a case of violation of the Act to Regulate Commerce. But, while we think the respondent Companies are entitled to have the complaint dismissed, we think it should be without prejudice, because it does not follow from the fact that no violation of the Act to Regulate Commerce is shown, that none could be shown under the alleged custom of making deductions from the weight of wheat. The complaint and evidence show a custom of what is claimed to have been a wrongful conversion of wheat by the Railroad Companies. Although such conversion would be a wrong within the jurisdiction of the common-law courts to afford a remedy, yet, if it amounted to an unjust and unreasonable charge for the receiving and delivering, storage or handling of the wheat, in connection with interstate transportation, then it would be a violation of section 1 of this Statute. It has not been indicated and is not readily apparent what other provision of the Act would be violated by the practice alleged. But if a case of violation of any provision can be shown there should be no bar to its prosecution; and facts may be developed when it might become the duty of the Commission to proceed on its own motion under that provision of section 12 (as amended) which is as follows: "And the Commission is hereby authorized and required to execute and enforce the provisions of this Act."

Petition dismissed without prejudice.

COLORADO SUPREME COURT.

B. H. BAYLES, *Appt.*,

v.

KANSAS PACIFIC R. CO.

(.....Colo.....)

1. **Mere inequality between the rate charged a shipper** by a railroad company for transporting goods, and the company's published tariff rates, is not prohibited either by the common law or by the provision in section 6, article 15, of the Constitution, that "no undue or unreasonable discrimination shall be

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made in charges;" hence, a contract to transport a certain shipper's goods at less than regular tariff rates is valid unless it be shown that an unjust discrimination was thereby made or intended.

2. **The burden is upon defendant**, in an action to recover back money paid for transportation over and above the amount provided for in the transportation contract, to allege and prove unjust discrimination.

3. **The authority of a receiver of a**

railroad company, who is operating the road, to make a contract granting special transportation rates, will be presumed until the contrary is shown.

4. **A demurrer will not be sustained** upon the ground that the complaint does not state facts sufficient to constitute a cause of action, if there are facts well pleaded sufficient to entitle the party to any relief; and the fact that the complaint fails to show that plaintiff is entitled to all the relief asked is immaterial.
5. **A receiver is neither a necessary, nor a proper, party** to an action, after his discharge, to reform a contract made with him as receiver.

(October, 1889.)

A PPEAL by plaintiff from a judgment of the Denver Superior Court sustaining a demurrer to the complaint in an action to recover a stipulated rebate upon a transportation contract. *Reversed.*

The facts are fully stated by the court.

Messrs. Brown & Putnam for appellant.

Messrs. Teller & Orahoad for appellee.

Pattison, C., delivered the following opinion:

The question presented for consideration in this case arises upon the judgment of the court below, sustaining a demurrer to the complaint.

The grounds of the demurrer were, in substance:

1. That the complaint did not state facts sufficient to constitute a cause of action.
2. That the contract sought to be enforced was void as against public policy.
3. That there was a defect of parties defendant.

To discuss the case intelligently, a careful analysis of the contract and the allegations of the complaint is necessary.

The contract is set out *in hac verba*, and is as follows:

"This agreement made this 20th day of March, A. D. 1878, by and between B. H. Bayles of Denver, Colorado, party of the first part, and S. R. Ainsley, general agent of and representing the Kansas Pacific Railway Company, party of the second part, witnesseth, that the said party of the first part hereby agrees to ship all merchandise bought by him and shipped from eastern cities, by the Kansas Pacific Railway Company. In consideration of which the said party, on behalf of and representing the Kansas Pacific Railway Company, agrees to transport all merchandise consigned to said party of the first part, from:

"1. New York to Denver, Colorado, \$1 per hundred pounds, regardless of classification.

"2. Chicago, Illinois, to Denver, Colorado, \$110 per carload, and 80 cents per hundred pounds on less than carload shipments.

"3. St. Louis, Missouri, to Denver, Colorado, 80 cents per hundred pounds on less than carload shipments, and \$110 per carload lots.

"4. Kansas City, Missouri, and Leavenworth, Kansas (proper), \$90 per carload, and 60 cents per hundred pounds on less than carload shipments.

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"It is agreed that above rates shall be and remain in force until January 1, 1879. And it is further agreed that the said party of the second part shall rectify and correct all overcharges and protect the said party of the first part in the above-named rates, in Denver, Colorado. And it is further agreed that when merchandise shipped to the care of the Kansas Pacific Railway Company shall be diverted to other roads and be delivered by other than the Kansas Pacific Railway Company, it shall in no way work a forfeiture of this contract.

(Signed)

"B. H. Bayles,

"S. R. Ainsley,

"Agt. K. P. Ry."

It is then alleged that prior to the date of said contract, by order and decree of the Circuit Court of the United States for the District of Kansas, in a certain suit wherein John A. Stewart and others were plaintiffs, and the Kansas Pacific Railway Company was defendant, one S. T. Smith had been appointed, and had duly qualified as receiver, and had taken possession of the said railway for its entire length, from Kansas City, Missouri, to the City of Denver, and from that time until June 14, 1879, had managed said railway, and that all transportation of freight was contracted for and controlled by him as such receiver.

This allegation is followed by the statement that S. R. Ainsley, at the time the contract was made, and during all of his term of office, was the general agent of the said receiver at the City of Denver, and authorized to execute, on his behalf, agreements for the transportation of freight, including the contract above set forth; that by mutual mistake in the form of the agreement the contract was executed by the said Ainsley as representative of the said Railway Company, rather than said receiver.

It is then alleged that the contract was adopted, and partially performed, by the said receiver, and that freight of plaintiff was transported under such contract by him, through his agents and employes, and all money paid by plaintiff was received by his agents, and used by him in the management of said railway, and accounted for by him upon his final discharge.

It is then stated that the railway remained in the possession and under the control of the receiver until June 4, 1879, when the circuit court decreed that it should be delivered to and retained by the Railway Company, which order was complied with by the receiver, who, on the 14th day of the same month, turned over to the Railway Company all moneys in his hands, amounting to the sum of \$265,791.20, and took a receipt therefor, by which it was stipulated and agreed by the Railway Company that "any other claims against the receiver should be assumed and paid by the said Railway Company," which said adjustment was afterwards approved by a final decree, rendered October 17, 1884.

It is then stated that at the time the money was so paid to defendant, by the receiver, the indebtedness sought to be recovered in this action was a valid claim against the receiver and one of the debts which the Railway Company assumed and agreed to pay.

It is then alleged that under the provisions of the contract plaintiff, in performance there-

of, shipped all merchandise bought by him in eastern cities over the Kansas Pacific Railway to Denver, and that the total freight on such merchandise aggregated the sum of \$10,619.69, which sum he, from time to time, paid to the agents of the receiver in full. That, under the contract, he was entitled to a rebate on the amount paid for freight, in the sum of \$2,565.91; that of that sum the agent of the receiver, with his full knowledge and consent, paid to plaintiff at various times, and in different amounts, the sum of \$1,353.53, leaving a balance still unpaid on March 3, 1879, of \$1,211.39; that the railway company refused to pay the balance remaining unpaid. That plaintiff paid the full freight rates on merchandise shipped by him as aforesaid, and by terms of the contract was entitled to a return of said sum of \$2,565.91, "which sum was the aggregate of overcharge made by said receiver thereon, in consequence of some running arrangement between the said receiver and certain other connecting lines, the nature of which is wholly unknown to plaintiff and cannot therefore be here stated."

The second cause of action need not be stated.

Judgment is prayed for the reformation of the contract, so that the same shall conform in its execution to the real intention of the parties, and for the sum of \$1,211.39 upon the first cause of action, and for the sum of \$2,000 upon the second cause of action, and for costs.

The demurrer was sustained upon the sole ground that the contract sought to be enforced was void as against public policy.

The court in effect held that, under the contract, the plaintiff secured rates for the transportation of merchandise which were less than the published schedule rates of defendant; that such charges amounted to an unjust discrimination, within the meaning of the law, and of the Constitution of this State, of which the court could take cognizance upon demurrer, without proof of any of the facts, circumstances, conditions or surroundings under which the contract was made, and which may have existed while the same was being performed by the plaintiff. This decision, and the principles which are invoked to sustain it, will now be discussed.

The naked facts of the case are, simply, that upon the day named a contract was made, by the terms of which plaintiff, for a certain period, was to have a special rate upon the merchandise purchased by him in eastern cities, in consideration of his undertaking to consign such merchandise from Kansas City *via* Kansas Pacific Railway. This rate only applied to shipments made at the eastern terminus of the railway, or which were shipped from eastern cities consigned to appellee. Whether the rate was either different or less than that given to other shippers residing in Denver, under like conditions, and under the same circumstances, does not appear.

It does not appear, either directly or indirectly, that the special rate given to plaintiff was an exclusive privilege enjoyed by him alone. There is nothing to warrant the inference that any shipper residing in Denver could not have secured the same rate upon property which was to be shipped by him from eastern

cities. There is nothing in the complaint showing that any shipper, whether he desired to ship much or little, might not have secured the same rate upon application to appellee. Neither is there anything to warrant the assumption that the arrangement was a secret one. Neither is there any reason for the inference that it was the intention of the Railway Company to give to appellant a preference. There was no promise not to give the same rates to others. The Railway Company remained at liberty to charge others the same or lower rates.

Upon all the facts, therefore, if effect be given, not only to the language of the contract itself, but to the very allegation of the complaint, it is clear that the purpose of the contract was to give to appellant a special rate and nothing more. This contract was performed by him, and partially performed by the Railway Company. The ultimate conclusion to be drawn from the entire record is that appellant secured a rate which was less than the regular schedule rates in force at the time; that there was some inequality in charges made by the appellee, but nothing to show that such inequality in charges was practiced toward those who shipped property under like circumstances and conditions.

Do these facts, standing alone, warrant the conclusion that, within the meaning of the law and of the Constitution, an unjust discrimination was intended, which rendered the contract void as against public policy?

It is a well-settled elementary principle of the law of common carriers that mere inequality in charges does not amount to unjust discrimination. The requirement of the law is that the charge made shall be reasonable. A claim against a common carrier cannot be predicated upon the bare fact that the amount paid by one is greater than the amount paid by another. At common law the question is whether, under all the circumstances, the charge is reasonable.

Complete uniformity in charges is not obligatory. This principle prevails in all States except where it has been modified by legislative enactment. In the administration of the law, the principle itself has never been modified, but the courts have declared in many cases that there must be no unjust discrimination. This, too, has come to be an elementary principle.

Charges, therefore, must not only be reasonable, but equal, when the circumstances and conditions are the same. Privileges tending to give to a shipper a monopoly, which may injuriously affect those engaged in like pursuit, are declared to be unjust. Contracts which tend to create such preference are held to be void as against public policy.

These principles of the common law remain in full force in practically every State. In this State they are made a part of the organic law, from which neither the courts nor the Legislature can depart.

Attention is here called to a few of the authorities bearing upon these principles: "Railroad companies may lawfully make contracts to refund to a shipper a certain portion of the stipulated or established freight by the name of drawbacks or rebates; but an agreement not to allow the same drawback to others is against public policy and void. But if such objection-

able part of the contract is severable, it will not affect the validity of the entire contract." 2 Rorer, Railroads, 1375.

In the case of *McNees v. Mo. Pac. R. Co.* 22 Mo. App. 224, 4 West. Rep. 872, the action was brought to recover rebates upon a contract practically the same as that stated in the complaint in the case at bar. A demurrer was interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and the question argued and decided was, whether the contract set forth was void as against public policy. Hall, J., in the course of his opinion, said: "The contract was not illegal and void. It was not within the prohibition of Revised Statutes, section 815 or section 821. Neither was it within the prohibition of the common law against any distinction or discrimination being made by a common carrier in favor of one against another. It was not discrimination against anyone for the defendant to agree with plaintiff to charge him less than the regular tariff rates. The regular tariff rates were fixed and known. By the contract, by means of a rebate, the plaintiff was to be charged less than those rates, but wholly without regard to what others were to be charged. The object of the contract was not to discriminate against anyone, but was simply to give the plaintiff a less rate than the fixed and regular rate. By the contract no discrimination was made between the plaintiff and others. Under the contract the defendant might not only have charged everyone the same rate given to plaintiff, but even a less rate than that rate. To charge one a rate less than the regular fixed rate is not discrimination. But to charge one a higher rate than the lowest fixed rate given to anyone else, under certain circumstances, is discrimination."

The sections of the statute cited by the court need not be quoted here. The statute was enacted to prevent unjust discrimination.

In the case of *Christie v. Mo. Pac. R. Co.* 94 Mo. 453, 32 Am. & Eng. R. R. Cas. 413, 13 West. Rep. 688, 2 Inters. Com. Rep. 22, it is held that "a common carrier has the right to contract to ship freight at a lower rate than the published tariff rate if he choose to do so, and such contract is not against public policy unless the privilege to ship at such rate is granted exclusively to the shipper with whom it is made, or is denied to other shippers. It is the exclusiveness of the privilege granted to one and denied to another which makes the discrimination and renders the contract void as against public policy. No such exclusiveness or discrimination appears in the contract sued upon, and the objection of the defendant to the reception of any evidence was properly overruled."

In this case the action was based upon an alleged contract whereby it was agreed that plaintiff should ship grain of various kinds from certain stations in the State of Kansas to Chicago, Ill., and that, on presentation of bills for such shipments, the plaintiff should pay the usual and ordinary rates therefor, according to defendant's tariff rates, and that defendant should pay to plaintiff all sums of money which defendant should receive over and above the rate agreed upon between the parties. The object of the suit was to recover from defend-

ant the difference between the sum paid by plaintiff according to defendant's tariff rates, and the amount that was, by the agreement of the parties, to be paid. *Ragan v. Aiken*, 9 Lea, 609; *Ex parte Benson*, 18 S. C. 39; *Avinger v. South Carolina R. Co.* 29 S. C. 265, 35 Am. & Eng. R. R. Cas. 519; *Langdon v. Robertson*, 13 Ont. Rep. 497, 30 Am. & Eng. R. R. Cas. 23; *Johnson v. Pensacola & P. R. Co.* 16 Fla. 623.

The cases cited clearly establish the proposition that mere inequality between the rate charged a shipper and the published tariff rates does not constitute unjust discrimination, within the meaning of the law.

The court below decided this case upon the authority of *Scofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 1 West. Rep. 812. The case is well considered, and contains a most exhaustive and instructive discussion of the question of discrimination; but nowhere, in all the fifty pages occupied by the discussion, can there be found a syllable upon which the conclusion that the contract in the case at bar was void as against public policy can be predicated.

The principle decided, briefly stated, is as follows: "Where a lower rate is given by such corporation to a favored shipper, which is intended to give, and certainly gives, an exclusive monopoly to the favored shipper, affecting the business and destroying the trade of other shippers, the latter have the right to require an equal rate for all under like circumstances."

Messenger v. Pa. R. Co. 36 N. J. L. 407, is cited in support of the judgment. The principle in that case is precisely the same as that decided in the Ohio case, and is stated in the syllabus in the following language: "An agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry under the same conditions for others is void as creating an illegal preference." The same case was reviewed a second time, and is reported in 37 N. J. L. 531. The doctrine of these two cases is unquestionably sustained both by reason and authority.

Nevertheless, in the same State, in the case of *Stewart v. Lehigh Valley R. Co.* 32 N. J. L. 505, it was expressly held that "a covenant by the Morris Canal & Banking Company not to allow to others a drawback from established rates, on the transportation of merchandise over its canal, which it agreed to allow to the covenantee, is against public policy and void. Such a contract does not, however, invalidate the entire contract in which it exists, and from the remainder of which it is severable. The agreement to allow the drawback to the covenantee is valid and enforceable, and others are entitled to equally reasonable terms."

In the case of *Hays v. Pennsylvania Co.* 12 Fed. Rep. 309, Baxter, Circuit Judge, in discussing the question of discrimination, says: "It is enough for present purposes to say that the defendant has no right to make unreasonable and unjust discriminations. But what are such discriminations? No rule can be formulated with sufficient flexibility to apply to every case that may arise. It may, however, be said that it is only when the discrimination inures to the undue advantage of one man, in consequence of some injustice inflicted on another,

that the law intervenes for the protection of the latter."

In the light of these authorities, attention is now called to the provisions of the Constitution which relate to this subject. Section 6 of article 15 declares that "all individuals, associations and corporations shall have equal right to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the State; and no railroad company, nor any lessee or employé thereof, shall give any preference to individuals, associations or corporations in furnishing cars or locomotive power."

That this is but a declaration of the common law is conceded. By this provision, the elementary principles of the law of common carriers, above defined, are adopted as a part of the organic law of the State. Railway companies organized or authorized to do business within this State are subject to the law as declared by this constitutional provision. The language of the section is, "that no undue or unreasonable discrimination shall be made in charges." By fair intendment, it is clear that railway companies, under this provision, may discriminate so long as such discrimination is neither "undue nor unjust." While this provision remains in force, it may well be doubted whether either this court or the Legislature can declare that a railway company shall not discriminate in charges at all, or that mere inequality in rates shall constitute an "undue or unjust" discrimination. By this provision railway companies are left at liberty to regulate the rates of transportation, and are not answerable for their conduct in this respect, unless such charges are unreasonable and by "undue and unjust" discrimination tend to create exclusive privileges, to the detriment of other shippers or the public at large.

It is clear that the contract set forth in the complaint, unless supplemented by proof of facts tending to establish an exclusive privilege, or an unlawful preference, is not void within the meaning of this section. There is no presumption that the contract is void, and in this, as in all other cases, when mere inequality in charges appears, the parties should be allowed to show that by reason of existing circumstances or conditions no unjust preference or discrimination was either created or intended. The court cannot act *ex mero motu*. The burden is upon him who charges illegality. The defendant should have been required to answer, and to establish the iniquity of the agreement by proof.

In this connection, attention is called to the case of *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, 6 West. Rep. 101, which has been cited as authority in support of the judgment. In the syllabus of that case it is stated that "a contract between a railroad company and a shipper, that the latter shall pay the regular established rates on freight, the same as all other shippers, and that the company shall pay back to him, by way of rebate, a certain portion of the freight so charged and paid, whereby such shipper will pay a less rate for transportation than that paid by others and the public generally, for like services under similar circumstances, and

for like distances, is void as being against public policy at common law, and in violation of the statute against unjust discrimination." An examination of this case will clearly show, first, that the doctrine above stated is not sustained by the opinion, and second, that the decision is based upon a statute of which the constitutional provision of this State is in no sense a counterpart.

The case suggests an examination and discussion of the course of legislative enactment and judicial decision in Illinois. The suit was brought to recover drawbacks or rebates. The railroad company, by special plea, set up the contract under which the plaintiff claimed. A demurrer to the special plea was sustained. Upon the trial, under the general issue, the railway company offered to prove that the arrangement by which the rebates were agreed to be paid was a secret arrangement, "that the rates as given to the plaintiff were private, and not open to the public generally, and less than were charged to the public generally, and less than the schedule rates, and less than any other shipper had, except Davis & Finney; that plaintiffs and Davis & Finney did the bulk of the grain business on the road; that no other grain shippers had such special rates and could not compete with plaintiffs." This evidence was excluded.

The Legislature had passed two different statutes. The one in force when the case of *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67, cited by appellant, was decided, had been repealed, and a subsequent statute enacted, which was in force when *Indianapolis, D. & S. R. Co. v. Ervin*, *supra*, was before the court. By the new statute it was declared, among other things, that "all discriminating rates, charges, collections or receipts, whether made directly or by means of any rebate, drawback or other shift or evasion, shall be deemed and taken against such railroad corporation as prima facie evidence of the unjust discrimination prohibited by the provisions of this Act." Ill. Rev. Stat. 1874, chap. 142, § 88.

This statute in effect established a new rule of evidence, which did not prevail in that State prior to its enactment. *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67.

Discriminating rates are declared to be prima facie evidence of the unjust discriminations prohibited by the Act. No new principle was created. Discriminating rates were not made conclusive evidence of unjust discrimination under that statute. Indeed, the Legislature of that State could not have lawfully enacted such a principle under the Constitution, as will be hereafter seen. The enactment of this statute resulted from a former decision of the supreme court construing a prior Act. *Chicago & A. R. Co. v. People*, 67 Ill. 11.

The Act in force prior to 1873 prohibited any discrimination whatever in charges, and was intended to give effect to a constitutional provision, which reads as follows: "The General Assembly shall pass laws to correct abuses, and prevent unjust discrimination or extortion, in the rates of freight and passenger tariffs on the different roads in the State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Art. 11, § 155.

In the case last cited *Chief Justice* Lawrence says: "This provision expressly directing the Legislature to pass laws to prevent unjust discrimination is a recognition of the palpable fact that there may be discriminations which are not unjust, and, by implication, it restrains the power of the Legislature to a prohibition of those which are unjust. That was undoubtedly the object of the Legislature in passing the existing law . . . But the Act itself goes further. It forbids any discrimination whatever, under any circumstances, and whether just or unjust, in the charges for transporting the same class of freight over equal distances, even though moving in opposite directions, and does not permit the company to show that the discrimination is not unjust. The mere proof of the discrimination makes out a case against the railway companies, which they are not allowed to meet by evidence, showing the reason or propriety of discrimination, and then, upon this sort of *ex parte* trial, imposes, as a penalty for the offense, a forfeiture of the franchise, which would often be equivalent to a fine of millions of dollars." He further says: "That the naked fact that a railway company charges a larger sum for transporting freight of the same class over a given distance than it is charging for the same distance over another part of its road, or in the opposite direction, is not, of itself, conclusive evidence of an unjust discrimination, will be manifest on a moment's consideration." Also: "We give this illustration for the purpose of showing that a difference of price for the same distance of transportation is not necessarily an unjust discrimination, and that any law must be fatally defective which infers guilt as a conclusive presumption, from a mere fact of difference of rates, without permitting the companies to show why the different rates were adopted." And finally: "The opinion of the court is that, while the Legislature has an unquestionable power to prohibit unjust discrimination in relation to freights, no prosecution can be maintained under the existing Act, until amended, because it does not prohibit unjust discrimination merely, but discrimination of any character, and because it does not allow the companies to explain the reason of the discrimination, but forfeits their franchise upon an arbitrary and conclusive presumption of guilt, to be drawn from the proof of an Act that might be shown to be perfectly innocent. In these particulars the existing Act violates the spirit of the Constitution."

This decision was made at the January Term, 1873. The Act construed in *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, 6 West. Rep. 101, was approved May 1, 1873, and went into force in July of the same year.

The above discussion of the Constitution and statutes of Illinois renders it clear that the case of *Indianapolis, D. & S. R. Co. v. Ervin*, *supra*, can have no weight in this State. The Legislature of Illinois has laid down a new rule of evidence, under which the burden of justifying such a contract is upon the party who seeks to enforce it. At common law its invalidity must be shown by the party who attacks it. In this State the common law prevails.

The contract sought to be enforced in this case was therefore presumptively a lawful contract. The complaint, as an entirety, express-

ly shows that the appellant secured special rates, and by inference, that such rates were less than schedule rates. For this reason alone the court below declared that the contract was against public policy. This was error. The demurrer should have been overruled and the defendant required to answer. If defendant had answered that the contract was against public policy, because an unjust discrimination was intended, and the answer had been sustained by proof, the plaintiff could not have recovered.

The remaining questions in the case will now be briefly considered.

The contention that the receiver was without power to make the contract is without merit. It is expressly alleged, and in effect admitted by the demurrer, that the receiver managed and controlled the business of the Company; that he operated the railway. It cannot be assumed that the contract was in violation of his authority until his authority in the premises is shown.

Upon the assumption that the contract was valid, other questions suggested by appellee's counsel will be briefly discussed.

The first and general ground of demurrer stated is that the complaint does not state facts sufficient to constitute a cause of action. The rule is well established in this State that if there are facts well pleaded, sufficient to entitle a party to any relief, a demurrer will not be sustained upon this ground.

In *Herfort v. Cramer*, 7 Colo. 483, it is held that "a pleading, to be subject to demurrer, must present defects so substantial in their nature, and so fatal in their character, as to authorize the court to say—taking all the facts to be admitted—that they furnish no cause of action whatever."

If the complaint is tested by this principle, can it be said that upon all the facts alleged no cause of action whatever can be predicated? It appears that at the time the contract was made Ainsley was the agent of the receiver of appellee; that he made the contract as such agent; that by it he intended to bind the receiver; that the contract was adopted by the receiver as his own; that at the time the contract was made and during all its life, he was operating the railway, and that he performed it, in part, by paying rebates according to its terms; that he received the moneys paid for freight by plaintiff and used the same in the operation of the road; that he accounted for and paid over such moneys when discharged from his office; that he took a receipt from the Railway Company, by the terms of which that company obligated itself to pay any other claims against him then outstanding; that this claim was existing at the time of his discharge. These allegations clearly state a cause of action. The contention that the cause is equitable, and that the allegations of the complaint are insufficient to entitle plaintiff to a decree reforming the contract for mutual mistake, cannot be entertained. It is clear that upon proof of all the allegations of the complaint, plaintiff would be entitled to a judgment, even if he failed to show that there was a mutual mistake in the manner of executing the contract, within the meaning of equitable principles.

If the complaint fails to show that the plaintiff is entitled to all the relief asked, it is not,

for that reason, demurrable because it does not state facts sufficient to constitute a cause of action. *White v. Lyons*, 42 Cal. 279; *Canty v. Lattner*, 31 Minn. 239; *Hewitt v. Powers*, 84 Ind. 295; *Bayless v. Glenn*, 72 Ind. 5; *Moritz v. Splitt*, 55 Wis. 441; *Teusbury v. Schulenberg*, 41 Wis. 584.

It is further contended that the complaint is demurrable for defect of parties defendant; that S. T. Smith should have been made a party, for the reason that, as a part of the relief asked, a reformation of the contract was prayed for. It appears that Smith was discharged from his receivership long prior to the commencement of this action. It is a well settled principle that a receiver is not personally liable upon a contract or covenant made officially. It has already been said that it affirmatively appears in the complaint that this was the contract of the receiver, and not of Smith as an individual. This being so, it would be idle to make him a party, as no relief could be had against him. He was neither a necessary nor a proper party to the action. *High, Receivers*, §§ 272, 273; *Arnold v. Suffolk Bank*, 27 Barb. 425; *Livingston v. Pettigrew*, 7 Lans. 405; *Farmers L. & T. Co. v. Iowa Cent. R. Co.* 2 McCrary, 181; *Brown v. Wabash R. Co.* 96 Ill. 297.

The judgment should be reversed and the cause remanded, with leave to appellee to answer.

Per Curiam:

For the reasons stated in the foregoing opinion the judgment is reversed, and the cause remanded to the District Court of Arapahoe County as successor under the law to the Superior Court.

Richmond, C., concurs.

Reed, C., dissenting:

I regret that I am unable to adopt the conclusions reached by the majority of the court. The question to be discussed and determined is, Was the judgment of the court below, in sustaining the demurrer to the complaint and dismissing the suit, correct? The suit was brought to recover money alleged to have been paid by the appellant to appellee for the transportation of merchandise. The written contract of the parties is set out in full in the complaint, and is as follows:

"This agreement made this 20th day of March, A. D. 1878, by and between B. H. Bayles, of Denver, Colorado, party of the first part, and S. R. Ainsley, general agent of and representing the Kansas Pacific Railway Company, party of the second part, witnesseth that the said party of the first part hereby agrees to ship all merchandise bought by him and shipped from eastern cities by the Kansas Pacific Railway Company. In consideration of which the said party, on behalf of and representing the Kansas Pacific Railway Company, agrees to transport all merchandise consigned to the said party of the first part, from,

"1. New York to Denver, Colorado, \$1.00 per hundred pounds, regardless of classification.

"2. Chicago, Ill., to Denver, Colo., \$110 per carload and 80 cents per hundred pounds on less than carload shipments.

"3. St. Louis, Missouri, to Denver, Colo., 80

cents per hundred pounds on less than carload shipments, and \$110 per carload lots.

"4. Kansas City, Missouri, and Leavenworth, Kansas (proper), \$90 per carload, and 60 cents per hundred pounds on less than carload shipments.

"It is agreed that above rates shall be and remain in force until January 1, 1879. And it is further agreed that the said party of the second part shall rectify and correct all overcharges and protect the said party of the first part in the above-named rates in Denver, Colo. And it is further agreed that when merchandise shipped to the care of the Kansas Pacific Railway Company shall be diverted to other roads, and be delivered by other than the Kansas Pacific Railway Company, it shall in no way work a forfeiture of this contract.

"B. H. Bayles,

"S. R. Ainsley,

"Agt. K. P. Ry."

There are several allegations in the complaint in regard to a receiver of the appellee, etc., that need not be set out or discussed, as they are satisfactorily disposed of in the majority opinion. Those necessary to a proper understanding of the case are the following:

"8. That pursuant to the provisions of the said contract the plaintiff did from the date thereof until the said 1st day of January, A. D. 1879, ship all merchandise bought by him in said eastern cities, over the said Kansas Pacific Railway to Denver, as he was required to do, and during the said period he shipped over the said railway merchandise to said City of Denver, the total freight on which aggregated the sum of \$10,619.69, which sum he paid at various times to the agent of the said receiver in full.

"9. That by the provisions of said contract the plaintiff was entitled to a rebate on the amount so paid for said freight, in the sum of \$2,565.91, of which sum the agent of said receiver, with his full knowledge and concurrence, paid to plaintiff at various times and in various sums the sum in the aggregate of \$1,353.52, leaving a balance still due and unpaid to plaintiff on the 3d day of March, A. D. 1879, of \$1,211.39, no part of which has ever been paid to plaintiff either by the defendant or the said receiver. And the plaintiff further alleges that pursuant to the terms, provisions and conditions of the said contract, the said receiver paid plaintiff, on account of money due on such rebate, eight different payments, to wit: in the months of April, June, August, September, October and December, A. D. 1879, and in February and March, A. D. 1879, sums aggregating the said sum of \$1,353.52, in part payment of the overcharges on said freight due plaintiff, thus recognizing the validity of said contract and the liability of the said receiver to perform its conditions and provisions; but that the said Railway Company wholly refuses, notwithstanding the several promises, to pay the said balance of \$1,211.39.

"10. That the plaintiff paid to the said receiver, under protest, the full freight rates on all of said merchandise so as aforesaid shipped by him over said railway, and by the terms of said contract was entitled to a return to him of the said sum of \$2,565.91, which sum was the aggregate of overcharges made by said receiver

thereon, in consequence of some running arrangement between the said receiver and certain other connecting lines, the nature of which is wholly unknown to plaintiff and cannot therefore be here stated.

"Second cause of action: The plaintiff further complains and alleges:

"1. That during the month of December, A. D. 1878, there arrived at Kansas City, in the State of Missouri, large shipments of merchandise, the property of the plaintiff, consigned to him at Denver, Colo., and which had been previously purchased by him in eastern cities, and which said merchandise of plaintiff should be carried over said railway under said contract at once, and which freight the said receiver was bound to ship to him without delay over said railway to Denver, but that the said receiver, in violation of said contract, utterly refused to do so at any time, and that after leaving said merchandise at Kansas City to be carried over the railway of the defendant by said receiver until after January 1, 1879, and the same not having been carried to him under said contract, the plaintiff was required to and did cause the same to be shipped to him at Denver, over the railroads of the Atchison, Topeka & Santa Fé Railroad Company, and paid freight thereon to said last-named company in the sum \$705, which was \$216 more than the contract price of such carriage under said contract; and which last-named sum he paid on, to wit, the 25th day of January, A. D. 1879, and that no part of said sum last named has been refunded to him either by said receiver or defendant.

"4. That the freight so charged by the Atchison, Topeka & Santa Fé Railroad Company was a reasonable sum to be charged for said carriage, and was the smallest sum for which the plaintiff could have the same carried from Kansas City to Denver."

The grounds of demurrer to the complaint necessary to be considered, are: "(1) that the complaint does not state facts sufficient to constitute a cause of action; (2) that the contract sought to be enforced is void as against public policy."

The demurrer was sustained on the second ground, consequently the discussion is narrowed to the one question, Is the contract illegal and void, being against public policy and in violation of the Constitution and common law?

Section 6 of article 15 of the Constitution of this State is as follows:

"All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager or employé thereof, shall give any preference to individuals, associations or corporations in furnishing cars or motive power."

It is declared in section 4 of the same article: "All railroads shall be public highways, and all railroads shall be common carriers."

In section 8 it is declared:

"And the police power of the State shall never be abridged or so construed as to permit

corporations to conduct their business in such a manner as to infringe the equal rights of individuals or the general well-being of the State."

It will be observed that railroad companies are not by the Constitution prohibited from all discriminations, but from undue and unreasonable discriminations. Hence, it becomes necessary in the first instance to determine, from the decisions of our own courts and the common law, what is unjust, illegal or unreasonable discrimination. Section 6 of the Constitution is declaratory of the common law. It has not, as in many States, been followed by statutes elaborating the principles contained in it, but clearly recognizes and asserts, in connection with the other sections named, the common-law principles of sovereign control of the State over such corporations and their amenability to such control. A railroad company is chartered solely for the purpose of exercising the functions and performing the duties of a common carrier. Such charters are granted for the supposed good of the public to furnish improved and adequate means of transportation and travel. Important franchises are conferred by this State, and in return the company accepting the charter assumes certain important duties, responsibilities and obligations. The State, in transferring to corporations franchises that pertain to state sovereignty, and that could be enjoyed and exercised by it, transfers them subject to control, and with the implied contract and understanding that they are to be taken and administered as a public trust for the benefit of the State. And the corporation, in accepting the charter, accepts it subject to the common-law, constitutional and statutory obligations attaching, and with the knowledge that the nature of the grant imposes those obligations, assuming, by so doing, a public trust, and becoming to a certain extent public agents for the administering of the trust. Hence, its relation to the public is the same as that of the State would be had it retained its franchises and prosecuted the business itself instead of delegating it. This precludes the corporation from exercising over the property the same control it could if it were private property, free of the obligations and duties it owes to the public by reason of its assumed public agency.

That common carriers were subject to control and could not, in the management of their affairs, discriminate unduly and unreasonably in the transportation of freight or passengers, or in charges, at common law; and that the clause in section 6 of our Constitution is declaratory of the common law,—is supported by the following authorities: The first is the celebrated case of *Coggs v. Bernard*, 2 Ld. Raym. 909, where it is stated that a common carrier exercises a public employment. To the same point: *Sinking Fund Cases*, 99 U. S. 719 [25 L. ed. 501]; *McDuffee v. Portland & R. R. Co.* 52 N. H. 430; *Messenger v. Pennsylvania R. Co.* 36 N. J. L. 407, 37 N. J. L. 531; *Sandford v. Catavissa, W. & E. R. Co.* 24 Pa. 378; *Chicago & A. R. Co. v. People*, 67 Ill. 11; *Seofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 1 West. Rep. 812.

The contract in writing, it will be observed, does not disclose the whole agreement. If suit had been brought on the written contract alone for

a violation of some of its provisions, the question presented might be more difficult to determine than at present, where the supposed cause of action by the complaint is shown to be partly upon the written contract and partly upon a parol agreement in connection with it, made at the same time; and these, taken together, it seems, were not deemed sufficient by the pleader to disclose the full nature and extent of the contract and intention of the parties in making it, and the injury or damage sustained by plaintiff in the alleged violation, but he had to state wherein and to what extent his contract differed from the general rates given the public by the defendant and competing lines in published schedules of tariffs, and also disclosed a fact not stated in the written contract, but possibly inferable from it, viz., that the money to be paid by the plaintiff to defendant was not the price fixed in the written contract where the charges were absolutely and arbitrarily fixed from different points without regard to classification, but was the published and general tariff price under classification given to the public as the price for which such transportation would be performed; all of which, in excess of the rates fixed in the written contract (such excess amounting to 25 per cent or 30 per cent of the amount paid), to be handed back or refunded to the plaintiff as rebate or drawback. Had the written paper embraced the entire contract the sums to be paid would have been those mentioned in it, not a larger sum, and the first supposed cause of action would have had no existence. As pleaded, it shows no damage growing out of the written contract, but an effort to recover back money paid in excess of the prices fixed, not through inadvertence or mistake, but voluntarily in pursuance of a secret arrangement not disclosed in the paper.

An examination of the opinion filed in this case will disclose the error into which the learned judge has fallen. All through, the question discussed is the written contract and its legality. The fact that it was not the entire contract of the parties is entirely ignored; the fact that there was a published schedule and tariff of prices for the public is admitted; that the published prices were those the public were to pay and did pay, is conceded. The fact that the contract was private and only known to the parties—that the business was to be done ostensibly at the prices others were required to pay, the whole published tariff rate to be paid and a part refunded—seemed to have been overlooked. These facts are not contained in the written contract, but are alleged in the complaint. The complaint does, or is supposed to, disclose all the facts upon which the plaintiff relied for a recovery; and if the complaint taken as a whole shows that the entire contract, verbal and written, was void and illegal, being against public policy, then the demurrer was properly sustained. If the contract was legal and proper, one that the parties had a right to make, it is hard to find a reason for shrouding it in secrecy. If not unduly and unreasonably discriminating against the public and other shippers, why did it become necessary to make the transaction double, showing to the public and on the books of the Company a state of facts that did not exist, while the real facts to be acted upon were only known to the interested parties?

Such methods of dealing are vicious and fraudulent prima facie, not such as the public demand and have a right to expect from an agent. They are wrong on principle, affording corporations an opportunity secretly to make unjust and illegal discrimination; and if the system was not intended to effect this end, no good reason can be adduced for its adoption.

It is argued in the opinion of the court that there is nothing in the case which indicates that in making this contract there was any discrimination in favor of the appellant against other dealers engaged in the same line of trade. It may be that other dealers doing a business as extensive, and requiring as large an amount of transportation, and willing to obligate themselves to furnish no freight to competing lines, could have secured the same favorable rates. Admitting this to be so, it does not remove the difficulty. The fact that a common carrier is willing to discriminate in favor of two, three or more large dealers against the public generally and against the smaller dealers who might need exactly the same kind of service in a lesser degree, would not relieve the present case from a taint of illegality and undue discrimination. What the public have a right to expect and demand is that every shipper, whether doing a large or limited business, shall pay the same price for the same service; and that the prices asked and taken for such service shall be those that are published and known. In the opinion it is said:

"There is nothing to warrant the inference that any shipper residing in Denver could not have secured the same rate upon property which was to be shipped by him from eastern cities; there is nothing in the complaint showing that any shipper, whether he desired to ship much or little, might not have secured the same rate upon application to appellee."

Is such the fact? In order for any other shipper to avail himself of the same rates would not a knowledge of the facts by him be necessary? Should not the transaction be open and appear on the books of defendant in its true character? How could another secure the same rates when he did not and could not know what they were? How could he know that the parties really paying the same price as himself were to have 30 per cent of such payments refunded? Where the whole transaction was secret and covert, known only to themselves and nothing made public until one of the parties found it necessary to disclose it in a court of justice, how were other parties to avail themselves of it? The sophistry of the proposition is apparent. Honest administration would not require a shipper to take advantage of facts he could not know, but would require the agent of the public to only charge the next shipper the same price for the same service. It is said in the opinion "that there is nothing in the complaint showing that any shipper, whether he desired to ship much or little, might not have secured the same rates, etc." Perhaps such is the fact; but there is an allegation in the complaint not referred to in the opinion. It is alleged that, after appellee broke the contract before its expiration and refused to transport one shipment of appellant at contract prices, appellant had them carried by a competing road (the Atchison, Topeka & Santa Fé

Railroad), between the same points, at a cost of \$216 in excess of contract price with appellee, and then says:

"4. That the freight so charged by the Atchison, Topeka & Santa Fé Railroad Company was a reasonable sum to be charged for said carriage and was the smallest sum for which the appellant could have the same carried from Kansas City to Denver."

This seems to have been overlooked, and, although the goods were not carried by appellee, shows the difference on one lot between the prices the public were required to pay, and the appellant, under the secret contract, for the same service. The question to be determined, is not the one propounded in the opinion: whether other parties could have obtained the same rates upon application if they had known the facts, but whether, not knowing the facts, and not applying, they were charged and paid the published tariff rates—25 per cent or 30 per cent greater for the same service than paid by plaintiff under the secret contract. That such was the fact is plainly alleged in the complaint, and practically conceded in the opinion, and if so, is clearly "undue and unreasonable discrimination in violation of the Constitution and common law."

"The actual intention of the parties at the time of contracting is the chief guide in the construction of contracts; and if the intent can be ascertained, . . . it must govern." Addison, Cont. 283; 2 Parsons, Cont. 493-498; *Schuylkill Nav. Co. v. Moore*, 2 Whart. (Pa.) 491; 2 Kent, Com. 727.

"In the construction of a written contract the court must place itself in the position of the contracting parties at the time of its execution, and look at the occasion that gave rise to it—the relative position of the parties and their obvious designs as to the objects to be accomplished." 1 Addison, Cont. 293; *Hollingsworth v. Fry*, 4 U. S. 4 Dall. 345 [1 L. ed. 861]; *Walker v. Tucker*, 70 Ill. 527.

These principles of construction are so elementary that perhaps an apology is necessary for citing authorities in their support; but they do not seem to have received proper consideration in this case. When the subject matter of the contract, the ordinary manner of doing business with the public by appellee, the published tariff of prices given as the prices for service, and the confidential character of the contract as disclosed in the complaint—where the service was ostensibly to be performed for the same price published and charged others, and one fourth or one third of the money paid to be secretly refunded—are considered, there can, under the rules of construction above given, be no question of the intention of the parties to make, or of the making of, the contract illegally discriminating in favor of the appellant.

In 2 Addison on Contracts, 720, it is said, in enumerating contracts illegal as against public policy: "And all contracts prejudicial to the interests of the public, such as contracts to prevent free competition." See *Hilton v. Eckersley*, 6 El. & Bl. (88 Eng. C. L.) 48-77, where this principle is discussed at length in the court of exchequer. To the same point, 2 Chitty, Cont. 982, 983, and notes.

Attention is called to the case of *Messenger* 2 INTER S.

v. Pa. R. Co. 36 N. J. L. 407. In that case the declaration set out that the plaintiffs were large shippers of live hogs from Chicago and Pittsburg to Jersey City; that the defendants agreed that if plaintiffs would ship all by them they would, on and after January 1, 1871, transport their hogs from Chicago and from Pittsburg to Jersey City at the regular rates, allowing them a drawback of 20 cents per hundred pounds upon all hogs shipped from Chicago, and 10 cents per hundred upon those shipped from Pittsburg; and, further, should the defendants, after January 1, 1871, transport the same description of freight for others between the same points, except seven parties named, at less than the regular rates, or should allow others a drawback, then they should allow to plaintiffs such further drawback as would bring their freight 20 cents per hundred and 10 cents per hundred lower than the lowest. In the opinion Beasley, *Ch. J.*, says:

"There can be no doubt that an agreement of this kind is calculated to give an important advantage to one dealer over other dealers; and it is equally clear that if the power to make the present engagement existed, many branches of business are at the mercy of these companies. A merchant who can transport his wares to market at a less cost than his rivals will soon acquire, by underselling them, a practical monopoly of the business; and it is obvious that this result can often be brought about if the rule is as the plaintiffs contend that it is, that these bargains giving preference can be made.

. . . The trader who can transmit his merchandise over it on terms more favorable than others can obtain, is in a fair way of ruling the market. The tendency of such compacts is adverse to the public welfare, which is materially dependent on commercial competition. Consequently, the inquiry is of moment, whether such compacts may be made. . . . It cannot be denied that at the common law every person under identical conditions had an equal right to the service of their commercial agents.

. . . The duty to receive and carry was due to every member of the community, and in an equal measure to each. Nothing can be clearer than that under the prevalence of this principle a common carrier could not agree to carry one man's goods in preference to those of another. . . . Recognizing this as the settled doctrine, I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for an identical kind of service under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of the public employment? A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all; and, therefore, to permit a common carrier to charge various prices, according to the person with whom he deals, for the same service, is to forget that he owes a duty to the community. . . . From these considerations it seems to me, testing the duties of this class of bailees by the standard of the ancient principles of the law, the agreement now under examination cannot be sanctioned."

In the same case in 37 N. J. L. 531, it is said: "It will be seen at a glance that a contract of this nature, if valid, gives an exclusive ad-

vantage or monopoly over all other transporters, except the several favorites, and compels the company, under pain of a further reduction below the lowest rates charged of others, to charge them a higher price than the plaintiff and those excepted. A few shippers, under this arrangement, would have a practical monopoly of the carrying trade of hogs over the defendant's lines between the termini indicated, at rates which would naturally result in crippling and excluding others from competition and giving to those few a material control of the market at the places of destination. Can such a contract be legally enforced? The mere statement of the proposition at once induces the answer that it is unjust and ought not to be sustained unless some imperative rule of law requires it. . . . The contract is that one customer shall be charged less than others, and, as a consequence, that others shall be charged more than that one. Such inequality operates directly upon the course of trade and creates monopolies. . . . A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, that by indirect means of unequal prices, some should lawfully get the advantage of the accommodation and others not."

In *Audenried v. Phila. & R. R. Co.* 68 Pa. 370, it is said: "A common carrier owes an equal duty to all, and it cannot be discharged if he is allowed to make unequal preferences and thereby prevent or impair the enjoyment of the common right."

See, to the same point, *New England Exp. Co. v. Maine Cent. R. Co.* 57 Me. 188, where Appleton, Ch. J., says: "The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special or unequal preferences."

See also *McDuffee v. Portland & R. R. Co.* 52 N. H. 480, where the same conclusion is stated and the question involved is exhaustively discussed with the ability that characterizes that court. Same point, *Sandford v. Catawissa, W. & E. R. Co.* 24 Pa. 378.

An examination of the cases cited from the States of New Jersey and Ohio will show that the decisions are rested entirely upon the common law. It does not appear that there were any constitutional or statutory prohibitions or restrictions in those States. It is true, in the case of *Messenger v. Pa. R. Co.* *supra*, that it was contracted between the parties that the prices given plaintiffs for transportation should be restricted to them and seven other favored parties named. In that it differs from the contract under discussion in this case; but upon principle there can be no difference where it is confined to seven or eight by contract, and where, as in this case, the method of doing business and the secrecy of the transaction preclude all others from participating in the same low rates from want of a knowledge of the contract, or an opportunity of acquiring the knowledge. In the lengthy and exhaustive discussion of the principles involved in this case in 2 INTER S.

the courts of the different States, it is conceded that at common law it was the duty of the carrier to serve the entire public without any discrimination whatever, giving equal service to all at equal prices. That this principle is inherent, growing out of the relations between the State and the corporation by virtue of the granting and accepting of the charter, is obvious. Many of the courts, through corporate influence or pressure, while admitting this fundamental principle, have labored hard to evade it—to avoid its application, and in so doing ignore the obligation of the corporation as consideration to the State for the grant, and treat the road as private property of the corporation shorn of its obligations to the public.

If the rule as above stated in the courts, and the principle involved, is one that can be sustained at common law, without the aid of constitutional or statutory provisions or inhibitions, how much more should the principle be enforced in the courts of this State where, in addition to common-law prohibition against discrimination, the organic law of the State forbids discrimination or the charging of unequal rates for the same distances, and to different parties for the same service.

The learned judge in the opinion cites, in support of his position, the following from 2 Rorer on Railways, 1375: "Railways may lawfully make contracts to refund to a shipper a certain portion of the stipulated or established freight by the name of drawback or rebate, but an agreement not to allow the same drawback to others is against public policy and void."

In support of the first proposition contained in the paragraph, the author only cites two cases, neither of which sustains it as broadly as stated. They are *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67, and *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505. The first case I shall discuss hereafter. The second has no application in this case, as will be seen upon examination. It was a suit brought by the corporation to collect tolls under a contract of lease of the use of its canal, and the sale of thirty-two boats, and under such lease and sale defendants were to be allowed a rebate or drawback of one half, and the tolls paid were to be applied to the payment for the boats. In the contract it was stipulated that defendants were to pay the plaintiff the published rates of toll in the first instance, and it was to refund the rebate. Defendants refused or failed to pay the tolls. Suit was brought to recover them. Defendants pleaded the drawback they were to have as a set-off, etc. The opinion is too lengthy for a full review here. Most of it is in regard to the legality of the lease and sale of boats, and an examination will show that it did not decide the general principle and legality of contracts for rebates, but only as applicable to the peculiar facts of that case.

The case of *Messenger v. Pa. R. Co.* is discussed and approved in that case, and in order to confine the decision to the peculiar case in hand, the court says: "Obviously, therefore, the drawback clause in this contract is in no way involved with, or dependent upon, the monopoly clause; and in accordance with the well settled principle so clearly applied by the supreme court of this State in the case of *Erie R. Co. v. Union L. & Exp. Co.* 35 N. J.

L. 240, the illegality of the latter does not affect the validity of the former covenant."

In *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67, suit was brought by Elliott and others to recover back a rebate of 5½ cents per hundred on a large amount of corn shipped under contract for such rebate. The opinion is short, the question of illegality at common law is not discussed, and the decision is based entirely upon the statute of that State in force at that time.

The court in conclusion says (and it is the only discussion of the question in the opinion): "We do not understand the contract is at all in violation of the statute to prevent unjust discriminations in charges of railway carriers. The contract was to carry the corn at the customary rates. The rebate in the charges was a matter of private agreement between the carrier and the shipper."

In support of the latter clause of the paragraph, "that an agreement not to allow the same drawback to others is against public policy and void," only the case of *Stewart v. Lehigh Valley R. Co.* supra, is cited.

An examination will show that the statement was taken from the syllabus and is not sustained by the opinion. It declares that the special contract of the canal company under discussion, which did not allow the same drawback to others, was void. The courts have treated the practice of doing business by the way of rebates as pernicious, and I doubt if any respectable court could be found to declare a contract not to give rebates void as against public policy. The contract was void because of the discrimination. The language used in the opinion is as follows: "And because this was a covenant that in the exercise of this franchise the company would discriminate in favor of the defendants as against others, it was in violation of public duty, and was void."

In *Indianapolis, D. & S. R. Co. v. Ervin*, 118 Ill. 250, 6 West. Rep. 101, suit was brought by plaintiffs against the railway company for rebates under a secret agreement. There was no agreement that others should not have the same rates, and the suit was brought by the shipper to recover the excess paid over the agreed price in the private contract. Judgment for the plaintiffs. Mr. Justice Sheldon, delivering the opinion of the court, says: "This question as respects the statute above named, then in force, was presented before this court in *Toledo, W. & W. R. Co. v. Elliott*, 76 Ill. 67, where a contract for such a rebate was held not to be in violation of the statute to prevent unjust discrimination in charges of railway companies. This ruling was followed and affirmed in *Erie & P. Dispatch v. Cecil*, 112 Ill. 185. The statute under which the Elliott decision was made was different from the present statute which applies here. The contract in the *Elliott Case* was made in February, 1872, and the statute which applied was the Act which went in force July 1, 1871. That Act provided only against unjust discrimination between places, and not between individual shippers, so that it was well said in the *Elliott Case*," etc. A subsequent statute which went in force July 1, 1873, and the one applying to this case, provides against unjust discrimination between individual shippers as well as between places.

The second section of the Act provides in general terms: "If any railway corporation in this State shall make any unjust discrimination in its rates or charges of toll for the transportation of passengers or freight upon its road, it shall be deemed guilty of having violated the provisions of the Act and be subject to its penalties."

Section 3, after speaking as to discrimination between places, provides further: "Or if it shall charge, collect or receive from any person or persons for the transportation of any freight upon its railroad a higher or greater rate of toll or compensation than it shall at the same time charge, collect or receive from any other person or persons, for the transportation of a like quantity of freight of the same class, being transported from the same point, in the same direction, over equal distances of the same railroad, etc., they shall be subject to the penalties."

The aim of this statute is against favoritism, against charging one shipper more than another for a like service under like conditions. The statute regards this as unjust discrimination and denounces and punishes it as such. Unjust discrimination by common carriers was not sanctioned by the common law.

In the case of *Chicago & A. R. Co. v. People*, 67 Ill. 116, this court says: "The duties and liabilities of a common carrier are clearly defined by the common law, and have been so defined for centuries. . . . Another well settled rule of the common law in regard to common carriers is that they shall not exercise any unjust or injurious discrimination between individuals in their rates of tolls."

In discussing the contract upon which suit was brought, the court says: "Such a contract appears to us to be one in contravention of this statute. As the matter stands, plaintiffs have paid the regular rates and have been treated alike with other shippers in having had no undue advantage. To enforce such a contract as above, and adjudge defendant to pay the rebates claimed, would be to compel defendant to make an unjust discrimination in favor of plaintiffs, and require the company to do what the statute forbids them doing. Such a result the law will not aid in accomplishing."

The learned judge in this case either misapprehended the decision last cited, and the statute of the State of Illinois, or attempted to avoid their effect. He gives the syllabus of the case and proceeds to discuss it by saying: "An examination of this case will clearly show, first, that the doctrine above stated is not sustained by the opinion; and, second, that the decision is based upon a statute of which the constitutional provision of this State is in no sense a counterpart."

The syllabus may or may not be correct. Whether it is or not is of little importance. I have found it necessary and have quoted above all, or nearly all, that applies to the questions raised in this case. The opinion is clear, unequivocal and easily understood, and asserts that in that case a contract, identical in all its legal aspects with the one in question here was illegal at common law, and cites several authorities in support of the proposition, and among others the case of *Messenger v. Pa. R. Co.* supra.

Let us examine briefly his second proposition, viz.: "That the decision is based upon a statute of which the constitutional provision of this State is in no sense a counterpart." It will not be claimed that they are counterparts, copies or duplicates, nor is it important that they should be. The question is, Are they alike in legal effect? For the purpose of comparison I will place them together:

Constitutional provision: "All individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State."

Statute of Illinois: "If any railway corporation in this State shall make any unjust discrimination in its rates or charges of toll for the transportation of passengers or freight upon its road, it shall be deemed guilty of having violated the provisions of the Act and be subject to its penalties."

I am at a loss to discover wherein the two differ in effect. One is a constitutional provision, the other a statute. The latter amplifies and explains the principle directly asserted in the former. It may be, as stated, true that in the latter part of the statute a new rule of evidence was established, making the contracts and acts prohibited *prima facie* evidence of unjust discrimination. By it, perhaps, the burden of proof was shifted, but that is unimportant for the purpose of this discussion.

The learned judge says the court below decided this case upon the authority of *Seofield v. Lake Shore & M. S. R. Co.* 43 Ohio St. 571, 1 West. Rep. 812, and further says: "The case is well considered and contains a most exhaustive and instructive discussion of the question of discrimination; but nowhere in all the fifty pages occupied by the discussion can there be found a syllable upon which the conclusion that the contract in the case at bar was void as against public policy can be predicated."

Is this so? As stated, the discussion is exhaustive; pages are devoted to the authorities cited from England and the different States to establish the fact that at common law it is a well settled rule that carriers shall not exercise any unjust and injurious discrimination between individuals in their rates of toll, and that constitutional and statutory prohibitions are only declaratory of the common law. At common law the whole line of decisions rests upon the fact that such acts are illegal because against public policy; and in deciding these questions courts are compelled to put the decision upon one or the other of two grounds—either that it is void and illegal at common law as being against public policy, or else that it is prohibited by a constitutional or statutory provision. Is there any difference in principle when the words "public policy" are used, or an Act is declared illegal because it discriminates against the public or the people generally? The entire discussion in that case puts it upon that ground.

On page 611 [827] (a part of the fifty pages), the learned counsel cites the case, in his own State, of *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666, as parallel to the case under discussion, and says: "And this court held that such an agreement was contrary to public policy be-

cause in restraint of trade, and void;" and further says: "McIlvaine, *Ch. J.*, said: 'The clear tendency of such an agreement is to establish a monopoly and destroy competition in trade, and for that reason, on grounds of public policy, courts will not aid its enforcement.'"

It is not claimed in the entire opinion in *Seofield v. Lake Shore & M. S. R. Co.* that the contract was void because prohibited by a statute, and from that fact it is to be presumed there was no statute. It is placed squarely upon the common law as being against public policy, and is put upon that basis plainly by adopting the language of the same court in *Central Ohio Salt Co. v. Guthrie*.

The conclusion is irresistible that the contract in this case was illegal and void, and unduly and unjustly discriminating and intended by both parties to be so. The manner in which the contract was worded, and the business conducted, is of itself conclusive, were other evidence wanting, which is not.

The foregoing view of the authorities establishes beyond controversy the fact that contracts of the character of the one under discussion have for many years been held illegal and void at common law, as against public policy, in England and many of the States where there were no constitutional or statutory prohibitions. The contract in this case is one clearly prohibited in terms by a provision in the Constitution of the State.

It is the duty of courts to guard the interests of the public, not to create or foster monopolies, either public or private, at the expense of the people. Such contracts and corporate management as those under discussion should be declared to be illegal and pernicious, favoring a few wealthy dealers, building up monopolies, preventing competition by ruining and driving out the weaker firms and smaller dealers by the unjust discrimination and favoritism of a public agent administering a public franchise granted by the people.

In *New England Express Co. v. Maine Cent. R. Co.* 57 Me. 188, it is well said, speaking of railway corporations: "A toll is granted, but a toll implies uniformity of compensation for equality of service. The very definition of a common carrier excludes the idea of the right to grant monopolies or to give special and unequal preferences."

It is said in the opinion in this case: "The burden is upon him who charges illegality. The defendant should have been required to answer and establish the iniquity of the agreement by proof."

I am confident no foundation can be found for this conclusion, either in reason or in law. The question of illegality was raised by demurrer to the complaint. No principle of practice is better settled or more ancient than that issues of law are raised by demurrer, and issues of fact by the pleadings. The plaintiff, in order to make his case, was compelled to, and did, set out in the complaint the entire contract. Its illegality was disclosed, and it was apparent upon its face. In order to recover, plaintiff was not only under the necessity of setting out the secret, fraudulent and illegal character of the transaction, but would have been, had the case proceeded to trial, com-

pelled to establish the same by proof in order to recover; where, as in this case, the complaint discloses facts sufficient to establish the illegality if supported by proof, it should be reached by demurrer. No rule of practice is better established, and no authority is needed in support of the proposition. It is said the defendants should answer and set up the illegality. The fallacy of that position is apparent. It is elementary that the demurrer admits the truth of all matters properly pleaded in the pleading to which the demurrer is filed. Here the illegality appears affirmatively in the complaint and is admitted by the demurrer. What could or would the answer have been to set up the illegality but a reiteration of the facts contained in the complaint? No rule of law requires or tolerates such useless and unnecessary proceeding.

In support of his position, the learned judge

cites *Indianapolis, D. & S. R. Co. v. Ervin, supra*, but no other authority. Even a cursory examination will show that the cases are not parallel. In that case all the facts to establish the illegal character of the contract were not disclosed in the complaint as they are in this.

In *Messenger v. Pa. R. Co. supra*, they were, as in this case, set out in the declaration, and the case was decided upon the demurrer. That case was well considered in a careful and able court. Further discussion of this position seems unnecessary.

I concur in the conclusion reached by the court on the last question discussed relative to the receiver, etc. The judgment of the court below in sustaining the demurrer should have been affirmed, and the contract sought to be enforced declared illegal at common law, and in violation of the constitutional provision of this State.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF ILLINOIS.

Gustavus F. SWIFT

v.

John B. SUTPHEN.

A state statute prohibiting the sale of dressed meats within the State unless the animals have been inspected by a state officer within twenty-four hours before slaughter is unconstitutional as an invasion by the State of the domain of Congress to regulate commerce and as a discrimination against the citizens of other States.

(September 13, 1889.)

ON demurrer to pleas in an action at law.
Sustained.

The case is stated in the opinion.

Messrs. Albert H. Veeder and Mason B. Loomis for plaintiff.

Mr. Charles H. Wood, for defendant:

States may control their purely internal affairs, and in so doing, protect the health, morals and safety of their people by regulations which do not interfere with the execution of the powers of the general government, or violate rights secured by the Constitution of the United States.

Mugler v. Kansas, 123 U. S. 659 (31 L. ed. 209); *License Cases*, 46 U. S. 5 How. 504 (12 L. ed. 256); *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 136 (21 L. ed. 931).

The power to establish such regulation reaches everything within the territory of a State not surrendered to the national government.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 203 (6 L. ed. 71).

The fact that an article was manufactured for export to another State does not make it an article of interstate commerce.

Coe v. Errol, 116 U. S. 517 (29 L. ed. 715).

Legislation may in a great variety of ways affect commerce, and persons engaged in it, without constituting a regulation of it within the meaning of the Constitution.

Hall v. De Cuir, 95 U. S. 487 (24 L. ed. 547).

In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating upon all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.

Sherlock v. Alling, 93 U. S. 103 (23 L. ed. 820).

In *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 479 (31 L. ed. 706), as well as in *Beer Co. v. Massachusetts*, 97 U. S. 25 (24 L. ed. 989); *Mugler v. Kansas*, 123 U. S. 623 (31 L. ed. 205); *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 846), the supreme court has abandoned the position, if it ever was distinctly held, that a sale of property can be protected under the commercial clause of the Constitution after it has once been introduced into a State.

The Minnesota Statute is a valid inspection law.

Gibbons v. Ogden, 22 U. S. 9 Wheat. 203 (6 L. ed. 71); *Turner v. Maryland*, 107 U. S. 38 (27 L. ed. 370); *Patterson v. Kentucky*, 97 U. S. 501 (24 L. ed. 1115); *Powell v. Pennsylvania*, 127 U. S. 684 (32 L. ed. 256); *Tiedeman*, Pol. Powers, p. 208.

The police control of employments in respect to locality has been constantly sustained.

Tiedeman, *Lim.* of Pol. Pow. p. 311; *Slaughter-House Cases*, 83 U. S. 16 Wall. 61 (21 L. ed. 403).

State inspection laws do not contravene the constitutional provision as to privileges and immunities of citizens, so long as all are treated alike.

Turner v. Maryland, supra; *Downham v. Alexandria Council*, 77 U. S. 10 Wall. 173 (19

NOTE.—In addition to the opinion of Judges Engsign and Stearns, referred to in the last paragraph of the opinion, reported in a foot note in 39 Fed. Rep. 636, under the title *Re Christian*, a decision of Nelson, J., in the Circuit Court of the United States for the District of Minnesota, *Re Barber*, 39 Fed. 2 INTER S.

Rep. 641, is substantially the same as that in this case, in respect to the same statute. A decision of Johnston, J., in the case of *Harvey v. Huffman*, in the Circuit Court for Porter County, Indiana, reported in a foot note to 39 Fed. Rep. 646, is to the same effect in respect to a similar statute of Indiana.

L. ed. 829); *Paul v. Virginia*, 75 U. S. 8 Wall. 168 (19 L. ed. 357).

The Fourteenth Amendment to the Constitution does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens.

Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26 (32 L. ed. 585); *Barbier v. Connolly*, 113 U. S. 27 (28 L. ed. 923); *Soon Hing v. Crowley*, 113 U. S. 703 (28 L. ed. 1145).

Blodgett, J., delivered the following opinion:

This is an action of assumpsit upon a contract entered into between the parties on the 10th day of May last, whereby it was provided that the parties should go into partnership in the City of Duluth, Minn., for the purpose of selling there, on commission, fresh dressed meats, slaughtered and prepared for market by Swift & Co. at the Union Stock Yards in Chicago, Ill. The contract further provided that the proposed partnership should continue for five years from June 1, 1889; that the capital of the firm should be \$15,000, one half to be contributed by each party; and further provided that if either party should fail or refuse to enter into such partnership, or perform its conditions as stipulated, the party so failing or refusing should forfeit and pay to the other party the sum of \$7,500. The declaration charges that the plaintiff has always been ready and willing to perform his part of the contract, but that the defendant refuses to enter upon said partnership, or in any manner comply with said agreement; wherefore the plaintiff claims damages as stipulated in the contract. The defendant, by way of defense, interposes two pleas, both of which set up, in somewhat different phraseology, an Act of the General Assembly of the State of Minnesota, approved April 16, 1889, prohibiting the sale of such meats as the partnership was formed to sell, unless the animals from which such meats should be taken had been inspected within twenty-four hours before slaughtering, and found healthy and in suitable condition to be slaughtered for human food, by inspectors appointed under the provisions of said Statute. Plaintiff demurs to both these pleas, upon the ground that the Statute invoked as a defense is in contravention of the Constitution of the United States, and therefore void.

The Statute in question purports by its title to be "An Act for the Protection of the Public Health, by Providing for Inspection before Slaughter of Cattle, Sheep and Swine Designed for Slaughter for Human Food." The first section prohibits the sale, in the State of Minnesota, of any fresh beef, veal, mutton, lamb or pork for human food, except as thereafter provided. By the second section it is made the duty of the several local boards of health of the several cities, villages, boroughs and townships within the State to appoint one or more inspectors therein, to hold office for one year, and to have jurisdiction co-extensive with the board making the appointment; and it further provides that the standing boards shall prescribe the form of certificate to be issued by the inspectors, and fix the fees for inspection, which are not to be greater than are actually necessary to defray the cost thereof. By the third sec-

tion it is made the duty of the inspectors so appointed to inspect, within twenty-four hours before slaughter, all cattle, sheep and swine to be slaughtered for human food within their respective jurisdictions, and, if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect; but if found unfit for food by reason of infectious disease, such inspectors are required to order the immediate removal and destruction of such diseased animals. By the fourth section it is enacted that any person who shall sell, expose or offer for sale for human food in said State any fresh beef, veal, mutton, lamb or pork whatsoever, which has not been taken from an animal inspected and certified to be fit for slaughter by the proper local inspector, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$100, or by imprisonment not exceeding three months. By section 5 it is provided that every certificate made by inspectors under the Act shall contain a statement to the effect that the animal or animals inspected, which are to be described as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition to be slaughtered for human food; and the sixth section provides a penalty for any false certificate made by an inspector. The demurrer to these pleas raises the question as to whether the Statute in question is or is not void under the provisions of article 1, § 8, of the Constitution of the United States, which clothes Congress with power to regulate commerce with foreign nations, and among the several States; and also under the provisions of section 1 of article 14 of the Amendments, on the ground that it abridges the privileges and immunities of citizens of other States.

Dressed meats have been from time immemorial articles of local commerce. It may be said that every civilized community has its butchers, engaged in the slaughtering and sale of animals for human food; and the courts will take judicial notice that within the last few years, by means of new appliances for the preservation of such meats, and the facilities for rapid transportation by means of railroads, a large and it may be said a new business has grown up in the slaughtering and transportation of these dressed meats for human food to distant points from the place of slaughter, so that this business has now become an important item of interstate commerce. The press teems with accounts and statements of the magnitude of the business. The traveler journeying over our railroads meets at almost every point cars constructed and adapted expressly for such business. The records of the Patent Office show the invention and patenting of many cars and warehouses specifically designed for conducting such business, and at the late session of Congress a committee was appointed by the Senate to investigate during the present recess, and report at the next session upon some of the phases and methods of said business; so that there can be no doubt, from common knowledge, that to-day dressed meats for human food are articles of interstate commerce.

The Act in question purports by its title to be an Act for the protection of the public

health, by providing for the inspection before slaughter of animals designed for slaughter for human food, and its validity is asserted on the ground that it is a police regulation, coming within the sphere of the state government; but even a cursory glance at its provisions shows that its practical effect and operation is to exclude all dressed meats from animals slaughtered outside of the State of Minnesota. The animals must not only be inspected within twenty-four hours before they are slaughtered, but they must be inspected within the State; that is, by State officers, who would have no power to act except within the state. It will therefore be assumed that this Statute, in effect, excludes and prohibits the sale in the State of Minnesota of dressed meats intended for human food, from animals slaughtered outside that State.

While the state legislatures are clothed with large discretion in the exercise of their police powers for the protection of the health, property and persons of their citizens, there can be no doubt that this power must be exercised so as not to interfere with matters over which the federal government has exclusive jurisdiction; and no matter how speciously a state statute may be worded, if in its operation it infringes upon the sphere of the federal government, it is so far void.

In *Mugler v. Kansas*, 123 U. S. 623 [31 L. ed. 205], it was said by the Supreme Court of the United States: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. . . . Undoubtedly the State, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the Constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government."

In *Brown v. Maryland*, 12 Wheat. 439, *Chief Justice Marshall*, speaking for the court, said: "There is no difference, in effect, between a power to prohibit the sale of an article and the power to prohibit its introduction into the country. The one would be a necessary consequence of the other. . . . If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when

given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

So in the *License Cases*, 46 U. S. 5 How. 588 [12 L. ed. 294], it was said by *Mr. Justice McLean*: "The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them, nor inhibited to them. From this it is clear that, while these supreme functions are exercised by the federal and state governments within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, Which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the States are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

And in *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465 [24 L. ed. 527], *Mr. Justice Strong*, speaking for the court, said: "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health and safety. . . . But whatever may be the nature and reach of the police power of a State, it cannot be exercised over a subject confided exclusively to Congress by the federal Constitution. It cannot invade the domain of the national government. . . . Neither the unlimited powers of a State to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon Congress by the Constitution. . . . While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws,—it may not interfere with transportation into or through the State, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

So in *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 465 [31 L. ed. 700], a case which involved the constitutionality of the Statute of Iowa prohibiting common carriers from bringing intoxicating liquors into that State, *Mr. Justice Matthews*, in the opinion of the court, replying to the argument that the Statute then in question was a proper exercise of the police power, says: "If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the State, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction; and, as an incident to this power, a State may use means to ascertain the fact. And here is the limit between the sovereign power of the State and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the State, and that which does belong to commerce is within the jurisdiction of the United States. . . . The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is properly usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the State is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of Congress to regulate commerce is subject to a very material limitation; for it takes from Congress, and leaves with the States, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the States determine what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the State and its courts could bring within the police power any article of consumption that a State might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors, and the produce of fruits other than grapes, stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. . . . It cannot, without the consent of Congress, expressed or implied, regulate commerce between its people and those of the other States of the Union, in order to effect its end, however desirable such a regulation might be."

It is urged in behalf of the defendant that while the power to regulate commerce is so

far vested in Congress that the state law cannot prohibit commercial commodities from being brought into a State, this does not prevent the state Legislature from prohibiting the sale after they are brought within the jurisdiction of the state. This position seems to me to be abundantly answered in the quotation already made from the opinion of the supreme court in *Brown v. Maryland*, that the power of Congress to regulate the introduction of articles of commerce necessarily implies the right to authorize the sale of commercial articles so introduced; and in the opinion in the *Bowman Case*, heretofore referred to, it is said by *Mr. Justice Matthews*: "It is easier to think that the right of importation from abroad, and of transportation from one State to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported."

And *Mr. Justice Field*, in his concurring opinion in the same case, says: "So, in the present case, it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the federal government ends, and the power of the State to restrict further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown v. Maryland*, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the State, and not afterwards. And yet it is evident that the value of the importation will be materially affected if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can himself be restrained from selling the article imported; and yet the power of the State must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises."

The Statute now in question meets at the border of the State an article of commerce intended for human food, and arbitrarily declares it unfit for such purpose, and prohibits its sale. This seems to me a palpable invasion by the State of the domain of Congress. That the State authorities may provide for the inspection of such articles, and prohibit their sale if found, in fact, unfit for use as food, must be conceded; but even the power of inspection is undoubtedly so limited by the first clause of article 14 as that the citizen of another State, owning such article, is to be treated in the same manner as a citizen of the State into which the article is imported. Upon this point the following extract from the opinion in the *Bowman Case* is pertinent:

"If the State of Iowa may prohibit the importation of intoxicating liquors from all other States, it may also include tobacco, or any

other article, the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect."

And the same principle is affirmed in the *Licenses Cases*, 46 U. S. 5 How. 504 [12 L. ed. 256]; *Ward v. Maryland*, 79 U. S. 12 Wall. 418 [20 L. ed. 449], and many other cases that might be cited.

It is further urged on the part of the defendant, in support of this legislation, that the inspection of the living animal from which the meat to be sold for human food is to be taken is necessary before slaughter in order to accurately determine whether the animal is fit to be slaughtered for such purpose. This reasoning is more specious than sound, and might be applied with the same force to any manufactured, or partly manufactured, article which is the subject of commerce, and especially such as is intended for human food. The wholesomeness of flour, cured meats, corn meal, tobacco, canned fruits, fish, etc., could perhaps be more accurately determined if the raw material from which such goods were produced could be inspected before manufacture; but the admission of the doctrine that a State can interdict the

introduction and sale of an article of commerce, unless an inspection is made by the proper officer of said State of the raw material from which such goods are produced, would put all commerce in the State within the control of its Legislature. As is said by *Mr. Justice Field*, in his concurring opinion in the *Bowman Case*: "What is an article of commerce is determined by the usages of the commercial world, and does not depend upon the declarations of any State."

The authorities, then, seem to me to fully establish the proposition that no article of commerce can be excluded from introduction into and sale in a State by state inspection laws or prohibition laws; and the common commercial usage and course of trade, and not the Legislature of the State, determines what are articles of commerce. Tested by these rules, I am of opinion that the Statute in question is unconstitutional and void, and furnishes no answer to the plaintiff's case.

Since preparing the notes for this decision, I have been furnished with a newspaper clipping of the opinion by *Judges Ensign and Stearns*, of the Eleventh Judicial District of the State of Minnesota, in the *Case of Christian* [See note, ante, p. 656], which arose upon a writ of habeas corpus, Christian having been tried for a violation of this Act, and sentenced to imprisonment, in which I am pleased to see that these learned judges have, in an able and exhaustive opinion, arrived at the same conclusion as myself in regard to the validity of this Statute.

The demurrer to the pleas is sustained.

INTERSTATE COMMERCE COMMISSION.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION

v.

THE PENNSYLVANIA RAILROAD COMPANY, The Pittsburgh, Fort Wayne and Chicago, and The Pittsburgh, Cincinnati and St. Louis Railroads.

(No. 243.)

COMPLAINT filed December 3, 1889, charging defendants with receiving a greater compensation for the transportation of inland traffic from the seaboard to interior points than for imported traffic, received under through bills of lading, for transportation from the seaboard to the same and more distant interior points.

TO THE HONORABLE THE INTERSTATE COMMERCE COMMISSION :

The New York Board of Trade and Transportation, a corporation duly created and existing under the laws of the State of New York and located in the City of New York, composed largely of merchants engaged in foreign and domestic commerce, respectfully petition your honorable body that you will hear and determine the complaints of your petitioner as hereinafter set forth, pursuant to the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, as amended.

Upon information and belief the complainants allege—

2 INTER S.

FIRST. That the defendants have been and are railroad corporations engaged as common carriers in the transportation of property between New York, Philadelphia, and Chicago and other western points, such transportation being in all cases under some common control, management or arrangement for continuous carriage between the points aforesaid, so that each of the defendants constitutes a part or portion of some through and continuous line of transportation so engaged as aforesaid under a joint tariff, and is, as to said transportation, within the provisions of the Act as amended. That since April 4th, 1887, the defendants, in violation of said Act, have been and are guilty of unjust discriminations, in that they have been and are in the habit of charging their regular tariff rates upon property when delivered to them at New York and Philadelphia for transportation to Chicago and other western points, while charging other persons rates much lower and even as low as fifty per cent thereof for a like and contemporaneous service under substantially similar circumstances and conditions, when the property was or is delivered to them at New York and Philadelphia by vessels and steamship lines under through bills of lading, from foreign ports and foreign interior points, issued under common arrangement between the defendants and such vessels and steamship lines and foreign railroads for continuous carriage at joint rates from the point or port of shipment to said Chicago and other western points; the defendants' share of such

through rate for the inland transportation has been and is, as aforesaid, lower than its regular tariff rates (being in some cases as low as fifty per cent thereof), and therein in each instance constitutes an unjust discrimination under the Act aforesaid.

Wherefore, the complainant respectfully asks that the Honorable Interstate Commerce Commission shall investigate the matters herein complained of, and shall obtain from the defendants full and complete information in regard thereto, and shall then adjudge and determine :

The following table shows rates charged per 100 lbs., etc., in cases where imports were carried by the American Line to Philadelphia :

| Date.—Bill. | Points. | Goods. | Through Rate. | Rail and Ocean to Phila. | Inland, Phila. to Chicago. | Tariff—Phila. to Chicago. |
|-------------------|-----------------------------------|--------------------|---------------|--------------------------|----------------------------|---------------------------|
| 1888. June 25. | Dumferline, Scotland, to Chicago. | Linens | 76.40 cts. | 44.50 cts. | 31.90 cts. | 69 cts. |
| 1889. March 4. | " " | " | 88 " | 42 " | 46 " | " " |
| July 1. | " " | " | 80 " | 40.91 " | 39.09 " | " " |
| June 25. | Liverpool to Chicago | Anvils | 29.47 " | 8.42 " | 21.05 " | 33 " |
| Feb. 27. | " " | " | 23.79 " | 8.42 " | 18.37 " | " " |
| April 15. | " " | Tin Plate | 24 " | 8 " | 16 " | 28 " |
| June 17. | " " | Tin Plate C. L. | | | | |

That said defendants have failed and do fail to state in their published tariffs or in such through bills of lading the inland charge separately from the ocean and other charges, in order to prevent ascertainment of the actual inland rates; that The Pennsylvania Railroad Company is an owner of, or interested in the management and operation of, steamship lines running from New York and Philadelphia to foreign ports, and under the opportunity thus afforded to it of fixing these through rates from foreign ports and points to inland American points, it is enabled to and does practice the unjust discriminations complained of, in connection with the other defendants, in such a way as to make full ascertainment of the facts involved very difficult, and, therefore, the complainant asks that the Board shall cause a full discovery thereof to be made.

SECOND. That by reason of the facts hereinbefore charged, the defendants have made and given, and do make and give, undue and unreasonable preferences and advantages to persons, firms, companies, corporations and localities interested in the transportation of imported traffic from the seaboard under such through bills of lading, and have subjected and do subject persons, companies, firms and corporations in and about New York and Philadelphia and those localities, to undue and unreasonable prejudice and disadvantage by reason of the higher rates charged to them for like and cotemporaneous service under substantially similar circumstances and conditions; that there are no conditions or circumstances relating to the transportation of imported traffic which justify any difference in rates between imported traffic transported to any place in the United States from a port of entry, and other traffic from such ports; that the inland published tariff must by law be the same for all such freights.

THIRD. That the facts aforesaid constitute a violation of section 4 of said Act as amended, in that defendants have charged and received and do charge and receive a greater compensation for transportation from the seaboard to interior points, than under such through bills of lading they receive upon imported traffic carried to more distant interior points, as will appear from an examination of the tariff rates published and maintained by defendants.

2 INTER S.

1. That in the particulars complained of the defendants have violated and are violating the "Act to Regulate Commerce," approved February 4, 1887, as amended.

2. That imported traffic, transported to any place in the United States from a port of entry, is required by law to be taken on the inland tariff governing other freights.

3. That defendants be compelled to comply with the Law and with the orders of the Commission by the methods and under the penalties provided; that the published tariffs shall show the through rate and the inland proportion and amount thereof charged upon imported as upon other traffic, and that in such through bill of lading the amount of the through rate charged for inland service shall be separately stated from other charges.

4. That the complainant may have such other and further relief as may seem to your Honorable Commission just and proper.

John D. Kernan,

Counsel for complainant,

10 Wall Street, New York.

(Duly verified.)

JOHN LIVINGSTON

v.

NEW YORK, LAKE ERIE & WESTERN R. CO. and others.

JOHN LIVINGSTON, President of the Railway Shareholders' Association,

v.

DELAWARE, LACKAWANNA & WESTERN R. CO. and 111 others.

SAME v. NEW YORK, LAKE ERIE & WESTERN R. CO.

(Nos. 202, 210, 238.)

STATEMENT and request for dismissal filed December 18, 1889, by petitioner in No. 210, a proceeding to inquire into the practices of the defendant Railroad Companies in the matter of granting passes and mileage tickets at special rates to railroad officers and employes and their families. Similar requests to dismiss

were also filed by petitioner in Nos. 202 and 238. *Cases dismissed.*

See abstract of complaint in No. 202, *ante*, p. 547; in No. 210, *ante*, pp. 550, 637; pleadings in full in No. 238, *ante*, pp. 631-637.

Convinced from the perusal and mature consideration of the answers of more than one hundred of the defendant Companies to the amended complaint filed herein on the 9th of October, 1889, that since the beginning of railroad operations in this country it has been and is now the custom observed by all railroads in the United States to grant free transportation under reasonable regulations to their own officers and employés and to the officers and employés of other railroad companies when the application as to the latter comes from the principal officers of such other companies; and that they have included among the officers and employés the members of the immediate families of such officers and employés; that in the employment of their officers and employés by many of the defendant Companies the same are engaged knowing that such transportation favors have been accorded not only to themselves individually but to the members of their families, while by other companies such privileges are regulated and fixed by the contract of employment; that such practice had become at and before the time of the passage of the Act to Regulate Commerce and continues to be necessary to the efficient management, and could not be departed from without seriously prejudicing the safe and successful operation of the railroads, toward which the relation sustained by the members of the families of its employés is different from that of the public generally, and the free carriage of such persons is a service rendered by the Railroad Companies under substantially dissimilar circumstances and conditions from that rendered to any other person not belonging to the family of an employé; that it is promotive of the interest of every railroad company and of the convenience and safety of the public to grant transportation to its employés and those dependent on them free or at reduced rates, and that such practice could not be safely departed from without seriously prejudicing the safe and successful operation of the railroads; and it further appearing from the verified statements of nearly all the defendant Railroad Companies that public policy requires the continuance of the aforesaid practices, and believing that if there is any question as to their lawfulness and there being a reasonable doubt whether anything in the Act to Regulate Commerce abridges or prohibits such right, the universal practice of half a century should be permitted to continue until Congress shall have considered and declared its true intent and meaning in the premises by apt and proper words amending said Act; and it further appearing that said Interstate Commerce Commission, by an order made herein at 2 INTER S.

a general session thereof held at Washington on December 7, 1889, held that where free passes are not given by any of the defendant Railroad Companies for interstate transportation evidence thereof would not be admissible upon any of the issues in this cause, and that therefore all passes to be used only within the limits of one State are lawful and proper:—

I hereby request the Interstate Commerce Commission to dismiss this cause as to each and every one of the hundred and eleven defendants herein, and that the petition and complaint and the amended petition and complaint heretofore filed by me herein be dismissed as against each and every of said defendant Companies, and that no further proceedings be had herein against any of them.

Dated, Dec. 16, 1889.

John Livingston,
Petitioner and Plaintiff, in Person,
Campville, Tioga County,
New York.

MEMORANDUM BY THE COMMISSION.

(Filed Jan. 18, 1890.)

The complainant in the above-entitled causes having filed a request that the same be dismissed, it was ordered by the Commission at the time fixed for the hearing of the causes on their merits that the several petitions therein be dismissed, subject, however, to the possible duty of the Commission to continue the investigation of the subject matter of said petitions pursuant to the provisions of the Act to Regulate Commerce in that behalf.

In the request for the dismissal filed in number 210 the petitioner undertook to state what had appeared as the legal effect of a previous interlocutory order therein denying a motion of the petitioner for a subpoena *duces tecum*. The statement of the petitioner in said request, so far as it embodied the assumption that the Commission in the denial of said motion passed on the question whether free passes to be used only within the limits of one State are lawful under the Act to Regulate Commerce, was erroneous. That question was not involved in a decision of the petitioner's motion and was not then considered.

WILLIAM H. HARVEY
v.
THE LOUISVILLE & NASHVILLE R. CO.
(No. 249.)

THE PETITION of the above-named complainant, after alleging jurisdictional facts, complains that certain persons hold and use free passes over the defendant's road between points in Louisiana and points in other States, in violation of the Act to Regulate Commerce, and prays investigation, etc.

THIRD ANNUAL REPORT*

OF THE INTERSTATE COMMERCE COMMISSION.

(ANNOTATED BY REFERENCE.)

OFFICE OF THE INTERSTATE COMMERCE COMMISSION,

Washington, D. C., November 30, 1889.

To the Senate and House of Representatives:

The Interstate Commerce Commission has the honor to submit its third annual Report, as follows:

ORGANIZATION OF FORCE AND DISTRIBUTION OF WORK.

Under the original Act to Regulate Commerce the Commission was required to report to the Secretary of the Interior and the report was transmitted by him to Congress. By the amendments to the Act approved March 2, 1889, the Commission was required to report directly to Congress.

In submitting its first annual Report under this amendment, the Commission deems it appropriate to set forth the organization of its force for the systematic and efficient performance of its duties, and the character and distribution of the work.

The Commissioners themselves exercise a general control and direction over all the business of the Commission. They personally examine all complaints received, hear the trial of all controversies, conduct investigations, prepare all reports made, decisions rendered and orders and circulars issued, allow subpoenas *duces tecum*, carry on the correspondence relating to the action and duties of carriers and the rights of shippers, and various other things.

The secretary acts as the executive officer and is also the disbursing agent of the Commission, and is under bonds for \$20,000. His duties are varied, and relate to the Commis-

sion's records, mails, correspondence, service of papers, publications, distribution of documents, supplies of all kinds, payment of employes, disbursement of all moneys, and whatever else may be found necessary.

Apart from the Commissioners and secretary, the force is divided into three sections or divisions.

One of these has diversified duties and is practically the operating division. This division consists of one senior clerk, four stenographers, eight general clerks, two junior clerks, and one messenger—seventeen in all. There are also six temporary employes in this division, namely, one clerk, two stenographers and three typewriters.

The duties of this division embrace the filing and service of all papers in cases and proceedings before the Commission; keeping the docket of such cases and the minutes of the Commission; entering and serving orders; filing and indexing correspondence; printing and mailing circulars and reports; copying and forwarding testimony in cases and investigations; the purchase of stationery and all other supplies for the Commission; keeping the accounts of disbursements, and various other duties that may become necessary. The stenographers and typewriters in this division are also used by the Commissioners in the performance of their official duties, and usually take the testimony at public hearings.

Since December 1, 1888, 95 cases and investigations have been commenced before the Commission in which 567 railroad companies have filed answers or have otherwise appeared. In the cases brought before the Commission

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during the year, 447 railroad companies have been notified of their pendency and granted leave to intervene. A large number of copies of complaints, testimony and exhibits filed in cases before the Commission has been prepared in this division and furnished without charge to parties in accordance with the Rules of Practice. The number of folios thus copied and furnished exceeds 50,000.

The number of letters received in this division during the year, relating to official business, was 7,862. The letters sent by the Commissioners and by the secretary during the year amount to 9,525.

Another division is the rates and transportation division. The head of this division is termed the auditor. In addition to the head, the force consists of one assistant auditor, one senior clerk, one stenographer, twenty-one general clerks, two junior clerks and one messenger—twenty-eight in all.

This division has special charge of all railroad tariffs, classifications, contracts, the examination, comparison, notation of changes and files of these documents, and the correspondence relating to matters pertaining to this division.

The number of tariffs received for filing by this division since December 1, 1888, is, in round numbers, 180,000; number of separate letters and packages received containing tariffs and other papers, 45,000. Number of acknowledgments of receipts of tariffs, 50,000. Number of letters written and forwarded from this division, 2,500.

The other division is the statistical division. The head of this division is called the statistician. The other force consists of one assistant statistician, two senior clerks, one of whom acts as chief clerk, one stenographer, ten general clerks and one messenger—sixteen in all.

This division has special charge of the annual reports made by the railroad companies to the Commission pursuant to the twentieth section of the Act to Regulate Commerce. This involves the examination of every report made, the correction of errors found therein, the compilation of the returns embraced in the reports, and the necessary tabulations of railway statistics for the report on that subject, together with the deduction of results therefrom, and the appropriate comment upon the data published. In addition to these duties, the investigation of the special questions in railway statistics is taken up from time to time.

The compilation of the returns of the railroads for the year ending June 30, 1889, is now in progress, and the statistical report will be submitted at as early a date as possible.

The preparation and distribution of the blank form of annual report for carriers, with accompanying pamphlets, is also part of the work of this division. The form for reports for the current year was sent to more than 1,500 railroads in the United States. Eighteen different editions of this form for as many different States were furnished, on request, to state railway commissioners, with reference to the important object of bringing about greater uniformity in state and United States returns of the railway statistics of the country.

The correspondence of this division during the last year numbered about five thousand let-

ters received and about the same number of letters and circulars sent out.

The names and compensation of all employes are given in Appendix 1.

INVESTIGATIONS AND PROCEEDINGS BY THE COMMISSION.

The general sessions of the Commission for the hearing of complaints, and for investigations of a general character relating to the business of common carriers and the manner and method in which the same is conducted, are usually held, pursuant to the Act, at the City of Washington. This has been found more conducive to the dispatch of business and to the convenience of attendance from different parts of the country.

In addition to the sessions at Washington, sessions are also held and investigations made at various places in different parts of the country, whenever the subject of investigation is local, or the convenience of parties and witnesses will be subserved, or the Commission be likely to be better informed as to the peculiar facts of the case. In selecting points for investigations of this character the Commission is governed largely by the convenience of parties and witnesses, but, as is often the case, witnesses and parties on one side or the other are required to travel considerable distances, as it is rarely possible to locate hearings so that both sides to a controversy will be equally accommodated.

The number of formal hearings and investigations assigned at Washington since the last annual Report is seventy-three. The greater part of these have been actually heard, more or less testimony taken therein, often extending through several days, and decided or otherwise disposed of; some are still held under consideration, and some have been continued.

During the same time complaints have been set for hearing, and investigations carried on, either by the Commission as a whole or by some of its members, at the following times and places: December, 1888, at Chicago, Ill., Toledo and Cincinnati, Ohio; January, 1889, at New York, N. Y., and Toledo, Ohio; February, at Philadelphia, Pa., New York, N. Y., Chicago, Ill., St. Paul, Minn., Baltimore, Md., and again at Chicago, Ill.; March, at Chicago, Ill., and New York, N. Y.; May, at New York, N. Y., Titusville, Pa., Toledo, Ohio, Chicago, Ill., Jefferson City and Kansas City, Mo.; June, at Newport News, Norfolk and Richmond, Va.; September, at New York, N. Y., Indianapolis, Ind., St. Louis and Kansas City, Mo., and Chicago, Ill.

Besides these, an extended tour of investigation was made by the Chairman to the Pacific coast in July and August, going west over the line of the Northern Pacific road and returning over the line of the Central Pacific and Union Pacific, and stopping over to make investigations into matters of interest relating to transportation and the operations of the Act at the following places: Chicago, Ill.; St. Paul and Minneapolis, Minn.; Bismarck, Dak.; Helena, Butte City, Anaconda and Garrison, Mont.; Spokane Falls, Tacoma and Seattle, Wash.; Portland, Oregon; San Francisco and San José, Cal.; Ogden and Salt Lake City, Utah, and Denver, Colo.

The number of cases assigned for formal hearing by the Commission since the 1st of December, 1888, is thirty-eight, besides a large number of less formal investigations.

The formal hearings and investigations constitute only a portion, and by no means the greater portion, of the administrative work of the Commission. Informal hearings, conferences, correspondence with shippers, and with carriers relating to numerous transportation questions constantly arising, and the adjustment of such questions without formal complaint, necessarily require considerable time and careful attention. More differences between shippers and carriers, many of which arise from mistake or misunderstanding, are disposed of or satisfactorily arranged through the intervention of the Commission than by formal complaint. The questions usually presented by formal complaint are mostly such as involve interpretations of the Law, or relate to classification, to rates supposed to discriminate in respect to kinds of traffic or in respect to localities, and to facilities for carrying, interchanging or forwarding traffic, and require on the part of the Commission a written report, with findings of fact and conclusions of law. Cases involving only charges of individual discrimination or injury resulting from some supposed contravention of the Act can in most instances be arranged satisfactorily to the parties, and often are so arranged, through the action of the Commission, without formal complaint or hearing.

INVESTIGATION OF SOUTHERN CARRIERS.

One of the first and most important investigations since the last report related to the management of the business of the common carriers operating in the territory south of the Ohio and James Rivers, and to the manner and method in which their business was conducted, with reference to the provisions of the Act to Regulate Commerce. The Commission, having reason to believe, from examinations of the tariffs on file and from other sources, that the requirements of the Act were not in all respects complied with, and that there were irregularities of various kinds that should be corrected, summoned the officials of the various railroads associated for certain purposes under the name of the Southern Railway and Steamship Association, and others operating in the territory before mentioned, being twenty-eight in all, to attend at an investigation appointed for the purpose. The investigation was held at Washington on the 18th, 19th and 20th days of December, 1888, and representatives of the various railroads summoned were present. A large amount of testimony was taken, and the investigation covered the whole field of classifications and tariffs, the methods of making and publishing rates, and the influences, whether water competition or otherwise, that were supposed to affect rates.

An elaborate report* of the investigation was made, setting forth the conditions found to exist, and the corrections that were deemed necessary. The general results were as follows:

*May be found *ante*, p. 461, as *Re Atlanta & West Point R. Co.*
2 INTER S.

The greater charge for the transportation of a like kind of property for a shorter than for a longer distance over the same line in the same direction was found to be made at many points where it was deemed to be unjustifiable; the disparity between the charges made at different points on the same line was in some instances apparently much too great; the form of the tariffs as prepared in many cases did not meet the requirements of the Law, and in other cases the tariffs did not show the rates actually charged to shippers; combination rates were made which were different from the rates specified in the tariffs as published and filed; the classifications in use were conflicting and involved, containing many exceptions and variations; different classifications were at times used upon the road of the same carrier for the shipment of the same commodity to neighboring points; at times two or more classifications were employed upon the same shipment, fixing a so-called combination rate upon the line of a single carrier, or of two or more connecting carriers, as is also done in same other portions of the country.

In these and some other respects the methods employed were not, in the judgment of the Commission, in conformity with the requirements of the Act to Regulate Commerce, and the Commission therefore ordered that the several carriers comply with the Act in the particulars pointed out, without unnecessary delay, and make report to the Commission of their action in the premises. The reports made by the carriers pursuant to this order, and the tariffs filed, show that material changes and improvements have been made in compliance with the order.

CIRCULARS.

On the 2d of March, 1889, the amendments made by Congress to the Act to Regulate Commerce took effect. By these amendments material changes were made in the Statute in respect to the filing and publication of tariffs, and in several other particulars. The Commission at once caused the Act as amended to be printed and distributed to the common carriers of the country, and generally for public information.

On the 12th of March the Commission issued and distributed a circular† to all the carriers

†May be found in Appendix II. to this volume, p. xli.

‡CIRCULAR.

March 12th, 1889.

To all Carriers, subject to the Act to Regulate Commerce:

The amendment to the Act to Regulate Commerce, adopted March 2, 1889, contains the following provision:

"Schedules shall be plainly printed in large type and copies for the use of the public shall be posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

* * * * *

"The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall

subject to the Act in respect to the printing, posting and publication of schedules of rates, a copy of which is set forth in Appendix 2.

On the 23d of March a further circular* was in like manner issued and circulated in respect to advances and reductions in joint rates, and the publication of joint tariffs, calling attention to the provisions of the Act as amended. This circular is given in Appendix 3.

CONFERENCE WITH STATE RAILROAD COMMISSIONERS.

On the 5th, 6th and 7th of March a general conference with the railroad commissioners of the States was held at Washington, pursuant to an invitation for the purpose issued by this Commission on the 31st of January, 1889.

The proceedings of this conference are elsewhere described in this Report.

CONFERENCE WITH TRUNK-LINE CARRIERS.

On the 16th day of March, 1889, a conference was held at Washington, pursuant to a notification issued by the Commission, with representatives of the common carriers comprising what is known as the Trunk-Line Association. The purposes of this conference, and what appeared, are elsewhere stated in this report.

PASSENGER RATES.

On the 21st of March, 1889, upon the request of the officials of the passenger department of the Central Traffic Association, a conference was held at Washington on the subject of passenger rates, which was attended by a large number of general passenger agents from different sections of the country, and by officers of

be prepared and arranged, and may change the form from time to time as shall be found expedient."

Much care will be required in deciding upon a general form of schedules; possibly various forms may be required in order to meet the different conditions of business. No action under the clause last quoted can be immediately announced.

The posting of schedules in two public and conspicuous places is now imperative, and is a substitution for the former provision which required such schedules to "be plainly printed in large type of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot and station upon any such railroad, in such places and in such form that they can be conveniently inspected."

This change in the Law requires immediate attention on the part of the carriers. The Commission suggests that one at least of the places to be provided in each depot, station or office should be a standing desk, which may be attached to the wall, at a convenient height, at slight expense, and upon which the tariffs and classifications can be laid in book form, between covers arranged for additions or removals from time to time; the agent in charge can easily keep the book of rates abreast with all changes; he should add new tariffs as fast as issued, and also promptly remove such as are canceled or superseded.

Thomas M. Cooley,
William R. Morrison,
Augustus Schoonmaker,
Aldace F. Walker,
Walter L. Bragg,

Interstate Commerce Commissioners.

several traffic associations. The subjects of the conference covered passenger rate-sheets; the form in which they might be prepared and be the most convenient for public information; the manner in which through rates over different lines might be made, and the posting of such rates; the making of various special rates, such as round-trip tourist rates, so-called party rates, carload passenger rates, and others.

A report of the conference was made and published by the Commission, and the views of the Commission upon some of the subjects considered and discussed were set forth.

CONFERENCE WITH SOUTHERN CARRIERS.

Pursuant to a request by representatives of some of the southern railroad lines who had attended the conference with representatives of the Trunk Line Association, a conference was held at Washington on the 2d of April, 1889, with representatives of most of the southern and southwestern common carriers, forty in all, and a large amount of testimony was taken. Another portion of this Report refers more fully to what was elicited on this investigation.

AMENDED RULES AND FORMS.

By the seventeenth section of the Statute, it is provided that the Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of the proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Under this authority, the Commission, on the 8th of June, adopted revised and amended Rules of Practice in cases and proceedings instituted before it under the Act, and prepared a set of Forms for the use of parties to such proceedings; these were printed and distributed generally throughout the country. These Rules and Forms are given in the Appendix.†

FREE PASSES AND FREE TRANSPORTATION.

On the 3d of May the Commission entered upon an investigation concerning free passes and free passenger transportation. Information received from time to time had given reason to believe that passes for interstate transportation, or having some relation to interstate business, were issued to some extent at least by some if not most of the railroad companies. The intention of the Commission was to make the investigation general, covering all the interstate lines of the country, but pressure of other business compelled the postponement of much of the investigation to a later period. As the investigation has not been completed only a limited report upon the subject can be made at the present time.

The companies first summoned were those operating in the Middle and New England States, twenty-seven in all. They were called upon, by order, to answer and set forth the persons and classes of persons to whom they had severally issued free passes or free transpor-

*See this report *ante*, p. 445, entitled *Re Passenger Tariffs*.

†These may be found as Appendix IV. to this volume.

*May be found *ante*, p. 453.

tation other than their own officers and employes and the officers and employes of other railroad companies since November 1, 1888, and the conditions and limitations connected therewith, with explanations showing how and why these acts were done; and the statements to be properly verified.*

Representatives of all the companies summoned appeared at the hearing in Washington, and all except three companies produced statements in compliance with the summons, showing the number of passes issued, the persons and classes of persons to whom issued, and the reasons for their issue. The three companies that furnished no statements of the character called for answered that they issued passes to be used only within their respective States, and that for such transportation they were not subject to the Act to Regulate Commerce, and therefore declined to show to what persons, or for what reasons, the passes were issued. Whether or not companies taking this ground can be compelled to disclose the particular persons to whom free transportation was given, in order that it may appear whether the passes were intended or used for interstate journeys, or are in any respect a device to favor interstate shippers, has not yet been determined.

The statements filed by the companies that produced lists show that passes have been issued to divers classes of persons, and for a variety of reasons, but mainly for use within a State, and claimed for that reason not to be in violation of the Act to Regulate Commerce. It also appears that to a limited extent passes for interstate journeys have been issued by many of the companies.

The persons who have had free transportation as shown by these returns are embraced in the following classes: Railroad directors; drovers; express men; telegraph men; news-company agents; officers of palace-car companies; managers of excursions and shows; persons injured on railroads, transported to their homes; attorneys; surgeons; persons on company's business; in consideration of contracts for purchase of land, water rights and rights of way; for services rendered; witnesses for companies; in consideration of advertising; hotel and boarding-house proprietors; newspaper men; shippers; complimentary; special car accommodations; to persons on request of others, no reason given; for charitable purposes; benevolent associations; ex-employes, and families of deceased employes; members of legislative bodies; state railroad commissioners; United States, state and municipal officers; employes of the railway mail service; officials of steamship and steamboat lines.

Under some of these classes the transportation has been very limited. Under others the numbers carried have been more numerous, but that a great diminution of free transportation has taken place since the Act, especially in interstate transportation, is very evident.

Some of the classes carried free there would seem to be no reason to question the propriety of, such as persons injured in railroad accidents, surgeons attending such persons, and witnesses for companies in judicial proceedings and investigations. Where contracts have

been entered into prior to the Act for free carriage of specified persons, in consideration of conveyance of rights of way or other property rights to companies, courts have held in some instances that they were enforceable, and rested upon lawful considerations. Employes of express companies and telegraph companies operating upon a line of railroad under agreements with the railroad company, and employes of the railway mail service, are clearly distinguishable from ordinary travelers.

With respect to nearly all the other classes to whom free transportation has been given, it would seem clear that no justification can be found for their carriage under the provisions of the Act.

According to the returns made, the largest number of interstate passes issued of any class was designated "complimentary." Next in numbers were passes to steamship lines and transfer companies, United States, state and municipal officers, palace-car companies, newspapers, and for advertising. The several other classes were small in proportion.

Of state passes the largest numbers were issued to members of Legislatures and drovers, with "complimentaries" next, and United States, state and municipal officers, newspapers and shippers next in numbers, the others being comparatively few.

The Statute undoubtedly was framed to prohibit passes or free transportation of persons, as one of the forms of unjust discrimination, favoritism and misuse of corporate powers that had grown into an abuse of large proportions and become demoralizing in its influence and detrimental to railroads, both in loss of revenue and in provoking public hostility. One of the minor and meaner phases of this abuse is the distinctive preference shown in various ways by employes, both in service and civility, to holders of passes, as if discrimination by free carriage includes discrimination in treatment of passengers.

It was well known that persons who were carried free were, to a large extent, precisely the persons who had no claim whatever to such favors. They were officials and others from whom free passes might be expected to secure reciprocal favors, and men of wealth and prominence who rode at the expense of others less able to pay; or the passes were given to influence business. In nearly all cases not specially exempted by the Act, the motive in demanding or in giving them was one deserving of no favor.

The Law aims at the correction of the abuses of free transportation, and, in accomplishing this general purpose, some forms of free or reduced transportation that at first view might appear plausible, or even unobjectionable in themselves, have to fall under its general restrictions. The principle of equality, under like conditions, for the traveling public had been grossly violated by the railroads. Favored persons or classes of persons had been furnished free transportation at the expense of the general public by higher general charges to reimburse for gratuitous carriage. The discrimination is equally unjust, whether the free transportation be complimentary or to aid some person's business, or for some supposed indirect advantage to the carrier. The correction of

*This order may be found *ante*, p. 494.

the evil, and the equality of right to which all are entitled, required the restrictions to be general and sweeping to furnish any substantial assurance that the abuse should not be continued or new ones devised under cover of any discretion left to the carrier.

For reasons deemed adequate by the legislative body certain specified exceptions are made in the Statute of classes of persons to whom reduced rates or free transportation may lawfully be given, in whose favor discrimination was not deemed unjust. The Act provides that it shall not "be construed to prohibit any common carrier from giving reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the national homes or state homes for disabled volunteer soldiers, and of soldiers' and sailors' orphan homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes." It further provides that it shall not "be construed to prevent railroads from giving free carriage to their own officers and employes, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employes." The classes of persons that may have reduced rates or free carriage are thus carefully specified in the Statute, and their enumeration necessarily excludes all others. Except as qualified by this section, the issuance and sale of passenger tickets must be in accordance with the general principles of the Act.

The investigation developed one custom of railroads that seems to be general and to rest on considerations that have no little force. This is the custom of giving free transportation or reduced rates to families of subordinate employes. It is obvious that, for many forcible reasons, the most amicable relations should exist between the railroad companies and their employes, and that the latter should feel that the companies are disposed in all proper ways to manifest an interest in their general welfare. The compensation of these employes is low, the service exacting and often hazardous, their opportunities to give attention to domestic affairs are very limited, and as a rule they are dependent almost entirely on their compensation for the support of their families. It is clearly for the interest of these employes to reside at points on their roads convenient to their business, where homesteads can be acquired, and cost of rents and living expenses is moderate. Such locations may often be some distance from points required to be frequently reached by members of their families, such as schools and markets, and it would seem reasonable, and no more than an equitable part of their compensation, for the company to carry the wives and children of its employes free, or at low rates, for fairly necessary purposes. Provision, it would seem, might very properly be made to permit this to be done.

As the investigation of this subject has not been concluded, any further report or action by the Commission is deferred until more complete information shall have been elicited.

PASSENGER TICKETS AT REDUCED RATES.

Among the reduced-rate tickets which were in 2 INTER S.

use before the Law to Regulate Commerce was passed, and which may be lawfully issued since its passage, are milage, excursion and commutation tickets.

After investigation of alleged abuses in the issuance and sale of these tickets, the Commission held, March 27,* that they must be offered impartially to all who accept the conditions on which they are issued; that the rates at which they are issued must be published, and that a practice which had grown up of selling tickets for ten or more persons at party rates, or rates considerably below the rates for single passengers, was illegal.

The milage ticket is one form of a reduced-rate ticket which had a well understood meaning before the Act. Besides milage, commutation and excursion tickets, there were various other forms in which tickets were sold at reduced rates. Special and reduced rates were obtainable without regard to the form of the ticket, and the meaning of commutation and excursion tickets was neither exact nor well defined.

Commutation tickets are commonly understood to be tickets sold for a gross sum at reduced rates for a number of rides between given points. Ordinarily, excursion tickets are understood to be round-trip tickets sold at reduced rates issued for one trip and on special occasions, sometimes for health or recreation, and sometimes for army or industrial reunions and assemblages for political, religious or benevolent purposes. It is sometimes urged that the only characteristic feature of these two tickets before the Act was their sale at reduced rates, and that, substantially, all forms of reduced-rate tickets come within the description of commutation or excursion tickets, and may lawfully be issued. Various practices are in use by which they may be made available for a journey of any description, and frequently for ordinary travel, and are good alike for picnics and prize fights.

In view of evil practices in the use of these tickets ascertained on investigation, the Commission, in January, felt constrained to recommend that the Act to Regulate Commerce be so amended as "to define what shall be considered excursion and commutation tickets, and to so restrict their issue in interstate commerce as to prevent the abuses now so common."

COMMISSIONS ON THE SALE OF TICKETS.

Another investigation was held at Washington on the 7th of May, in respect to commissions on the sale of tickets, to which twenty-seven companies were summoned and which was attended by representatives from the different companies. The subject of commissions to ticket agents has heretofore been reported upon by the Commission, and its bearings and the evils supposed to be connected with it discussed. The object of the investigation was to ascertain the extent of the practice, the conditions under which it is carried on, and the carriers that engage in it. The roads summoned were principally those of the west and northwest that operate in the territory reached from Chicago, where the practice was supposed most generally to prevail.

*See ante, p. 445, *Re Passenger Tariffs*.

Nearly all the roads operating south and west and southwest of Chicago, it appeared by the returns made, pay commissions upon passenger tickets to ticket agents of other lines. The commissions paid to agents of connecting lines on competitive business were represented to be those fixed by the Western States Passenger Association, in effect from February 1, 1889, and the amounts paid ranged from 25 cents to \$1 a ticket, depending upon the cost of the ticket and distance traveled. The maximum paid in any case was represented to be \$1 for certain distances and more for longer distances. Other roads operating eastward from Chicago, it was shown, pay no commissions to agents of other lines. Some roads, it was shown, pay some of their own agents by commissions upon sales of tickets, instead of salaries.

Commissions, however, may be, and, as the Commission has learned, sometimes are, cumulative, as, for example, \$1 from New England points to Chicago, \$1 from Chicago to the Missouri River, and \$1 from the Missouri River to Denver. In addition to these sums some roads may pay 10 per cent commission on their earnings for a passage to a traveling passenger agent of, say, \$1.20, making a total for the sale of a single ticket of \$4.20. In cases of commissions of only \$1 for short distances there may be no inducement for the agent to divide with the passenger, but in cases of cumulative commissions for long distances the temptation to divide is stronger, and the probability of abuse is so great that the impropriety of putting the opportunity before an agent is manifest.

Viewed in another aspect, the amount of money paid annually by the larger companies is vast; it is not unusual for a single company to pay a sum approaching \$100,000, or even more, in a year, and the aggregate undoubtedly reaches millions of dollars. The money is illegitimately spent; it is paid in excess of salaries to agents for the purpose of diverting business from competitors, and when competitors all do it, it is difficult to see how any benefit can accrue from it to any company. The money so spent of right belongs to the stockholders, or should be remitted to the public in reduced fares; if the rates are not in fact too high, the money wasted for commissions should be expended for improved service, or toward the safety of passengers and employes.

This practice has frequently been condemned by this Commission as one of very doubtful benefit in any case, and of positive injury in others; as one that affords opportunities, too often improved, for discriminations and fraud in the sale of tickets, and as, generally, a source of demoralization.

CAR MILEAGE.

On the 8th of May an investigation was held at Washington in respect to car mileage, or compensation paid by railroads for the use of cars belonging to other railroad companies or to private companies or individuals. Information had been received giving reason to believe that the payment of car mileage for cars owned by private shippers had in some instances been made use of as a cover for discrimination in rates, and the Commission

deemed the subject of enough importance for an investigation.

Twenty-six railroad companies operating in the territory extending in different directions from Chicago, and engaged in the business in which discriminations by allowance of car mileage were supposed to exist, were summoned to make a showing of the allowances paid by each of them for car mileage for the different classes of cars furnished by shippers, car companies and individuals, or connecting lines; how the business was conducted; and what sum was, in their opinion, a fair and just allowance for the different classes of cars. The companies appeared by their representatives, and produced their statements and testimony relating to the subjects of inquiry. The facts elicited were substantially as follows:

The mileage paid for different classes of cars, and for the same class of cars, is not uniform by different companies, nor by the same companies, except for ordinary freight cars exchanged between companies in the course of transportation. The rates allowed for car mileage were shown to be as follows: For ordinary freight cars, a uniform rate of three fourths of a cent a mile; for Pullman palace cars, 3 cents a mile; for Pullman palace tourist sleepers, 1 cent a mile; for ordinary passenger cars exchanged with other companies, 3 cents a mile; for baggage, mail and express cars exchanged with other companies, $1\frac{1}{2}$ cents a mile by some roads and 3 cents a mile by others; for refrigerator cars used for carrying dressed beef, 1 cent a mile in some cases and in other cases three fourths of a cent a mile; for furniture cars, oil-tank cars, palace live-stock cars, and other cars owned by private individuals and companies, three fourths of a cent a mile. Some companies pay mileage on tank cars both loaded and empty, and some only when loaded. For palace horse cars no mileage is allowed on some roads, shippers in such cars paying for the car. Since May 1, 1889, the roads running east and southeast of Chicago, with the exception of one company, have allowed three fourths of a cent a mile for refrigerator cars. The one road referred to allows 1 cent a mile.

It appeared by the evidence adduced that one of the roads west of Chicago had entered into a contract with one private company owning a large number of refrigerator cars, and who are also shippers, to pay 1 cent a mile on such cars for a period of five years, the private company agreeing to furnish sufficient cars for their own business and for all other like business requiring that class of cars. This was naturally followed by all of the competing roads, with perhaps one exception, paying the same rate of car mileage on that class of cars, and that is accordingly understood to be the rate on the different roads in the competitive territory.

A forcible illustration of the results of car mileage to owners of private refrigerator cars appeared by a statement put in evidence from the books of a railroad company, showing the mileage made, and earnings of some of such cars, for nine months from August 1, 1888, to May 1, 1889. During that period the mileage for which compensation was allowed, made by the cars of three shippers, from Chi

cago to an eastern point, and over a single line of road, was 7,428,406, and the earnings of the cars \$72,945.97, being about the cost of 81 cars. The mileage allowed during most of this period was 1 cent a mile, and three fourths of a cent a mile for part of the period. Refrigerator cars run on fast time, and make four times the mileage of ordinary freight cars.

The cost of the investment in cars and the amount of mileage allowed for their use show that the investment is very profitable. Refrigerator cars cost from \$900 to \$1,000; private cattle cars cost about \$650; oil-tank cars about \$610; cars used for the transportation of live hogs about \$500; ordinary freight cars from \$450 to \$500. Repairs to the cars are made by the railroad company in whose use they are when repairs are required. The life of a box car averages fifteen years, and of a refrigerator car eight years. At a car mileage rate of 1 cent a mile the profit on the investment in many of these cars is very large, reaching, according to information acquired by the Commission, 25 per cent, 50 per cent, and even more, annually. Sometimes a car will pay for itself in two or three years. Owners of several hundreds of such cars, therefore, receive a very large amount of money from the railroads over which they are hauled, and it is easy to see how it is possible, out of the large returns from these cars, for owners to pay rebates to shippers, if so disposed. The evidence taken in the case did not prove the payment of rebates to shippers by owners of any of these cars, but it was quite clear that some of the officers of railroad companies who were examined had impressions that such might be the fact. It is also evident that the payment of either 1 cent or three fourths of a cent a mile to a large shipper owning and controlling his own cars and furnishing business therefor constitutes a very profitable incident to his legitimate business, and is at least a material advantage to the man owning cars over the man who owns none.

In the original draft of the Report, as submitted, it was stated that another illustration in which car mileage is a factor is furnished by the Pullman palace cars and similar cars, and that the rate of car mileage received was 3 cents per mile. This was founded on evidence before the Commission. Evidence since submitted shows this rate is paid by only a portion of the roads under old contracts outstanding, and that under recent contracts with some companies the rate is 2 cents per mile. The evidence also shows that on roads where the earnings of a car from passenger accommodations reach \$7,500 no car mileage is paid. The report of the Pullman Company for the year ending July 31, 1888, shows revenue (\$6,259,370.97, car earnings; \$1,239,565.93, manufacturing profits; \$10,817.48, from patents) from all sources, \$7,509,754.38. Car earnings are explained by evidence not to include car mileage, but arise from passenger accommodations. The aggregate car mileage has not been shown. After deducting operating expenses and some other items, the total net earnings were first stated to be \$3,957,771.87. From this deductions are claimed for interest, repairs and depreciation of cars, reducing materially the previously stated profits of 20 per cent on the 2 INTER S.

capital stock, \$19,872,900. Although the results on the whole business of the company show larger profits than those of railroads generally, the exact extent to which car mileage is a legitimate factor cannot be determined without more facts than have as yet appeared from satisfactory evidence.

The use of these cars is sometimes an excuse for furnishing inferior passenger coaches by the roads. The traveling public are burdened with high rates for transportation in these cars, or subjected to inferior accommodations in ordinary coaches. If any portion of the public desires to pay higher rates for special accommodations there can be no objection to their doing so, but the provision for the superior accommodations should not become a charge upon the general transportation. In England, where different classes of passenger cars are furnished, striking results have been produced by the provision of suitable cars of the third class. That class of cars has of late absorbed the bulk of the travel, and furnished the revenue to the roads from their passenger business, while the first and second-class cars, with the superior accommodations, have become a tax upon the other business.

Illustrations might also be drawn from the use of the cars of the numerous fast freight lines that operate generally over the railroads of the country. These lines derive their revenue from the roads upon which they are operated, and as a rule are highly profitable, while the roads proper show very different results. This revenue accrues from payments for car mileage, and from commissions for procuring traffic, which in effect are divisions of earnings between the roads and irregular outside organizations.

So far as rates upon traffic are concerned, whether for freight or passengers, their reasonableness can probably be controlled without regard to the source from which cars are supplied. Any railroad company voluntarily using a car in its business, no matter how obtained, in legal contemplation makes the car its own for all the purposes of rates and of safe carriage. It cannot escape its duty to charge only reasonable rates, or its liability for the safe carriage of persons or property, on the ground that its cars may not be its own property, or that a high rate may be paid for their use.

With regard to the sum that may be considered a reasonable allowance for the use of freight cars, the general opinion expressed on the investigation was that three fourths of a cent a mile is ample, and many regard even that as too high a rate. In the case of cars interchanged between railroad companies the mileage nearly equalizes itself, and does not bear very disproportionately upon any one company, but in the case of the private ownership of cars there is no reciprocity, and the payment of three fourths of a cent a mile may be a burden to the carrier, besides the other objections that have been mentioned.

It is an obvious deduction from all the facts that cars for the various kinds of business done by a carrier should be owned by the carrier itself and furnished to all alike, or, if owned by the shipper, only such reasonable allowance for their use should be made as to permit no advantage to the private owner of cars who is also

a shipper, nor afford a margin for paying rebates to other shippers.

FREE CARTAGE.

On the 17th of June most of the leading railroads, five hundred and eighty-five in number, were summoned by circular* to furnish the Commission with information with regard to free-cartage delivery of freights and to have their answers duly verified by some officer of their companies with knowledge of the facts. They were required to state at what stations on their lines they made free-cartage delivery, if any, and of what class of freights; whether such stations, or any of them, were grouped with any other station or stations on their lines at which the same transportation rates were charged as to like freights delivered with free cartage; how long the system of free-cartage delivery of such freights had been made; what its origin and all the facts, circumstances and conditions, if any, that induced it to be done; whether it resulted in competitors making free-cartage delivery at the same stations; what effect, if any, such free cartage had upon rates at such stations, as compared with rates at other stations; whether their rate-sheets or tariffs made any, and what, reference to free cartage where it existed; what estimate they made of the actual cost of such free cartage at the stations where it was done. Four hundred and sixty-three companies responded to this circular. By the answers received it appears that sixty-five railroad companies allow free-cartage delivery of freight or equalizing cartage allowances; that three hundred and eighty-nine railroad companies do neither; that seven railroad companies only deliver free to connecting lines freight shipped on through tariffs; and that two railroad companies only switch cars free to mills and manufactories.

It further appears by these returns that no company furnishes free-cartage delivery at all its stations, but, as a rule, only at few stations; that in some instances, when free cartage is furnished at a station by one company, competitors do the same, but it does not appear that that is generally done; that in no instance do the rate-sheets or tariffs give any information about free-cartage delivery; that the estimated cost of free-cartage delivery will average about $2\frac{1}{2}$ cents per 100 pounds; that where allowance is made for switching on connecting tracks to consignees' doors, or where an allowance is made per car to equalize distance from shippers' doors to depot, the average cost is about \$2 per car, or \$2.50.

As a case† is pending before the Commission involving the lawfulness of free-cartage collection and delivery of freight, no further comment is made on this subject.

With respect to two of the foregoing subjects of investigation, commissions and car mileage, their nature and magnitude clearly demand legislation to restrain their evils and make correction effective. Acts supposed to promote business interests, however inconsistent with a

sense of right and of just accountability to others whose interests are represented, are not usually restrained by moral or public considerations, or by anything less than positive law. Railroads are constructed for business purposes, and are expected to produce profits; they are not different in this respect from other business undertakings. If managers are ambitious for a larger showing of business, or more revenue is necessary to insure profits, or even to balance accounts, they have not infrequently felt at liberty to make use of methods that have no better sanction than that the end justifies the means. But managers of this character are undoubtedly in a small minority; conservative and upright managers regard such practices with no less abhorrence than the general public, and legislation is required for their protection no less than for the public protection. The best managed road may find its business diverted and its revenues impaired by a weak but unscrupulous competitor, and in self-defense feel compelled to retaliate. This may not be the course of wisdom nor defensible on any just grounds, but it is one of the well-known facts of experience.

TICKET BROKERAGE.

Another subject of general notoriety related to some of the foregoing, and universally recognized as an abuse of gross character and large extent, and which, in the opinion of the Commission, urgently demands legislative action, both for public reasons and to regulate dishonest competition, is ticket brokerage, or scalping, as usually termed. The Commission has made investigations concerning it, and has frequently expressed condemnation of the practice, setting forth its dishonesty, and the discrimination and evils to which it leads, and urged managers of railroads to relieve themselves from its odium and wrong. There is no indication, however, that the practice is diminishing; on the contrary, it flourishes with unabated boldness and success in many of the cities of the country, including the national capital. As dealers in these irregular sales are not recognized as agents of the railroads, nor as connected with any company, but as independent operators, there are difficulties in enforcing legal remedies against them under a Law framed to apply to carriers and their proper officers and agents.

It is sometimes said that railroads can destroy ticket scalping whenever they see fit, by ceasing to countenance or connive at the practice. This is doubtless true, but one or two reckless roads, indifferent to the methods by which they procure business, may be able to defeat the best purposes of a great majority of roads that oppose the evil and desire its abatement.

Some of the States have legislation that is understood to be preventive of ticket scalping, and similar provisions, incorporated in the Act to Regulate Commerce, may prove efficacious. They are, in substance, that any person authorized to sell passenger tickets shall have and exhibit a certificate from the company or companies upon whose lines he sells tickets, and the companies to be responsible for his acts; and that it shall be unlawful for any other person to sell tickets, under suitable criminal penalties.

*See circular letter in Appendix V. to this volume, p. iv.

†See complaint in *Stone & Carten v. Detroit, Grand Haven & Milwaukee R. Co.* ante, p. 152, and answer, p. 185.

QUESTIONS DECIDED.

The decisions of the Commission in contested cases have related more largely to rates than to any other incident of transportation. A statement briefly setting forth the points passed on in the various cases decided is contained in Appendix 4.* Another statement in the Appendix shows the cases that are still pending and undetermined. Some of the more important decisions rendered are briefly referred to here and some elsewhere in this Report in connection with particular subjects.

One of these, announced early in the year, related to passenger tariffs and rate wars,† and various matters relating to the publication of tariffs, the reduction of rates, employment of ticket brokers and scalpers for the sale of railroad tickets, the illegality of lower rates obtained from brokers, and the existing methods respecting excursion and mileage tickets were examined, discussed, and the views of the Commission with regard to them expressed.

In two cases,‡ one arising in Illinois and the other in Pennsylvania, the practice of making group rates upon soft coal was presented, and, under the conditions found to exist in both cases, a group rate for a district of considerable size was found to be reasonable and not in contravention of the provisions of the Statute. A group rate upon an article of traffic for a district of country where the circumstances as to the character of the commodity, the extent of the public demand for its use, and sometimes the nature of the competition existing in its transportation, has been considered by the Commission as warranted by the provisions of the Act, and in most respects conducive to the public welfare.

In other cases through rates for long distances, and the relation of local rates upon the same line to the proportions of through rates, have been several times considered and applied. In all these cases the Commission has adhered to the rule it had previously laid down, that through rates are not required to be the sums of locals, but may lawfully be lower so long as they are not unreasonably disproportionate, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which the throughrate is charged; but that rates should be reasonably proportional, and, distance being usually an element of importance, a proper regard to distance proportions should be observed in connection with any other considerations that may be found material in fixing transportation charges.

In another case§ the question of relative rates upon different branches of the same road was considered upon the facts presented in the case, and it was ruled that railroad service may be rendered under such dissimilar circumstances as to make it lawful to charge more for the

same distance on one branch than on another branch of the same road; that the departure from the rule of equal mileage charges, as applied to several branches of a road, is not conclusive that such rates are unlawful, but in such cases the burden is on the company making the departure to show its rates to be reasonable when challenged.

A case of some importance in respect to the principles involved was brought before the Commission, relating to the application of the provisions of the Act to Regulate Commerce to international commerce with Canada.¶ The particular controversy was in respect to rebates allowed upon coal to consignees in Canada upon continuous shipments from a point in the United States. The Commission regarded the Act as intended to regulate all commerce originating in the United States, and destined by continuous carriage to or into a foreign country, as well as commerce originating in a foreign country and destined to a place in the United States by continuous carriage. It was accordingly ruled that the Act applies as well to foreign as to domestic common carriers engaged in the transportation of passengers or property by continuous carriage or shipment from a place in the United States to a place in an adjacent foreign country, and that such common carriers are subject to the provisions of the Act respecting the printing of schedules of rates, fares and charges for the traffic carried, the posting and filing with the Interstate Commerce Commission of copies of such schedules, the notice of advances and reductions, and the maintenance of the rates, fares and charges established and published, and in force at the time; that such common carriers are also subject to the provisions of the Act in respect to joint tariffs of rates, fares and charges for continuous lines or routes, and that, pursuant to the seventh section of the Act, the carriage of freights cannot be prevented from being treated as one continuous carriage from the place of shipment to the place of destination, by any means or devices intended to evade any of the provisions of the Act.

A case was again brought before the Commission involving the rights of colored passengers in respect to the character of their transportation upon lines of road in some of the Southern States,‡ and the principle that colored passengers paying the same fare are entitled to equality of accommodations and treatment was again affirmed and applied by the Commission.

The Commission had occasion to consider with care the question of practice involved in the allowance of subpenas *duces tecum*.** It had been found in some instances that parties, without leave of the Commission, would serve subpenas *duces tecum* upon common carriers, requiring them to produce upon a hearing a wholly unreasonable and mostly unnecessary amount of documentary evidence, subjecting a company to burdens in the form of expense and labor of its employes to prepare the documen-

*All decisions are contained in this and the preceding volume—those of the year ending Dec. 1, 1889, being in this volume.

†*Ante*, p. 341.

‡See *Rend v. Chicago & N. W. R. Co. ante*, p. 313, and *Imperial Coal Co. v. Pittsburgh & L. E. R. Co. ante*, p. 436.

§See *Northwestern Grain and Stock Shippers' Assn. v. Chicago & N. W. R. Co. ante*, p. 431.

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¶See *Matter of Grand Trunk Railway Co. ante*, p. 497.

‡See *Heard v. Georgia R. Co. ante*, p. 508.

**See *Rice v. Cincinnati, W. & B. R. Co. ante*, p. 584.

tary evidence, that were regarded as unjustifiable and oppressive. The Commission therefore laid down certain general principles in regard to the allowance of subpoenas *duces tecum* and the production of books and documentary evidence, defining the manner in which documentary evidence may be called for, the kinds of evidence proper to be called for and produced, the distinctions to be made between custodians of documentary evidence who are parties and who are not parties to a proceeding, and regulating the practice, as it was thought, upon a reasonable basis.

In another case the question of the mode of making rates upon the shipment of live cattle* was presented and passed upon. A practice had existed among the carriers in large sections of the country to make a carload rate irrespective of the weight carried, and to permit the shipper to load into the car as many cattle as he pleased or as he was able to put into it. The carriers substituted for this the rule that, while naming a carload rate, they prescribed a minimum weight for a carload, and then charged by the hundred pounds, in proportion to the carload rate, for any excess over the minimum. The shippers complained that this substituted rule was unlawful and that they suffered prejudice by reason of its enforcement. They emphasized the complaint by showing that state commissions, in the district affected by the new rule, retained and enforced upon state transportation the former practice, thereby, as they insisted, putting interstate traffic at a great disadvantage. The Commission decided, however, that the new rule was not unlawful. The former practice, when, as is well known, the cars were of different sizes, almost necessarily led to discriminations and to favoritism as between shippers, and on the face of it the new rule was more just and reasonable than the practice it supplanted, since the charge would be more in proportion to the service rendered.

Whatever might be the action of the state commissions in the premises it was held that it could not be allowed to control in respect to interstate traffic, inasmuch as, if it did, the regulation of interstate traffic would, to some extent, be relegated to state commissions. The new rule also corrected some incidental difficulties and abuses in the transportation of live cattle which always attended the old practice, especially in the temptation it held out to the overloading of cars. Shippers complained that difficulties were found to exist in practice in the prompt and accurate weighing of cattle, but this was held not to furnish a reason for abolishing the new rule, but rather, on the other hand, for improving and perfecting it.

QUESTIONS DECIDED BY UNITED STATES COURTS.

Since the last annual Report some questions arising under the Act to Regulate Commerce, and involving interpretations of its provisions, have been presented to and passed upon by courts of the United States. These are given for public information.

In a decision †announced by the Commission

*See *Leonard v. Chicago & A. R. Co. ante*, p. 599.

†See *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. ante*, p. 102.

in August, 1888, it had been held that a certain corporation, chartered by name as a bridge company, had by its charter the powers and rights and was subject to the obligations of a common carrier; that it was a common carrier in fact, and was therefore entitled, under the third section, to demand interchanges of traffic with a railroad company with which it had track connections that were not strictly at a station or depot, but convenient for the purpose of interchange. The case was subsequently presented to a circuit court of the United States, under a somewhat different showing, and it was held by that court that the bridge company was not to be deemed a common carrier and could not lawfully demand interchanges of traffic and through rates with the railroad company under the facts and circumstances of the case.

In another case in which the Commission had ruled that a through route and through rate could not be enforced in favor of a carrier making application therefor, and connecting at each terminus with other carriers, the same question came before one of the courts of the United States, and the same ruling, in effect, was made.

In an original case § that arose in a United States circuit court, under the amendment to the twenty-second section of the Act giving jurisdiction to the circuit and district courts of the United States to require a common carrier by mandamus to move and transport interstate traffic or to furnish cars or other facilities for the transportation of such traffic, it was decided that a shipper of live cattle is not entitled to have his cattle carried in cars of a special construction of his selection belonging to a third party, and superior to ordinary cattle cars, by reason of the fact that the carrier transports some cattle in other cars, available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper, by reason of their peculiar construction, can be used in the chief business of the road, which, in that case, was the carriage of coal, when not in use for cattle; and that the refusal to use the cars desired by the shipper in that case did not constitute unjust discrimination.

In another case, in one of the district courts of the United States, in which an official of a railroad company was indicted for unlawful discrimination under the Act to Regulate Commerce, the official was convicted in the trial court, and upon a review of the case it was held by the court that the transportation by a railroad company to a certain point on its line of freight received from a connecting carrier which had reserved a right to forward the property by any carrier it might select, especially where the freight thereon was to be paid at the point of destination by the purchaser, is not a service rendered for the party by whom the through shipment is made, but for the connecting carrier, and therefore that there may be an unlawful discrimination between the

§See *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. ante*, p. 351.

§See *Morris v. D. L. & W. R. Co. ante*, p. 617.

§See *U. S. v. Tozer, ante*, p. 597.

charges for such service and for a shipment by the same shipper to the same consignee at the same destination over the local line alone, and that an unreasonable adjustment of joint rates for through transportation may constitute an unreasonable discrimination against local traffic. The court further held that the question whether the difference in rates for transportation of local traffic and through traffic is reasonable or unreasonable is a question of fact for the jury, and the conviction of the official was affirmed.

An important decision covering many points of interest in railway transportation, though not under the Act to Regulate Commerce, was rendered by the United States Circuit Court for the Southern District of Iowa in a suit brought by a railroad company against the Railroad Commissioners of the State of Iowa.* The case related to the schedules of rates for transportation within the State prescribed by the state commissioners under a Statute of the State.

It was held in the case that the federal courts have jurisdiction in a suit against state railroad commissioners brought by a corporation of another State to restrain the enforcement of a schedule of rates prepared by such commissioners, under a State Statute claimed by the complainant to be unconstitutional; that the authority conferred upon the railroad commissioners by the Legislature to make and put in effect a schedule of rates for railroad transportation within a State is not an unconstitutional delegation of legislative power; that the provision of the Act making the commissioners' schedule *prima facie* evidence that the rates fixed thereby are reasonable is not an infringement of the constitutional guaranty of the right to trial by jury, nor of the provision against deprivation of property without due process of law; that an inquiry by the courts into the reasonableness of rates established by state authority, notwithstanding the forms of law have been pursued in prescribing a schedule of rates, may be made, and must be decided in each case, whether the rates prescribed are within the limits of legislative power or are mere proceedings which, if not restrained, will work a confiscation of property; that the courts have no power to interfere with rates for railroad transportation fixed by statute when such rates will give some compensation, however small, to the owners of railroad property, but it is their duty to interfere when the rates prescribed will not pay compensation to the owners—that is, some dividend to stockholders after payment of fixed charges and operating expenses; that state legislation which deprives the owners of a railroad line within the State of all compensation from their business cannot be upheld on the ground that the company is a foreign corporation and is permitted simply to do business within the State, and is at liberty to abandon its business if found unremunerative; nor can it be upheld on the ground that the railroad affected thereby is an interstate road and that its deficiency of revenue may be made up by receipts from interstate commerce or from traffic in other States, or on the ground that a future increase of business may render the prescribed rates remunerative. And it

being found that the rates prescribed were not remunerative to the railroad company, an injunction was issued restraining the enforcement of the schedules.

PUBLICATION AND FILING OF TARIFFS.

Publicity of rates is, in itself, a powerful factor in the correction of the evils of unjust discrimination, extortion and unlawful preference. By this means a record, open to public inspection and criticism, is kept of rates as they actually exist at the time. The shipper can see for himself what they are, and if there be a choice of routes for his shipments, as is frequently the case, he may make this choice intelligently, or he can see whether, in any respect, they are such that he may feel it his duty to make complaint against them. But in addition to this information, which is thus valuable and important to the shipper and the public, there could be no efficient supervision and regulation of rates and of the methods prevailing in their enforcement unless tariffs were filed with the Commission as provided by the Statute.

The previous provisions of the Statute on this subject had been highly valuable, but these were greatly strengthened by the subsequent amendments of March 2, 1889. Under the operation of the Statute as thus amended rates have been more steady than before. The temptation to preferences by sudden cuts for the benefit of some dealers and at the expense of others, and resulting as a preference in the transportation of certain kinds of traffic over other traffic, has been very greatly restrained. The posting of rates has been more clearly provided for, so that complaints on the part of shippers that they are unable to see these rates at depots have virtually ceased to exist. Prior to the adoption of the amendments of March 2, 1889, this was a fruitful source of complaint.

The Commission has rigidly enforced that provision of the Statute found in one of these amendments in reference to notice on the part of carriers to the Commission of advances and reductions in rates, and finds that it has worked well. To the force of the Statute as thus amended is unquestionably due, in a considerable measure, the decrease that has occurred in the reckless and wasteful rate wars among the carriers, resulting, as they inevitably do, in ruining the business of some honest dealers, building up the business of dishonest dealers, squandering the property of shareholders, and then endeavoring to recoup the loss sustained by their folly in subsequently charging the general public higher rates than before.

The system by which the tariffs of each company are filed separately in the office of the Commission, and a careful index of them kept so that they are of easy access or reference, has been greatly extended, and it is but the work of a moment to produce them for any necessary purpose, and to ascertain what the rates are from any point in the country to any other point. These tariffs are in many instances voluminous and their number is enormous. The number of tariffs received and filed during the year ending December 1, 1889, was 180,000. The changes in them are numerous and frequent, and it requires a large force to handle them. The regulation and supervision con-

*See *Chicago & N. W. R. Co. v. Dey*, ante, p. 325.

templated by the Statute can never efficiently be made until the Commission is in a position to know promptly whether or not these tariffs, as filed, show on their face that they seem to comply with the Law; and this is equally true of all proposed advances and reductions. To enable the Commission to perform this duty in the manner required by the Statute renders it necessary that the clerical force should be such that these tariffs, and all changes in them, can be promptly filed and indexed without any delay, and that the Commission may be able to see at once the nature and effect of proposed changes.

RAILWAY METHODS IN SHIPMENTS OF FREIGHT AND THE RECORDS THEY KEEP OF THESE TRANSACTIONS.

Other instances of investigations made by the Commission under the twelfth section of the Act to Regulate Commerce have been referred to in this Report, but in addition to these the Commission has investigated the business methods of railways in shipments of freight and the records they keep of these transactions with a view of ascertaining what they are and what changes, if any, have been made by carriers under the operation of the Statute. Under an order of the Commission made on the 24th day of August, 1889, this investigation was made by Mr. C. C. McCain, auditor of rates and transportation in the office of the Commission. His report will be found in Appendix 5 of this Report. His report shows the business methods and the records kept by carriers of their business transactions in shipments of freight. These methods and records are substantially much the same as those in existence prior to the enactment of the Act to Regulate Commerce, though continual improvements are being made in such matters by the carriers; and this will continue to be the case as practical experience will demonstrate its necessity in handling and moving the commerce of the country.

PRINTING AND DISTRIBUTION OF REPORTS, DECISIONS AND OTHER DOCUMENTS.

Section 14 of the Act to Regulate Commerce (as amended) contains provisions as follows:

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use. * * * The Commission may also cause to be printed for early distribution its annual Reports.

The action of the Commission has been in compliance with these provisions.

Copies of reports of investigations have been distributed to those who applied for the same and to others to whom they would be of interest and service, in the opinion of the Commission, including Senators and members of Congress, attorneys having matters before the Commission, boards of trade, railway journals and newspapers, state railroad commissioners, and others.

Soon after the Commission was organized

arrangements were made for the publication of reports and decisions of causes and investigations heard by the Commission, corresponding in form and style to the decisions of judicial tribunals. The material for these reports has been furnished to two publishing companies, and volumes have been issued on their own responsibility containing the reports and decisions of the Commission to March 25, 1889. The reports and decisions since that date will appear in forthcoming volumes, which will be issued in due course as the material therefor accumulates. The Commission authorized the purchase of sufficient copies of these Reports as issued for its own use and distribution to the President and his Cabinet, judges of federal courts, national, state, college, bar and some other public libraries, both American and foreign, to railroad commissioners and some other officials.

Section 21 of the Act to Regulate Commerce was amended March 2, 1889, so as to read as follows:

That the Commission shall, on or before the first day of December in each year, make a Report, which shall be transmitted to Congress, and copies of which shall be distributed as are the other reports transmitted to Congress.

Under the provision first above cited an edition of the second annual Report was printed and distributed as follows:

To the President and to Senators and Representatives in Congress; judges of United States courts; district attorneys of the United States; to boards of trade, chambers of commerce and commercial exchanges of the United States; public library associations; universities and other educational institutions; parties and counsel in cases before the Commission; to leading newspapers of the country; railway and labor journals; law publications and financial papers; to granges and agricultural societies; to the directors and other officers of railways in the United States; to the executive departments of the government; to state railroad commissioners, and to foreign governments.

Of the proceedings of the general conference of railroad commissioners, the purpose and nature of which are elsewhere alluded to in this Report, there were published some 3,000 copies, which were sent to the state railroad commissioners; to the principal officers of railway companies of the country, including the accounting and auditing officers, as the proceedings related in a measure to the methods adopted by the railroads in keeping their accounts and to the making of financial reports to the Commission, in accordance with section 20 of the Act to Regulate Commerce.

Early in 1889 the Commission caused to be prepared and published an edition of 10,000 copies of the first statistical report, entitled "Statistics of Railways in the United States." This is a volume of 390 pages, prepared under the immediate supervision of the statistician of the Commission, compiled from reports of railway companies pursuant to the provisions of section 20 of the Act to Regulate Commerce.

This report, which is further alluded to elsewhere herein, was distributed as follows:

To public libraries of the country, newspapers, railway journals, boards of trade, the

principal officers of railroads; to the executive departments of the government, United States Senators and Representatives, judges of United States courts, agricultural societies, state railroad commissioners, and other officials, and to many others who have applied for copies.

The above distribution of reports and proceedings of the Commission was made with the purpose of carrying out the evident intention of Congress in this behalf as indicated in the provisions of the Act to Regulate Commerce, and manifestly has been of great value in familiarizing carriers subject to the Act and shippers and the public generally with the Law, and the principles of justice and fair dealing which it intended should be applied to transportation.

Circulars and other documents have been sent out as follows:

Circular of January 31, inviting a general conference of railroad commissioners.*

Circular of March 23, relating to amendment of the Act.†

Circular of April 1, relating to automatic car couplers.‡

* See *ante*, p. 230.

† See *ante*, p. 453.

‡

April 1, 1889.

Dear Sir: In view of the large number of accidents to railroad employes which occur in coupling and uncoupling freight cars, and of the general belief that these accidents can be greatly diminished by the adoption of suitable automatic appliances, the Commission desires to obtain fuller information regarding the couplers now in use, and to have the benefit of the experience of those directly engaged in building and operating freight cars, in forming an opinion as to what, if anything, is required of legislation. Your answer to the following questions is therefore requested:

I. (a) What number and proportion of the freight cars owned or leased by your road are equipped with some form of automatic coupler? (b) What forms are in use, and how many cars are fitted with each? (c) Please state briefly what you believe to be the advantages of the automatic couplers in use by you.

II. (a) Which of these couplers, if any, belong to the standard type adopted by the Master Car Builders' Association? (b) Which can be conformed to that type? (c) Is your road taking or contemplating any action towards the adoption of the Master Car Builders' coupler? (d) If there are any obstacles to such action, what are they?

III. Is it your opinion that a single type of automatic coupler should be aimed at, each form of which couples with every other form, or are there practical reasons which, to your mind, make two or more independent standard types preferable? Please state the considerations upon which you base your opinion.

IV. What bearing would the adoption of a standard coupler have upon the more general use of train brakes?

V. Is it your opinion that the use of good automatic couplers tends, by lessening shocks or otherwise, to diminish the number of that particularly fatal class of accidents caused by falling from trains or engines?

The Commission specially invites any observations that your experience may suggest on the general subject. Comparative statistics bearing upon the question will be of especial value.

Very respectfully,

Edw. A. Moseley, Secretary.

Circular of April 10, relating to telegraph. §

§

April 10, 1889.

To the -----:

On the 26th day of October, 1888, a circular was sent to you by the Interstate Commerce Commission, calling your attention to the provisions of an Act of Congress, approved August 7, 1888, entitled "An Act Supplementary to the Act of July 1, 1862, Entitled 'An Act to Aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes,' and also of the Act of July 2, 1864, and Other Acts Amendatory of Said First-named Act," of which Act a copy was also transmitted to you.

You were requested by that circular, with all reasonable promptitude, to comply with certain specified provisions of said Act, by filing copies of contracts mentioned in the sixth section of the Act, and also certain reports, required by the Act, with the Interstate Commerce Commission.

These duties not having been complied with, you are now requested, pursuant to said Act, within fifteen days from the receipt by you of this notice, to file with the Interstate Commerce Commission at its office in the City of Washington, D. C., full and complete reports upon the following subjects:

First. In what manner, and to what extent, if at all, you comply with the first section of the said Act of August 7, 1888, which provides "that all railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, which, by the Acts incorporating them, or by any Act amendatory or supplementary thereto, are required to construct, maintain or operate telegraph lines, and all companies engaged in operating said railroad or telegraph lines shall forthwith and henceforward, by and through their own respective corporate officers and employes, maintain and operate, for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the Acts making the grants as aforesaid."

Second. Whether any telegraph company which has accepted the provisions of title sixty-five of the Revised Statutes, and if so what company, has extended its line to any station or office of a telegraph line belonging to your company, and whether any telegraph company that has so extended its line has formed a connection for the prompt and convenient interchange of telegraph business between said companies; and whether you so operate your telegraph lines as to afford equal facilities to all, without discrimination in favor of or against any person, company or corporation whatever; and whether you receive, deliver and exchange business with connecting telegraph lines on equal terms, and affording equal facilities, and without discrimination for or against any one of such connecting lines, and on what terms such exchanges of business are made.

Third. Whether, in operating your railroad or telegraph lines, you refuse or fail, in whole or in part, to maintain and operate a telegraph line as provided in the first section of the Act, for the use of the government or the public, for commercial and other purposes, without discrimination; or whether you refuse or fail to make and continue such arrangements for the interchange of business with any connecting telegraph company.

Fourth. You are also required within the said fifteen days to file with the Commission copies of all contracts and agreements of every description existing between your company and every other

Circular of May 17, relating to federal regulation of safety appliances.*

person or corporation whatsoever in reference to the ownership, possession, maintenance, control, use or operation of any telegraph lines or property over or upon its rights of way.

Fifth. You are also required within the said fifteen days to file with the Commission a report describing with sufficient certainty the telegraph lines and property belonging to your company, and the manner in which the same are being used and operated by your company, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of said claim, and the manner in which the said lines and property are being used and operated.

Your attention is called to a provision in the sixth section of the Act, as follows:

"And if any of said railroad or telegraph companies shall refuse or fail to make such reports or any report as may be called for by said Commission, or refuse to submit its books and records for inspection, such neglect or refusal shall operate as a forfeiture, in each case of such neglect or refusal, of a sum not less than one thousand dollars nor more than five thousand dollars, to be recovered by the Attorney-General of the United States, in the name and for the use and benefit of the United States; and it shall be the duty of the Interstate Commerce Commission to inform the Attorney-General of all such cases of neglect or refusal, whose duty it shall be to proceed at once to judicially enforce the forfeitures hereinbefore provided."

Edw. A. Moseley, Secretary.

May 17, 1889.

Dear Sir: The large number of accidents to employes and passengers occurring on the railroads of this country, and the public belief that a great part of these might be avoided by the use of proper appliances, have led many States to make the mechanical features of railroad working the subject of statutory regulation. It is well known, however, that in respect to some at least of these features the conditions are such that regulation if attempted can neither secure adequate benefit to the public nor be just to the railroads themselves unless it be uniform over the whole country.

In view of this fact and of the request of the railroad commissioners of the country, as embodied in a resolution adopted at their recent convention, the Interstate Commerce Commission desires to call out as full information and discussion as possible upon the question of federal regulation of safety appliances on railroads. The following matters seem to be of especial importance, but it is not intended to restrict the discussion to them:

1st. The history in each State of safety-appliance legislation. How far such legislation has been enforced. What have been the means used to enforce it. What obstacles have been met with. What the general effect has been.

2d. What is the present condition regarding automatic couplers. What prospect there is of a uniform and safe coupler coming into use. What progress the standard coupler, adopted by the Master Car Builders' Association, is making, and what is the attitude of railroads towards it.

3d. What progress there is in the use of train-brakes on freight cars. Whether such progress is satisfactory, viewed as a means of greater safety to trainmen. To what extent freight trains are run without the necessity of brakemen traversing the tops of cars.

4th. What is being done to introduce safer methods of heating and lighting passenger cars.

2 INTER S.

Two circulars of June 17, relating to free cartage and trackage facilities.†

Two circulars of August 1, relating to relations between railway corporations and their employes.‡

Act to Regulate Commerce as amended. Amended and revised Rules of Practice.

Reports and opinions in cases before the Commission.

The total number of reports and other documents distributed during the year is over 90,000 copies.

STATISTICAL WORK OF THE COMMISSION.

The statistical work of the Commission for the year ending June 30, 1888, is fully explained in the report of Statistician Adams, which was published by the Commission some months since. In that report the statistician says of the information called for from the railroad companies that it may be classified under four general heads: First, questions are asked respecting the corporate history of the several roads and their organization for purposes of operation; second, returns are required bearing on the financial standing of railway corporations, whether they be operating or subsidiary corporations; third, what may be termed "statistics of operation" are demanded; fourth, statistics pertaining to the physical characteristics of roads are made the subject of inquiry. The object of the inquiry thus indicated may be easily perceived. The railway problem is one that presents itself in many phases, but at the present time there are two questions of more importance than all others. The first of these pertains to fair, uniform and steady rates between the railways and the public for service rendered; the second, to the number and situation of new lines that can be economically constructed.

For neither of these questions is there as yet any absolute answer. General principles, it is

5th. What is the state of affairs respecting other safety devices.

6th. Whether legislation looking to federal regulation of these matters or any of them is desirable, and what the reasons are for and against such regulation.

7th. What such federal legislation, if any be desirable, should attempt to accomplish in regard to couplers; in regard to train-brakes; in regard to car heating and lighting; in regard to other matters. What its provisions should be upon each of these points.

8th. If federal legislation be expedient, what special administrative agencies, if any, should be provided to carry it out. Whether federal inspection should be attempted, and to what extent and how. Whether a board should be created after the analogy of the steamboat inspection service. If so, how such a board should be constituted in regard to the number and character of its members; what its powers and duties should be; what its connection with other branches of administration.

The Commission believe that justice to railroad employes and to all others concerned requires that this matter receive thorough consideration, and trusts that you will be able to give it immediate and careful attention.

Very respectfully,

Edw. A. Moseley, Secretary.

† See Appendix V. to this book, p. lv.

‡ See *ante*, p. 640.

true, may be laid down, but in the application of those principles accurate and detailed knowledge of conditions is essential, and the nature of the knowledge required is, as will be readily admitted, such as may be gained by the questions outlined in the form which is sent out for the annual corporate returns. The report shows in detail how far the call has been successful in obtaining the information desired, and explains some of the difficulties in the way of making it complete and accurate. The chief of these relate to the cost and value of railroad property, franchises and equipment, and the statistician says that for reasons which he gives there is some plausible ground for saying that satisfactory and conclusive information respecting the cost of railways in the United States cannot be obtained. The chief difficulty in the way arises from the fact that reliable record evidence upon these points was in many cases never made, and in some cases, after being made, has been lost or destroyed.

Five tables are appended to the statistician's report. The first table shows the length of line owned by each railroad company, the length of time operated, and whether operated by the company owning or by some other. In a preliminary report given in the second annual Report of the Commission the total railroad mileage of the United States was given at 152,781. Those figures were the result of an estimate based upon publications by private statisticians. This proved to be an overestimate. The statistician gives as sources of overestimation in railway mileage the following: Mileage may be easily multiplied in case a line or part of a line is used jointly or owned jointly by two or more operating companies; roadways lying partly out of the country, in Canada or Mexico, may be returned as roadways within the country; lines once operated but abandoned, as lumber roads, quarry roads, etc., may continue to be counted after they have ceased to form part of the country's railway system; street railways, operated in connection with steam railways, may be included in total mileage. A careful sifting of the returns received and of such other evidence as was found available fixes the total railway mileage in the United States, on June 30, 1888, at 149,901.72. The whole number of corporations owning railroads is given at 1,488. Of these 795 actually operate roads; the others are called in the report subsidiary roads, their lines being operated by other companies as lessees or otherwise.

Of the aggregate mileage above given 10,799.89 was obtained from what are designated as unofficial sources; in other words, from sources other than returns made to the Commission. For the most part, reports of the state railway commissioners supplied the information. It must be expected that there will always be difficulty in obtaining complete and accurate statistical information, so long as corporations owning lines which are entirely within single States do not recognize an obligation to make returns. It should be said for such corporations that they have in general responded to the call of the Commission, and have claimed no exemption; but in many cases, as will be apparent from the figures given, response has not been obtained.

The second table appended to the report

gives the amount of railway capital at the close of the year ending June 30, 1888, under the three heads of stocks, funded debt and current liabilities. The amount of stocks is given at \$3,864,468,055; of funded debt, \$3,869,216,365; and of current liabilities, \$396,103,311. This makes a total of \$8,129,787,731, being \$59,392 per mile of road. But this is for 136,883.53 miles of line only.

The third table gives a summary of earnings and income for the same number of miles operated. The amount for passenger service is stated at \$277,339,150, which was 30.46 per cent of the whole; from freight service, \$613,290,679, or 67.35 per cent of the whole; other earnings, \$19,991,391, or 2.19 per cent of the whole. The total earnings from operation were \$910,621,220. The income from other sources, excluding credits sold, was \$89,506,471, making total income for the year \$1,000,214,691.

In a fourth table is given a summary of expenditures for the year. From this it appears that there was paid for maintenance of way and structures, \$131,447,859; for maintenance of equipment, \$101,659,972; for conducting transportation, \$299,049,713; for general expenses, \$55,601,045; not classified, \$4,245,067; making total operating expenses \$594,994,656. For fixed charges there was paid \$285,492,433. Total expenditures, \$880,487,089.

From tables 3 and 4 the following comparative summary of results was deduced:

| | |
|--|------------|
| Revenue per passenger per mile..... | 2.349 cts. |
| Average cost of carrying one passenger 1 mile..... | 2.042 " |
| Revenue per ton of freight per mile..... | 1.001 " |
| Average cost of carrying 1 ton of freight 1 mile..... | .630 " |
| Revenue per train mile, passenger trains..... | \$1.139 |
| Average cost of running passenger train 1 mile..... | 84.691 " |
| Revenue per train mile, freight trains..... | \$1.657 |
| Average cost of running freight train 1 mile..... | \$1.038 |
| Average cost per train mile of all trains earning revenue..... | 96.050 " |
| Percentage of operating expenses to operating income..... | 65.340 |

The impossibility of thus apportioning revenue and expenses with entire accuracy is well understood, but the above is probably as near an approach to accuracy as is attainable.

A fifth table gives a statement of payments on railway capital for the year, from which it appears that upon \$2,374,200,906 of stock no dividend was paid, and upon the remainder there was paid as follows: Upon \$4,818,626, less than 1 per cent; upon \$90,805,607, from 1 to 2 per cent; upon \$46,775,644, from 2 to 3 per cent; upon \$34,079,425, from 3 to 4 per cent; upon \$318,690,245, from 4 to 5 per cent; upon \$301,631,511, from 5 to 6 per cent; upon \$264,402,331, from 6 to 7 per cent; upon \$295,755,706, from 7 to 8 per cent; upon \$76,473,650, from 8 to 9 per cent; upon \$4,209,510, from 9 to 10 per cent; upon \$48,459,100, from 10 to 11 per cent; and upon \$4,006,800, 11 per cent or over. Interest payments were made on 78.31 per cent of the bonds, and none on 21.69 per cent.

The theory of a sixth table, which shall give a cash statement of financial operations for the year, and which may be regarded as the culmination of the plan to which all the other tables conform, is also presented, but it was found not possible to give the table itself in this first

report. The abstract above given will be sufficient to show that the statistical work of the Commission has been satisfactorily begun; that the leading facts are now established with nearer approach to accuracy than ever before; and that there is reason to believe that the obstacles to obtaining reliable statistics regarding railroad property and railroad operations will from this time grow less numerous and troublesome from year to year.

The single-track mileage of new road constructed during the year ending June 30, 1888, by the companies which reported to the Commission, was 7,502.17. If the companies not reporting constructed new road in like proportion, the total would be 8,084.65; and this may be assumed to represent very nearly the actual extension of lines during the year.

One of the chief difficulties in the way of obtaining accurate and reliable statistics of the working of railroads springs from the fact that the methods of keeping accounts vary so greatly. There is no good reason for the great diversity that exists. It has come largely from the different practices of different roads originating many years ago when the general subject was less understood than it is now, and which have continued in existence for no better reason than that the present officers of railway corporations have found them in existence at the time of entering upon their duties. Accounting officers of railroads very generally recognize the importance of uniformity in the methods of accounting, and in their meetings have considered the subject to some extent, and a very general desire is believed to exist that the Commission should act under the authority given to it by the twentieth section of the Statute and prescribe uniformity in the methods of keeping accounts. The subject has recently been taken up by the Commission, and steps have been taken to obtain from the roads such information as may be necessary to enable the power of the Commission in this respect to be wisely and usefully exercised.

The statistical work of the Commission for the year ending June 30, 1889, will appear in detail by the report of the statistician now in course of preparation. This report is unavoidably delayed by the tardiness of some of the railroad companies in making their returns. The new railroad mileage constructed during the year can now be only approximately given and was about 6,500 miles, making the total railroad mileage of the United States to June 30, 1889, 156,400 miles.

It is of much interest to know how the operation of the Law has affected the earnings of railroads. There are so many other causes, however, that exert more or less influence, that exact conclusions cannot be predicated from one cause alone. Full returns are also necessary for accurate and complete results, and as these have not all been received, only incomplete results can now be given. Enough appears, however, by official returns and from unofficial sources, to warrant the positive statement that as a whole there has been considerable increase in railroad earnings, and that during the year since the last Report of the Commission every month has shown a marked, though not the same, increase over the corresponding month in the preceding year. The lowest rate of increase upon a given number of roads in any month was nearly 4½ per cent, and the highest was over 12 per cent, being the largest since the extraordinary rate of earnings in the year 1880.

It is to be noted that with the exception, perhaps, of some coal roads the increased earnings have been shared by the various groups or classes of roads in different portions of the country, and apparently in the following order: The Pacific Slope roads, the Trunk Lines, the roads south of the Ohio and Potomac Rivers, the southwestern roads, and in a less degree by those elsewhere.

There seems no reason to believe, therefore, that the effect of the Law has been injurious to railroad earnings, but on the contrary that, notwithstanding the general lowering of rates from all causes and the equalizations and reductions of charges due especially to the just provisions of the Law, railroads in the main have prospered with the general prosperity of the country, and show materially better earnings wherever excessive competition and the misconduct of managers in rate-cutting and other reprehensible practices have not inflicted injury on themselves.

THE GOVERNMENT-AIDED RAILROAD AND TELEGRAPH LINES.

Certain duties were devolved upon this Commission in relation to railroad and telegraph companies to which the United States has granted any subsidy in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, by the Act of Congress approved August 7, 1888, being chapter 772 of the Acts of the Fiftieth Congress of the United States, Volume 25, U. S. Statutes at Large, page 382.

The Act also imposes certain specified duties upon the railroad and telegraph lines referred to.

So far as this Commission is required to take action in respect to these companies and to secure the reports and information pursuant to the Act, the Commission has endeavored to give effect to its provisions.

The general purposes of the Act may be summarized as follows:

First, that every railroad and telegraph company aided by any subsidy from the United States in lands or bonds or loan of credit for the construction of either railroad or telegraph lines, and all companies engaged in operating such railroad or telegraph lines, should forthwith and henceforward, by and through their own respective corporate officers and employes, maintain and operate for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the Acts making the grants of government aid.

Second, that any telegraph companies that may have accepted the provisions of title 65 of the Revised Statutes of the United States, which shall extend its line to any station or office of a telegraph line belonging to any railroad or telegraph companies referred to in

the Act, should have the right to connect its line and exchange business with such government-aided companies.

Third, that each of the railroad and telegraph companies referred to in the Act should file with this Commission copies of all contracts and agreements between it and every other person or corporation in reference to the ownership, possession, maintenance, control, use or operation of any telegraph lines or property over or upon its right of way, and also to make a report describing with sufficient certainty the telegraph lines and property belonging to it, and the manner in which the same are being then used and operated by it, and the telegraph lines and property upon its right of way in which any other person or corporation claims to have a title or interest, and setting forth the grounds of such claim and the manner in which the same are being then used and operated.

Fourth, that the said companies should also make annual report to this Commission, with reasonable fullness and certainty, of the nature, extent, value and condition of the telegraph lines and property belonging to them, the gross earnings, and all expenses of maintenance, use and operation thereof, and their relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports to be prescribed by this Commission.

Prior to the passage of the Act of August 7, 1888, it is believed that the various railroad companies that had been aided by the United States by subsidies for the construction of their railroad and telegraph lines, and that were required to construct, maintain and operate telegraph lines, had availed themselves of the provisions of the nineteenth section of the Act of Congress of July 1, 1862, in regard to Pacific railroads, by which such railroads were authorized to enter into arrangements with certain specified telegraph companies in lieu of constructing telegraph lines of their own, and by which it was enacted that—

If said arrangement be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of this Act, be held and considered a fulfillment on the part of said railroad companies of the provisions of this Act in regard to the construction of said line of telegraph. And, in case of disagreement, said telegraph companies are authorized to remove their line of telegraph along and upon the line of railroad herein contemplated, without prejudice to the rights of said railroad companies named herein.

The Commission believes that the telegraph business of the subsidized railroad companies in question was provided for by arrangements under this section, and was, in fact done by the Western Union Telegraph Company, either under direct contracts with that company or as successor in interest to the other telegraph company specified in the Act with which contracts were originally made. These contracts also contain provisions as to telegraph business other than that of the railroad companies, but not necessary to be restated herein.

None of the railroad companies or telegraph

companies referred to in the Act of August 7, 1888, made report to this Commission within sixty days from the passage of the Act, as required by its sixth section. The Commission thereupon called upon the various companies, by circular,* to file with the Commission copies of the contracts and agreements specified in the sixth section, and to report certain other facts set forth in the circular. This circular, published in Appendix of second annual Report, was duly served upon the various companies believed to be subject to the Act.

The only responses to this circular were as follows:

The Northern Pacific Railroad Company filed a copy of agreement between the Northwestern Telegraph Company and the Western Union Telegraph Company of the one part and the Northern Pacific Railroad Company of the other part under date of May 1, 1880; and also of a supplemental agreement to the foregoing between the same parties under date of December 18, 1885; also a brief report in regard to the ownership and operation of the telegraph lines and property upon the right of way of said company.

The Southern Pacific Company filed a contract entered into between the Central Pacific Railroad Company, the Southern Pacific Railroad Company, the Sacramento and Placerville Railroad Company, the Northern Railway Company, the San Pablo and Tulare Railroad Company, the Los Angeles and San Diego Railroad Company, the Amador Branch Railroad Company, the Berkeley Branch Railroad Company, the Los Angeles and Independence Railroad Company, parties of the first part, and the Western Union Telegraph Company, party of the second part, under date of December, 14, 1877.

The Sioux City and Pacific Railroad Company filed a copy of a contract entered into between said company and the Western Union Telegraph Company under date of April 1, 1871; also a brief report in regard to the ownership and operation of the telegraph lines and property upon its right of way.

The Union Pacific Railway Company filed a copy of a contract entered into between said company and the Western Union Telegraph Company under date of July 1, 1881.

The companies not having complied with the requirements of the circular as fully as was necessary, the Commission, on the 10th of April, 1889, issued another circular,† which was duly served upon the various companies, calling upon them for more complete and specific reports, which circular is given in Appendix 6.

Responses to this last circular have been as follows:

The Union Pacific Railway Company filed a report in regard to the ownership and operation of the telegraph lines and property upon its right of way; also a statement showing the pleadings and certain proceedings in a suit pending in the Circuit Court of the United States for the District of Nebraska, brought by the Western Union Telegraph Company

*See this circular, *ante*, p. 208, entitled *Re Act of Congress of August 7, 1888*.

†See *ante*, p. 676.

against the Union Pacific Railway Company.

The United States Telegraph Company and the Western Union Telegraph Company communicated by letter, denying that said companies are subject to the Act of August 7, 1888.

The Sioux City and Pacific Railroad Company filed a report giving a brief description of its telegraph line.

The Northern Pacific Railroad Company filed a report giving a full and detailed account of the ownership and operation of the telegraph lines and property upon its right of way.

The St. Joseph and Grand Island Railroad Company (successor of the St. Joseph and Western Railroad Company) filed a report in regard to the ownership and operation of the telegraph lines and property upon its right of way.

The responses of the United States Telegraph Company, the Western Union Telegraph Company, the Texas and Pacific Railway Company, the Missouri Pacific Railway Company, the Hannibal and St. Joseph Railroad Company consisted only of letters respectively denying that the said companies are subject to the Act. The Atchison, Topeka and Santa Fé Railroad Company also answered, denying that that company is subject to the Act, but filed a copy of an agreement between said company and the Western Union Telegraph Company.

Pursuant to the provisions of the sixth section of the Act of August 7, 1888, the Commission prepared a form, as set forth in Appendix 6 *a*, for annual reports to be made by the railroad and telegraph companies referred to in the Act, setting forth with reasonable certainty and particularity the various matters required to be shown by those reports, and on the 22d day of August last these blank forms were duly transmitted and delivered to the following companies:

The Atchison, Topeka and Santa Fé Railroad Company; the Atlantic and Pacific Railroad Company; the Central Pacific Railroad Company; the Northern Pacific Railroad Company; the Oregon and California Railroad Company; the St. Joseph and Grand Island Railroad Company; the St. Louis and San Francisco Railway Company; the Sioux City and Pacific Railroad Company; the Southern Pacific Company; the Union Pacific Railway Company; the United States Telegraph Company, and the Western Union Telegraph Company.

The various railroad companies to which blanks were so transmitted are believed to be subject to the provisions of the Act of August 7, 1888, either by reason of subsidies directly granted to them by the United States government or by the acquisition of or consolidation with lines of road to which such subsidies have been granted.

The Western Union Telegraph Company is believed to be subject to the Act, not by reason of any direct subsidy granted to that company, but by reason of the acquisition by contract of the franchises and rights of other companies that had received government subsidy, whereby the former became subject to the obligations of such companies.

The United States Telegraph Company is

believed to have been a subsidized company, but, although its corporate existence is still maintained, its franchises are controlled and its lines operated by the Western Union Telegraph Company.

The Central Pacific Railroad and the Oregon and California Railroad are controlled and operated by the Southern Pacific Company.

The only railroad companies that have yet made an annual report to the Commission, pursuant to the forms transmitted, are, first, the Sioux City and Pacific Railroad Company. The report of this company is imperfect and gives only a small part of the information called for by the circular. The main facts called for are not reported at all, but the report states in a general way that its telegraph line is not operated by the railroad company for commercial business, but is operated by the Western Union Telegraph Company; and also states that the entire capital stock of the railroad company is issued on account of all the property of the company, and that a division to show the cost and value of the telegraph property cannot be made; second, the Northern Pacific Railroad Company, whose report seems to be as full as practicable, in view of the fact of its contract with the Western Union Telegraph Company.

The general result to be reported by the Commission is that all of the subsidized railroad companies referred to in the Act have failed to comply with the provision of the first section that all of said companies should "forthwith and henceforward, by and through their own respective corporate officers and employés, maintain and operate for railroad, governmental, commercial and all other purposes, telegraph lines, and exercise by themselves alone all the telegraph franchises conferred upon them and obligations assumed by them under the Acts making the grants;" and all except the two companies above specified have failed to comply at all, and those two literally, with the provision in the sixth section requiring said companies to make annual reports to the Interstate Commerce Commission, setting forth "with reasonable fullness and certainty the nature, extent, value and condition of the telegraph lines and property then belonging to it, the gross earnings, and all expenses of maintenance, use and operation thereof, and its relation and business with all connecting telegraph companies during the preceding year, at such time and in such manner as may be required by a system of reports which said Commission shall prescribe."

It is proper to state that the Union Pacific Railway Company reports to this Commission that immediately after the passage of the Act of August 7, 1888, it attempted to assume direct control over its telegraph line, and to comply with the provisions of the Act, but was prevented from so doing by an injunction granted by the United States circuit court at the suit of the Western Union Telegraph Company, which suit is still pending.

The said Act of August 7, 1888, is precise in its provisions that subsidized railroad companies shall "maintain and operate for railroad, governmental, commercial and all other purposes, telegraph lines," and shall afford facilities to connecting telegraph lines "for the prompt

and convenient interchange of telegraph business, * * * and afford equal facilities to all without discrimination in favor of or against any person, company or corporation whatever, and shall receive, deliver and exchange business with connecting telegraph lines on equal terms and without discrimination."

This Commission has never received an application to institute an investigation or make an order upon any railroad or telegraph company under the provisions of said Act, and no complaint has come to the Commission on account of refusal of the Western Union Telegraph Company or any other subsidized company to connect with other companies in the reception or transmission of messages, except a communication in the nature of a complaint from Albert B. Chandler, president and general manager of the Postal Telegraph and Cable Company, in September, 1888. This led to a correspondence and inquiry which continued for some months, but no formal complaint or application followed.

It is also provided by the Act last referred to, that in case any of said railroad or telegraph companies shall refuse or fail to make the reports mentioned in the sixth section of the Act, or any report that may be called for by the Interstate Commerce Commission, it shall be the duty of the said Commission to inform the Attorney-General of such cases of neglect or refusal.

Pursuant to this provision of the Act the Interstate Commerce Commission, after waiting what seemed to it a reasonable time for the reports specified in the circulars above mentioned, reported to that officer the facts in respect to such neglect and refusal by said companies; and the Commission is informed that he has taken action in this behalf.

CONFERENCE OF RAILROAD COMMISSIONERS

Early in the present year the Commission decided to invite a conference with the authorities intrusted with the supervision of railroad affairs under the laws of the several States and Territories. Many reasons had weight in inclining the Commission to take this action, some of which appeared to its members to be very cogent. The United States, by the Act to Regulate Commerce, had entered upon the regulation of transportation by rail, but in doing so had made the descriptive terms as to the carriers to which the regulations should apply so precise and particular as to leave a considerable number unaffected. The Act by its first section was declared to "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and

carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country;" but an important proviso was added, "that the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

Many railroad corporations, whose lines are wholly within single States and who manage them independently, are supposed by the force of this proviso to be altogether exempt from the provisions of the Act, and to be left for regulation—if regulated at all by public authority—under state or territorial laws. Some of the carriers who may thus plausibly claim exemption owned roads which were not only important, because of the very considerable capital invested and of the magnitude of business done upon them, but also because, whether operated independently or otherwise, their relation to interstate roads and to the traffic upon them was such as to make it imperative that they should be taken into account in any comprehensive survey of interstate transportation. Moreover, in the nature of things, it was impossible to classify state and interstate roads upon any distinction that was at once obvious and permanent; neither physical characteristics nor location, nor indications afforded by the mere appearance of the traffic, furnished a conclusive test for the purpose; they did not in any way stand apart from each other so as obviously to constitute separate systems. Then a road might be a state road one year, and without any change except such as should be made in traffic arrangements, be an interstate road the second year, and a state road again the third year; and in any attempt to give comparative views from year to year this likelihood of changes from one class to another was a fact that was necessarily embarrassing, since it was easy to see that it was liable to cause confusion and perhaps lead to serious errors.

The consequent difficulties were increased by the fact that state laws for the regulation of state carriers differed from the Act to Regulate Commerce in important particulars. This, of itself, would be unfortunate, even if it caused no embarrassment in the performance of duties by federal and state roads. It was obviously desirable that the duties and obligations imposed upon all the carriers should be substantially alike, and that the laws for regulation should, as nearly as possible, be identical. The embarrassment resulting from diversity in state and federal action was perhaps greatest in respect to the matter of statistics. To make these of value it was essential that they be complete and accurate; and they could not be complete and accurate unless the returns made annually by the carriers were all made in response to the same questions and covered the same grounds. If all the carriers by rail made returns to this Commission, the end desired might be expected to be accomplished; but if some of them claimed exemption by reason of being state roads, the effort to obtain full sta-

tistics would fail, unless returns under State laws could be resorted to for supplying deficiencies. Many of the carriers did, in fact, claim such exemption, but responded to the call of the Commission as matter of courtesy.

It was found, however, in some cases that though a willingness to make return existed, it was impracticable to do so, for the reason that the books and accounts, which had been planned and kept with a view to meeting the requirements of state law and state regulation, would not enable the carrier to meet the call made by this Commission except at great expense. This was most noticeably the case when the financial year covered by the return made to the State was different from the financial year to be embraced in the return to this Commission; under such circumstances one return could not be a mere copy of the other, but would require a special sifting and a new arrangement of accounts, and this would involve an expense which the carrier could hardly be expected to incur as matter of courtesy merely. The impracticability of obtaining complete statistics of the railroads of the country and of their financial and other operations when their returns were not all made on the same basis was as manifest as it was embarrassing. To take as an illustration the important fact of current railroad building, which perhaps interests the general public quite as much as any other—it will be readily understood that it must be quite impossible to give the amount of railroad building for a specified year when the returns of some of the carriers cover the defined year, while others embrace years differently beginning and ending.

The proposed conference had these matters specially in view, but not these exclusively. The importance of harmony in state and federal law and regulation, so that for the whole country the rule of conduct in the management of railway transportation should be the same, was too great to be overlooked, and the Commission believed that such a conference might be an important step towards the desired end.

On the 31st day of January last the secretary by direction of the Commission issued a circular letter* inviting participation in a general conference of railroad commissioners to be held at the office of the Interstate Commerce Commission, on the 5th of March following. The letter specified as among the subjects which might be properly considered—

Railway statistics, with special reference to the formulation of a uniform system of reporting.

Classification of freight, its simplification and unification.

Railway legislation, how to obtain harmony in.

Railway construction, should regulation be provided?

And such other topics affecting state and interstate commerce as should be brought forward by members of the conference, the specification made not being designed to exclude the consideration of any other subjects of common interest. It was stated also that an opportunity would be afforded for consultation in respect to the heating and lighting of cars,

automatic car coupling, continuous train brakes, and other matters now more particularly within the sphere of state authority. And papers were invited from members of the conference upon any topic deemed of importance.

The invitation was sent to the railroad commissioners of the several States and Territories having commissions; to the board of tax assessors of Arkansas, Indiana and New Jersey; to the secretary of internal affairs of Pennsylvania; to the secretaries of state of North Carolina and West Virginia, and to the governors of such States and Territories as have not by law given a supervision of railway affairs to commissions or other public boards or functionaries. The Association of Railway Accounting Officers was also invited to send representatives, their presence and assistance being specially desired when the subject of annual returns and the forms for securing them should be under discussion. In the invitation to the Association it was stated that it has been the constant desire of the Commission to obtain the utmost harmony of action in respect to the subject of railway statistics, and also to avail itself, as far as possible, of the intelligence and experience of practical railway accountants.

On the day appointed for the meeting it was found that the invitation had been very generally accepted. Nearly every state and territorial railroad commission was represented, as was also the department of internal affairs of Pennsylvania; the American Railway Accounting Officers, by its president and other officials. In an address of welcome on behalf of the Interstate Commerce Commission, made on calling the meeting to order, the reasons for the conference and the subjects to be considered were thus stated by the Chairman:

It gives me great pleasure, on behalf of the Commission of which I am a member, to welcome you to this place. We are all engaged in kindred work, and not kindred work merely, but in a large degree in the same work. You have your respective spheres of action, limited in territory and by legislation, and we have ours which is intended to be as nearly as in the nature of things is possible, distinct and separate. But if the Union of which we are all citizens is in a political sense one and indissoluble it is even more distinctly so in respect to the great interests which are committed for regulation to your respective commissions. What is often spoken of as the railroad system of the United States is an illustration of unity in diversity such as it would be difficult to find elsewhere in the world. Every railroad corporation is in a legal sense independent of all others, and when its line is wholly within the limits of a single State, and it is operated independently, the laws make no provision for any other than local regulation. But there is scarcely a line of road in the country so short or so insignificant that the method in which its operations shall be conducted is not of something more than local importance, or the character of its regulation of some concern to business interests beyond the state limits. It may be a link in a long line extending through two or more States; it may be the principal or perhaps the sole means of transportation for the products of a mine or other important industry which supplies many States; but whether of greater or less importance, it has relations to other roads which are not and cannot be wholly limited within any political division of the country, however extensive it may be. Even the little Catskill Mountain Railroad, by the issue of coupon tickets to San Francisco, may in a

*See this letter, *ante*, p. 320.

sense become a part of a transcontinental highway, and the citizen from the Pacific coast who applies for one of the tickets has an interest in the treatment he shall receive in respect to it which is precisely the same that it would be if all the roads of the country were one in ownership and in management.

I mention these things for the purpose of emphasizing the fact which is constantly before us in all of our work, that in respect to all the railroad interests of the country—to the lines that you regulate and to the lines that come more particularly under our own supervision—it is of the highest importance that there should be harmony in the legislation of control, so that this system can be controlled as nearly as possible—as nearly as the local conditions of the country will enable it to be controlled—harmoniously and as a unit.

There are two matters of particular importance that it seemed to us it would be desirable that we be enabled to confer with you. One is the matter of statistics. We are giving a great deal of prominence to the railroad statistics of the country; we are endeavoring to make them as complete as possible. In order that they shall be made complete it is necessary that we should have your co-operation. I shall not pause to enlarge upon this at this time, because when you shall have become organized and the proper opportunity can be afforded our statistician will appear before you and will present some points for your consideration connected with this general subject, and I think you will be satisfied when you shall have heard the paper he will present—if you are not satisfied already—that it is of the utmost importance that we should be moving upon the same lines in respect to the railroad statistics of the country; that our respective methods for collecting the statistics should look to the like results; that the legislation in respect to them should be as nearly as possible identical, or at least be harmonious, and that we should make sure when we use the same terms in gathering statistics—terms, for example, like “through freight,” “way freight,” and others, many illustrations of which I might give—that we are using them in the same sense, so that when we gather the statistics and place them before the public they should represent actual facts, be reliable, and therefore have value.

Another matter, which it has seemed to us we ought to have some conference about, is the subject of uniform classification. You have all felt, I have no doubt, the annoyance we feel constantly growing out of the complaints that have their origin in the diversity of classification which prevails in different sections of the country. Now, those complaints ought to have their foundation removed as nearly as is possible without injury to business interests. The problem of doing this is a difficult one; so difficult that it is not uncommon that the most experienced railroad men in the country, when spoken to upon the subject, say at once, “A uniform classification is entirely out of the question; it is absolutely impossible.” Now, we do not feel that it is so. Our impression has been that the uniform classification was something that in time the country must have; that it was something not to be forced, something that could not be brought about at once, but something that if the several railroad commissions of the country would co-operate in could gradually, somewhat slowly, but gradually and by steady movement, be at length accomplished; and that when it was accomplished, although inevitably some evils must attend the great change from what now exist to general uniformity, yet after all the general interests of the country would thereby be benefited.

In the circular we sent out calling this meeting we have given special prominence to these two

topics, but without any purpose of limiting in any way such action as you may see fit to take here. The meeting, when it is organized, will of course be in your hands. We desire to meet with you as listeners, as learners. Many of you have been in this work very much longer than we have, and probably there is not one of you but has some experience that will be valuable to us if placed before us. And we desire that you should understand at the outset that while ready and willing to co-operate in your conference to any extent that may seem desirable, our attitude on the whole will be that of learners rather than of participants.

The conference was organized by appointment of officers, and remained in session for three days. The first subject considered was that of uniform railway statistics.

UNIFORM RAILWAY STATISTICS.

Upon that subject the statistician to the Interstate Commerce Commission read a carefully prepared paper, which is given in an appendix to his first annual report to the Commission, and for that reason is not reproduced here. The paper had for its object to show the great importance of uniformity in railway statistics, the difficulty of procuring them, the inaccuracies resulting from the existing methods of making corporate reports, the remedies that may be available for preventing these in the future, and the absolute necessity for harmony in state and federal action in regard to corporate returns, if trustworthy results were to be looked for.

The general subject was very fully discussed by members of the conference, a diagram was exhibited which showed the diversities in the laws or official regulations of the various States and Territories in respect to the time for making railway returns and also as to the information called for. It was also shown how far the state and territorial requirements differed from those made by the Interstate Commerce Commission in the form for a return which it had prescribed. After discussion the following was adopted without dissent:

Resolved, That it is the sense of this convention that a uniform method of collecting and publishing statistics, both as to time and matter, should be adopted.

The conference then proceeded to consider the form for a return then in use by the Interstate Commerce Commission, and went very carefully and critically over it with a view to seeing whether by modification thereof in any particular it could be made more completely to answer the purposes for which it is sent out. In most particulars the form was approved as satisfactory. Some few changes were recommended, and with these made it was generally agreed that the form would not only be suitable for all the purposes of gathering statistics for the use of this Commission, but would be equally adapted to the work of the state commissions, and might well be made use of in substitution for existing state forms. In some States, however, express provisions of law regarding corporate reports would render modifications essential. The chief impediment to the adoption of the form in all of the States was found in the fact that they do not all name the same period for the close of the operating year to be covered by the return that has been

fixed upon by the Commission. The Commission has named for that purpose the 30th of June. Ten States name the same day, others name different days. The desirability of uniformity in this regard was manifest, and wherever amendment to state laws was necessary to accomplish it, it was understood that such amendment would be advised.

The modifications in the form, which were advised by the conference, the members of the Interstate Commerce Commission at once gave assent to, and they were made in the form which was sent out for returns for the current year. There is every reason to expect, therefore, that hereafter the work of this and of the state commissions in the collection of statistics will be in general harmony, and that when any impediments that may exist in state laws are removed, the forms made use of for returns will be identical.

The conference also considered the subject of

UNIFORM CLASSIFICATION OF FREIGHTS.

This was acknowledged on all hands to be a subject of great importance, but also of great difficulty. The annoyances which were constantly resulting from the use of different classifications were well understood, but it was also understood that unification must to a considerable extent affect relative rates, and that to force it would necessarily be damaging to business interests in many sections. The result of the discussion was the unanimous adoption of the following conservative resolution:

Resolved, That we believe that still further advance toward uniform classification of freights will promote the welfare and convenience of shippers, and of the railroad companies, and we commend a conservative but persistent effort to that end.

The subject of

RAILWAY LEGISLATION, HOW TO OBTAIN HARMONY IN,

was taken up and discussed, and so far as opinions were expressed it seemed to be the unanimous opinion of those present that there was great desirability in having the state laws brought into conformity with the Federal Law wherever that had not already been done. A committee consisting of George G. Crocker, of Massachusetts, O. P. Mason, of Nebraska, Henry R. Shorter, of Alabama, Samuel E. Pingree, of Vermont, and John T. Rich, of Michigan, was appointed upon this subject, with the understanding that it should report at a future conference.

Among the other subjects considered was that of

SAFETY APPLIANCES IN RAILWAY TRANSPORTATION,

and the discussions resulted in the unanimous adoption of the following:

Whereas thousands of railroad employes every year are killed in coupling or uncoupling freight cars used in interstate traffic and in handling the brakes of such cars, and most of these accidents can be avoided by the use of uniform automatic couplers and train brakes; and

Whereas the success and growth of the system of heating cars by steam from the locomotive or other single source largely depends on the adoption in interstate traffic of an uniform steam coupler; and

Whereas these subjects are believed to be of pressing importance, and within the proper scope of the powers of the Congress of the United States, while attempts on the part of the individual States to deal with them have resulted, and must continue to result, in conflicting regulations:

Resolved, That we do respectfully and earnestly urge the Interstate Commerce Commission to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars used in interstate commerce and in handling the brakes of such cars, and in what way the growth of the system of heating passenger cars from the locomotive or other single source can be promoted, to the end that said Commission may make recommendation in the premises to the various railroads within its jurisdiction, and make such suggestions as to legislation on said subjects as may seem to it necessary or expedient.

Whereas it has been represented to this convention that the problem of an automatic electric safety signal has been solved; and

Whereas if said representation be true, said matter is of great moment to the traveling public:

Resolved, That we invite the attention of the Interstate Commerce Commission to said subject, and if, in its judgment, the inventions in relation to such signals are as represented, said Commission be requested to make such recommendations to the railroads and such suggestions as to legislation on said subject as may seem proper and necessary.

The resolution was adopted by a unanimous vote.

The subject of these resolutions is considered in another part of this report.

FUTURE CONFERENCES.

The interest in the discussions of the conference was continuous throughout, and at the conclusion it was felt that the meeting had been of great value and could not fail to have a strong tendency towards unity and harmony in the legislation and other public action for the regulation of transportation by rail. It was therefore deemed wise to follow up so promising a beginning by making provisions for future meetings, and this was done in the adoption of the following:

Resolved, That it is the opinion of the members of this convention that provision should be made for annual conventions of the railroad commissioners of the several States and the members of the Interstate Commerce Commission, to be held at such place as may be agreed upon, with a view of perfecting uniform legislation and regulation concerning the supervision of railroads.

The chairman of the Interstate Commerce Commission and Messrs. George M. Woodruff, of Connecticut, Frank T. Campbell, of Iowa, and John M. Mitchell, of New Hampshire, were chosen a committee to call the next convention.

ENFORCEMENT OF THE FOURTH SECTION OF THE STATUTE.

The general rule indicated by the fourth section of the Act to Regulate Commerce, usually known as the "long and short haul" clause, at the outset of its administration engaged the serious consideration of the Commission. Its importance and value to the public, as well as to the transportation interests of the country, were manifest. A few exceptions, such as were evidently contemplated by its provisions, were then recognized and announced by the

Commission. The practical experience of considerably more than two years has not demonstrated the necessity of adding to these exceptions. The justice of the principle involved in the general rule has never admitted of serious question; the justice of the principles upon which the exceptions are based is equally apparent.

The temptation of carriers to add to the exceptions arising from competition in business, from the pressure brought to bear upon them by particular localities, and by the importunities and devices of large dealers, is, of course, one that, in the nature of things, is ever present, but all the time the steady power of the Law has been doing its work, and this is seen in the gratifying progress that has been made by the carriers in the direction of compliance with the provisions of this section of the Statute.

It was not to be expected that compliance with the requirements of this section could be accomplished without a very great change of methods existing previously to and at the time of the enactment of the Statute, involving changes of rates at various points, loss of earnings at some of these points, and increased earnings at others, the extent of which, as a matter of estimate in advance, was in each instance problematical and involved in much uncertainty. The localities in which the greatest difficulty has been found in the application of the general rule have been in the territory of the transcontinental lines and the States south of the Potomac and Ohio Rivers, and States also south of Kansas and Missouri. The causes of this have heretofore been reported and discussed in our previous annual Reports. Briefly stated, in the case of the transcontinental lines, it has been to some extent the actual and apprehended competition of the Canadian lines and of water competition, and also to the fact that in the intermediate portion of the long haul between the Pacific coast and the Mississippi and Missouri Rivers there are large portions of uninhabited country, with occasional points widely separated, where the traffic is so inconsiderable that it is served at a largely increased cost and expense to the carrier.

In the Southern States it is an extensive coast line, with ports reached by a large number of steamship lines and coasting vessels, and the penetration of the interior by deep, navigable rivers to an extent that exists nowhere else in the country, and here the population is more sparse, and the traffic lighter than in the States north of the Potomac and Ohio Rivers, and the cost of service at intermediate points correspondingly greater. While it is true that there yet remain many instances in which the existing exceptional difficulties can and must be further overcome by carriers in each of these localities in the direction of a nearer compliance with the fourth section, yet it is also true that since our last annual Report very considerable progress has been made by them on this line. The business of localities, no less than of the carriers, is growing to the Law, and all this strengthens its operation and administration. Results for the better are, upon the whole, everywhere reached in the transportation rates and methods of carriers.

To those who may suppose that no very good

reason can be given why all disparities and inequalities of rates and methods may not be discovered and corrected as fast as they exist by a tribunal appointed by Congress for that purpose, it may not, perhaps, have occurred that the railroad mileage of the United States, if it could be transposed into that shape, would make six parallel lines of railroad around the earth. Over this net-work of public highways, in extent without parallel, in diversity equal to its extent, and constantly increasing, the vast commerce of the United States is, in one way or another, transported. The competition of carriers and localities contends for it with ceaseless energy. Its transportation is environed by different circumstances and conditions at many points in the wide confines of the Republic. That, growing out of this condition of affairs, inequalities and disparities of rates, for which plausible, but not lawful, reasons on the part of the carriers can always be given, must occasionally occur even where the carriers who make them are animated by the best of motives, and that objectionable methods may in like manner be adopted by them occasionally, is one of the inevitable features of such a situation.

The Statute which provides for the regulation of these rates and methods prescribes rules of conduct for the transaction of an amount of business that no other statute has ever done; and if it be true, as is the case, that every other statute which prescribes methods and rules of conduct for the transaction of business, to any considerable extent, has been occasionally violated, thereby furnishing employment to the courts of the country for a large portion of their time, it would seem not to be strange that there are here and there many failures to comply with the provisions of the Act to Regulate Commerce, that require laborious and patient investigation to correct them. But the feature of the Statute that renders the regulation it contemplates practical is that it prescribes plain, general rules, just and fair in themselves, which are for the most part declaratory of the common law, and creates a tribunal before which the voice of the citizen, or of the community or the carrier, may always be heard to challenge rates and methods that involve unjust discrimination, extortion or unlawful preference in an informal and comparatively inexpensive way; and goes further by requiring this tribunal, at all times, as a matter of duty, to keep a watchful supervision over these rates and methods; to which is added the power of the courts.

A case of much interest, arising under this section and illustrating its operation, was recently brought to our attention. It involved the question of relative rates on lumber from two far interior points in the Southern States to the City of Boston. The usual excuse for discrimination, that there was far-distant water competition of supposed controlling force, was brought forward by the carrier to justify the lower rate on the longer haul. But in addition to this the carrier attempted to justify the lower rate for the longer haul chiefly on the further ground that in the case of the longer haul the

**James & Abbott v. East Tenn., Va. & Ga. R. Co. reported ante, p. 608.*

lumber had already paid a local rate from the interior point of origin to a common or competitive point as a market before it was afterwards transhipped over the longer haul to Boston, and insisted that this ought to be taken into consideration as part of the lower rate from this competitive point to Boston, and the rates were thus made to equalize them as between these respective localities. The interior point from which shipments were made and which was challenging these rates before the Commission, was neither a common nor a competitive point, but it was several hundred miles nearer to Boston than the competitive point from which the lower rate was given, and was on the same line, and in the same direction over which the lumber was in each instance transported by the carrier to Boston.

An investigation showed that it was simply a case of a shipper from one interior point shipping his lumber first to one competitive point, a large city, and trying the market there, and afterwards, by another shipment, availing himself of the lower rate made by the carrier from such competitive point to the City of Boston, while the shipper of lumber at the interior point on the same line and in the same direction, but several hundred miles nearer to the City of Boston, was required to pay a higher rate. Accordingly the Commission held that the lower rate for the longer haul was not justified, and directed that the rate at the interior point nearest to the City of Boston should be reduced below the rate for the longer haul, which was done.

UNIFORM CLASSIFICATION.

It becomes our duty to report the progress that has been made by interstate carriers in reference to the subject of uniform classification, and in doing so it is to be regretted that the results attained have not been equal during this period to what the indications then existing led us to expect might be accomplished at the time of the presentation to Congress of our second annual Report. At that time a call had been issued by a conference consisting of representatives from each of the leading traffic associations of the country, dated November 15, 1888. In that conference it had been agreed that this call should be made for a meeting of officers, agents and representatives of each of the great freight associations of the country in the City of Chicago on the 4th of December, 1888, for the purpose of determining what progress could be made toward unifying the several freight classifications then in use. Delegates from each of these associations were appointed to that meeting, and there were eight of these traffic associations. The attendance was of a character to fairly entitle the conference to be considered national in its representation. The Pacific, the South, the West, the Middle, the East, and the New England States had representation.

At this meeting two days were spent in discussing the subject under consideration, and finally resolutions were adopted to the effect that in the opinion of the committee greater uniformity in classification of freight is both desirable and practicable, but that the magnitude and diversity of the interests involved are such that strict uniformity cannot be

reached by forced or hurried measures without producing conditions disastrous to the business interests of the country, while it may be closely approximated without danger to these interests by frequent conference and constant effort by the carriers to remove the disparities in the several classifications now in use; and that the progress in the past in this direction attests this view. A standing committee, composed of two members from each of the traffic associations, was appointed for the purpose of unifying as rapidly as possible the several classifications in use. The committee was instructed to first endeavor to combine the existing different classifications in one general classification by the use of such number of classes as would prevent conflicting commodity as well as class rates in the several sections of the country, without sacrificing the proper interests of the carriers.

The committee organized, met after the adjournment of the general meeting, and agreed upon methods of procedure for the first regular session, to be held in Chicago February 5, 1889, at which time the committee met with a full representation, either in person or by proxy; and this session lasted seven days. After three days spent in discussion the committee agreed upon rules and regulations necessarily preceding a classification, and the remaining time was spent in discussing questions of classification. The committee, however, divided upon the question of representation as between the west and the east, the western representatives claiming that they did not have sufficient representation. After this, and when the committee met in New York, in June, 1889, the four delegates from the Texas and Transcontinental Associations and from the Trans-Missouri Association had withdrawn. But notwithstanding this the committee met in Saratoga in September, 1889, and continued its work, and after a four days' session adjourned to meet in New York during the same month, at which place a session of one day was held. Afterwards the committee met in Washington, D. C., November 19-23, where the work assumed much of a routine character. The list of articles to be placed embraced nearly six thousand items, and in many cases involved protracted discussion. The committee is yet far from having completed its work.

The members of the committee are of the rank of general freight agents, on the idea that judgment and experience in traffic matters are requisite to the proper performance of the task assigned. The excuse made for the short sessions of the committee, as above outlined, is that the members of the committee are general freight agents and are busy men, upon whom large and pressing responsibilities, growing out of their official positions, constantly rest. The report of the committee, when made, will be merely recommendatory, and will go to the various traffic associations and carriers for adoption or rejection, as these constituent bodies may determine.

As stated in the first and second annual Reports of the Commission, the difficulties and work connected with establishing a uniform classification or even approximating a uniform classification are indeed very great. The short sessions, however, devoted to this work at

long intervals by the committee, the tedious delays, and the failure to reach a result that amounts even to a recommendation to the freight associations and carriers, who, after all, may accept or reject the work of the committee, would seem to indicate that much more might have been done by the freight associations and carriers if more time had been taken for this work; and that, while recognizing, as they fully do, the importance of an approach to uniform classification, the freight associations and carriers have not yet taken such effective steps to reach the result within a reasonable time as is commensurate with its importance, though the good faith of the committee in their efforts is not intended to be questioned by anything said in this Report.

While it is true that it does require men of judgment and experience, well versed in freight matters and in the business and interests of localities, to perform well the task of preparing such a classification, yet it would not seem to follow that the only person possessing such experience and capacity that could be found to represent each of the great freight associations would necessarily be a general freight agent; and if it be considered that the general freight agent's presence is necessary in the work of such committee, then it does not appear to follow that some other suitable arrangement cannot be made by the carriers for the place of the general freight agent being properly filled by some other competent person temporarily while the general freight agent is engaged in the important work of preparing a uniform classification to be submitted to the carriers for their approval or rejection. A work of this character and importance, in view of the provisions of the Act to Regulate Commerce and the general interests of the country, should be made the subject of more than a few days' meetings at long intervals from time to time during the course of a year. When such report is made as a recommendation, it will doubtless undergo the most careful scrutiny and revision at the hands of the carriers, and will be antagonized in many instances by local and special interests; and while this is a reason that it should be well and carefully prepared in the first instance, it is also a controlling reason that it should be framed at as early a period as it can reasonably be done.

Not only will it be true that the carriers will act upon the proposed uniform classification as a mere recommendation, but it is also true that after that classification is adopted, if it succeeds in approximating uniformity in the treatment of the bulk of the tonnage interchanged between eastern, western and southern roads, and should be adopted and made effective upon the lines operating between the Atlantic seaboard and the Rocky Mountains, complications to some extent may still arise on account of the different classifications maintained on local traffic within state limits in some of the States. Confusion would, to some extent, certainly follow if by the use of an interstate classification at the point of junction with a state classification the two could be combined to make a lower total charge on a shipment from the point of origin to destination within the State in question. On ship-

ments carried through a State, in which conflicting classifications would govern, to a point beyond such State, the intermediate classification of the State would not interfere; but on shipments within state limits some embarrassments from these causes might follow.

We do not believe, however, that any serious trouble in this respect need be anticipated, inasmuch as, consistently with the demands for greater uniformity in freight classifications which have proceeded from the various sections of the country and have by none been supported with greater vigor than by the state boards of railroad commissioners, the latter would doubtless find it to their convenience and would cheerfully accommodate their regulations to those which, by reason of their approach to uniformity, would be likely to claim the stamp of national approval and general utility. If the carriers engaged in interstate commerce agree upon an established and uniform classification of freight, or what is a near approach to such uniformity, with perhaps here and there a few commodity tariffs, it could hardly be said to be a supposable case, until the contrary is demonstrated, that exceptional state classifications in a few of these States will be permitted to stand as obstructions and disturbing elements to the free flow of the commerce of the country and the regulation provided by Congress for this commerce.

Regarding the character of this work, its importance, the time necessary for doing it and putting it into effective operation, and those by whom it could most properly and should be done, a report and discussion of these now would only involve what has heretofore been said after the most careful consideration of the same matters in our previous Reports, and to which nothing substantially new could be added. Yet no consideration of the subject can be intelligent, just and fair which would leave out of view these features of it. In this connection, and as the entire subject is one of very great interest and importance, we would again submit as part of this Report extracts from what was said by us in regard to it in our first and second annual Reports.

In our first annual Report we referred to this subject as follows*:

It is greatly to be regretted that the same classification is not adopted by the carriers by rail in all sections of the country. The desirability of uniformity is so great that the suggestion is frequently heard that national legislation should provide for and compel it. If such legislation should be adopted it would be necessary to empower some tribunal to make the classification, and the difficulties which would attend the making would be very great. Relative rates would be involved in it, for classification is the foundation of all rate-making. It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value.

On the system of apportioning the charges strictly

*See 1 Inters. Com. Rep. 667 *et seq.*

to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added. The traffic would thus be precluded, because the charge for carriage would be greater than it could bear. On the other hand, the rates for the carriage of articles which within small bulk or weight concentrate great value would on that system of making them be absurdly low; low when compared to the value of the articles, and perhaps not less so when the comparison was with the value of the service in transporting them.

It was therefore seen not to be unjust to apportion the whole cost of service among all the articles transported upon a basis that should consider the relative value of the service more than the relative cost of carriage. Such method of apportionment would be best for the country, because it would enlarge commerce and extend communication; it would be best for the railroads, because it would build up a large business, and it would not be unjust to property owners, who would thus be made to pay in some proportion to benefit received. Such a system of rate-making would in principle approximate taxation; the value of the article carried being the most important element in determining what shall be paid upon it.

Accordingly, and for convenience and certainty in imposing charges, freight is classified, that which comes in one class being charged a higher proportional rate than that which is placed in another. But other considerations besides value must also come in when classification is to be made. Some articles are perishable, some are easily broken, some involve other special risks in carriage, some are bulky, some specially difficult to handle, and so on. All these are considerations which may justly affect rates, and therefore may be taken into account in classification. But still others have been found potent. Every section of the country has its peculiar products which it desires to market as widely as possible, and is not unwilling that classification should be made use of by the railroads which serve it as a means of favoring and thus extending the trade in local productions,—favoring them by giving them low classification and thus low rates; and discriminating against those of other sections through a classification which rated them more highly.

It has been in the power of every railroad to have a classification of its own; but the necessities of an interchange of business have brought about agreements, and the railroad associations have been given the authority to make classifications for all their members. Their labors in this direction have been extremely important and useful; they have been steadily reducing the number of different classifications in the country, and steadily approaching a condition of things in which there will be one only. But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the road should favor the policy its patrons favored, but also because the same policy was likely to be beneficial to both.

The result necessarily is that a classification made by a railroad association represents a series of compromises, to which not only the railroads are parties, but in a certain sense business interests and sections of country also; these in many cases being admitted by their representatives to the consulta-

tions upon a subject so vitally concerning their interests, and allowed to present their views. This contention of interests still continues to go on in the meetings and conferences, but with a steady tendency in the direction of one uniform classification, and there is reason to hope that without much further delay all classifications will be brought into harmony. If any other tribunal were to be given the authority to make classification, it must, if it would exercise its power wisely, proceed in much the same way; it must act deliberately, give all interests an opportunity to be heard, take into account all the considerations which ought to bear upon it,—cost of service, interest of sections, equity as between industries and between classes of persons, and so on indefinitely.

Whether, therefore, the steady tendency in the direction of one uniform classification would be hastened by conferring the power to make one on a national commission is not entirely certain. The work if taken up anew would be one requiring much time for its proper performance; it would involve a careful consideration of the interests peculiar to different sections of the country, and a close study of the conditions of railroad service as they bear upon such interests. But these conditions change from month to month; the classification cannot be permanently the same, but must be subject to modification on the same grounds on which it was originally made; the appeals for modification would be as numerous as they would be perplexing, because of the diversity of reasons on which they would be grounded. Under the Law as it now is the Commission has appellate powers to correct any unjust classification, and it will keep in view the desirability of general uniformity and do what it properly can to bring about that result.

* * * * *

And again in our second annual Report we referred to this subject as follows: [Here follows what may be found in full *ante*, pp. 267-271. Ed.]

The views expressed by the Commission as to the importance of uniform classification, the difficulties connected with it, and the time and labor necessary to reach it and to put it into effect with safety, have undergone no change or modification as expressed in our previous Reports. Since our second annual Report, however, considerable progress has been made practically on the line of uniform classification by the absorption of special and exceptional classifications into those of the three chief classifications of the country, namely, the Official, the Western, and the Southern Railway and Steamship Association, as will appear by Appendix 7, made part of this Report.

COMPETITION BY CANADIAN CARRIERS.

The competition of Canadian common carriers is a factor of influence and increasing force in the transportation interests of the United States, and is not casual or temporary, but permanent. It was deliberately planned in the past, and has been advanced to its present state with persevering energy. Its agencies are natural and artificial water-ways, and great railroad systems constructed at large expense and materially aided by government subsidies. Our government policy authorizing American goods to be transported in bond over Canadian lines and to re-enter our country free of duty, thus putting the transportation upon an equality with that over our own lines, has assisted these agencies to business. Valuable assistance has also been afforded by our own citizens by direct

investments in the construction of Canadian railroads and in building connections within our own territory with those roads, and leasing or otherwise surrendering control of these connections to Canadian companies. Concessions of rights of way over our soil have also been made.

The existence and character of Canadian competition are therefore largely due to friendly co-operation on the part of our own country, inspired as it would seem by a policy of business independent of national boundary lines, and regardless of rivalry by the subjects of a foreign jurisdiction. What is called Canadian competition, therefore, is the common use by our own citizens of Canadian carriers for business that might be done by our own carriers, and induced solely by commercial considerations.

The Dominion of Canada stretches from ocean to ocean like our own domain, and its great lines, located safely within its own border, have auxiliary lines and feeders at numerous points along the whole distance of nearly 4,000 miles, over which our products, moving from one part of our country to another, are transported in uninterrupted and increasing volume. Our whole northern border is penetrated by these connections. They exist in Maine and Vermont, and reach the whole of New England; they come into New York at several points; they traverse Michigan in many directions, reaching Wisconsin, and go through Indiana and Illinois; they are very effective in Minnesota, both on its eastern side and its northern frontier, and in the new State of North Dakota. On the Pacific side, they reach by water the States of Washington, Oregon and California.

The main line of the Grand Trunk Railway, for American business, extends from Chicago, Ill., to Portland, Me. The Canadian Pacific road, with its connections, both in Canada and the United States, stretches across the continent from Halifax to Vancouver. It has, or soon will have, a direct line from Portland, Me., through New Hampshire and Vermont, to the Pacific coast, by connection with its main line at Newport and with other connections at intermediate points. It also has a direct line to Minnesota south of Lake Superior over its connection with the Minneapolis, St. Paul and Sault Ste. Marie, usually called the "Soo Line," by which St. Paul, Minneapolis, and the country tributary to those cities are reached, and, over the Duluth, South Shore and Atlantic Railway to Duluth, reaching the traffic of that city and its tributary region. The connection from Winnipeg to the Minnesota line, and then over the St. Paul, Minneapolis and Manitoba Railroad, gives it a through line for all east and west-bound business between the northwest and the Pacific coast; and freight and passengers between San Francisco, Portland, Port Townsend, Seattle, Tacoma, and points in the northwest and interior of the United States, and all points in the eastern portions of the United States, are transported over these lines.

The Canadian Pacific Railway, by the recent extension of its line across and nearly through the center of the State of Maine to its terminus at Mattawamkeag, and thence by trackage rights from the Maine Central to Vanceborough, on the

the New Brunswick boundary, where it connects with the railway system of the maritime provinces of Canada, has a direct route to St. John and Halifax.

These are the general physical conditions of the competition in question. A detailed and more precise statement of the connections of Canadian carriers with the United States and the methods by which the transportation is carried on, together with the present American and Canadian competitive rates over these connections in force, is set forth in Appendix 8.

The reports of the Canadian Pacific Railway Company on file in this office do not show separately from its aggregate business the earnings and tonnage of its business with the United States. Its report for the year ending June 30, 1888,—the last filed,—shows a mileage of 4,661 miles, besides the Southeastern Railway, its connection from Montreal to Newport, Vt., which has a mileage of 109 miles; a total capital of \$110,392,563; gross earnings, \$12,711,010; total freight tonnage, 2,321,957.

The connections controlled by the Grand Trunk Railway Company within the United States, as appears by the reports for the year ending June 30, 1889, embrace a mileage of 977.23; capital stock, \$42,371,807; gross earnings, \$6,193,781; and total freight tonnage, 3,773,831.

These statistics, however, are general, and do not show the kinds of traffic carried, nor its place of origin or destination. The freight from the northwest, consisting of grain and grain products, beef and live stock, annually taken into the State of Maine alone for consumption and mainly brought over Canadian roads, exceeds 200,000 tons, and the exports through Portland of American products, carried by these roads, are considerable. The reported tonnage of the Atlantic and St. Lawrence Railroad, the Portland branch of the Grand Trunk, was 957,735 tons. What quantities were taken over Canadian lines and their connections to Boston and other New England points, and to New York and Philadelphia, there are no statistics at hand to show, but the Boston traffic is probably 50 per cent or more of the transportation for that city.

It is estimated that fully one third of the through business of the Canadian Pacific to and from the Pacific coast consists of traffic furnished from the United States. The west-bound business going over the Canadian lines originates at various places in the New England and Middle States, and at the northwest. These lines therefore compete for traffic moving in both directions across the continent, or across sections of it. The competition is consequently with all our east and west-bound lines, both the transcontinental and trunk lines, and in nearly all the varieties of traffic.

The explanation for the diversion of such a considerable amount of traffic from our lines to the Canadian carriers is found in the rates charged. Our own lines, it may be assumed, make their competitive rates as low as they can afford to do the business at any fair profit, and, not having unrestricted liberty to charge less for a longer than for a shorter distance over the same line and in the same direction, to make good, if necessary, any loss on long-haul traffic by higher charges on local traffic, their

rates must be adjusted to make some profit on all traffic, and be graduated to comply with the Law.

On the Canadian roads, although the distances are almost invariably longer, and in many instances very much longer, the rates on all United States traffic are materially lower. By traffic arrangements between American companies and the Canadian companies differentials are allowed to the latter, which furnish an inducement to shippers to patronize those lines for freight for which the quickest transit is not urgent. These differentials are conceded to avoid rate wars, and they involve a diversion of whatever business the reduced rates may invite.

The concession to the Canadian Pacific on business between San Francisco and St. Paul, Minneapolis, and common points, ranges from 15 cents per hundred pounds on first-class traffic to 5 cents on the lowest-commodity class. Between San Francisco and more eastern points the concessions are progressively greater at Chicago, Cincinnati, Pittsburgh, New York, and the points common to them, reaching at New York, Boston and Philadelphia, and their common points, 28 cents on first class, 14 cents on fifth class, and 5 cents on the lowest-commodity class. A differential of 28 cents per hundred pounds is \$5.60 a ton, or \$67.20 a carload of 12 tons. Under adjustments at present in force the United States roads from New York, via Chicago, to St. Paul, Minneapolis and common points allow differentials via the Canadian Pacific, on different classes of merchandise, of 10, 8, 6, 4 and 3 cents per hundred pounds. It is to be remarked that the differentials are not permanent, but change from time to time, and that the Canadian connections with lines in the United States and the transportation arrangements also frequently change, and are constantly becoming more numerous.

A natural inquiry arising on these facts is how the Canadian roads can afford to carry at so much lower rates than American lines, and why the rates for both are not uniform. There are various answers to this inquiry. In the first place, they must in general carry at lower rates in order to participate in the carriage of American traffic. The differentials consented to by traffic arrangements to preserve amicable relations and to maintain steadiness of rates have been mentioned. The lower rates are, therefore, first of all, a necessity of the situation.

Again, the American roads are many in number, keenly competing among themselves, and dividing the business which, particularly west of Chicago, might be reasonably remunerative for one half or one third the number; and therefore, in order to maintain their existence, are compelled to charge rates that might be lower and yield a profit to the carrier if the volume of business were greater, or equal to the capacity of the road. The American roads are also under many different, independent, and sometimes hostile managements, increasing the expense of general control, creating a necessity, or at least occasion, for numerous auxiliary associations with governing or regulating powers, maintained at heavy cost, and requiring, for continuous carriages over long distances, traffic

arrangements between several different carriers for interchanges, divisions of earnings, joint tariffs, payments for use of cars, and other things. The exceptionally heavy grades of the transcontinental lines to overcome mountain summits, large expense for fuel, for maintenance of snow-sheds and snow service, and other incidental matters, add greatly to the cost of operation.

On the other hand, very different conditions exist with respect to Canadian carriers. On the Canadian Pacific, the only through transcontinental line, the grades are much easier, and, it is claimed, less interruptions occur from snow blockades and similar causes. There are practically only two great systems in Canada, the Grand Trunk system and the Canadian Pacific. There is, therefore, unity of control and management, and no occasion for auxiliary associations nor for divisions of earnings, except with adjuncts in the United States. Besides, they are heavily subsidized by direct government grants and favored by liberal allowances for transportation. They are practically under no restrictions imposed by their own statutes in respect to long and short-haul traffic, but are at liberty to charge high rates on local business to indemnify for losses on through or international business. Their managers deny with more or less emphasis that their local traffic is subjected to higher rates, but when the liberty to make such charges and the necessity for it co-exist, the inducement at least is strong. The provisions of the Canadian Statute on this subject are as follows:

SEC. 226. The company, in fixing or regulating the tolls to be demanded and taken for the transportation of goods, shall, *except in respect to through traffic to or from the United States*, adopt and conform to any uniform classification of freight which the governor in council, on the report of the minister, from time to time, prescribes.

SEC. 232. No company, in fixing any toll or rate, shall, under like conditions and circumstances, make any unjust or partial discrimination between different localities; but no discrimination between localities, *which by reason of competition by water or railway, it is necessary to make to secure traffic*, shall be deemed to be unjust or partial.

These enactments give all traffic carried in competition with our carriers unlimited freedom.

Some or all of these conditions may furnish an explanation. In a word, their lower rates are necessary to get the business at all, and, as is seen, the conditions under which they are made are favorable.

There is no doubt that considerable portions of our country are benefited by the transportation over Canadian lines, by reason of the cheaper service, especially northern and central New England and large portions of the north-west, as far south as Chicago and including Michigan, and, in fact, generally along the whole border, and even beyond it. Many of our citizens feel a deep interest in the subject, and would consider themselves aggrieved by any measures resulting in an advance of rates over those roads. High cost of staple articles of consumption forming part of the necessities of life is to be deprecated, and is an argument of great force against higher rates. It is possible, however, that these apprehensions are mis-

taken, and that a greater volume of business over our own lines would so cheapen rates as to result in no advance in cost to ultimate consumers. At least that has been the uniform lesson of experience in railroad transportation.

What, if any, method of regulation shall be applied to the competition by Canadian common carriers in our traffic is a question for the wisdom of Congress to determine. There are considerations on both sides of this question. On one side, it is generally urged, is the fair protection against foreign rivalry of our own carriers, with the immense sums invested in their construction, the multitudes of our people engaged in their operation, and their inestimable importance to the country, commercially and as agencies for its development and settlement, and for all governmental purposes.

And on the other side are urged the interests of such portions of our citizens as are not so well or so cheaply served by our own carriers, and who claim the right to make use of any agencies that will best subserve their own interests and give them an equality of advantages with others.

Besides, it is said, and perhaps with force, that the competition of Canadian carriers exerts an influence not unlike that of the Erie Canal in preventing unreasonably high rates by our own carriers, and that the competition is therefore in the public interest. It is also claimed that investments made by our citizens, either directly in Canadian roads or in the construction of their connections in the United States, are entitled to consideration.

Another important fact is the reciprocal privilege of conveyance, by some of our carriers, of goods and passengers by land through portions of Canada, or through Canadian canals, under the following provision of Canadian law:

The governor in council may, from time to time, and as occasion requires, make such regulations as to him seem meet, with respect to goods conveyed directly through the Canadian canals or otherwise by land or inland navigation, from one part of the frontier line between Canada and the United States to another, without any intention of unlading such goods in Canada, and with respect to travelers in like manner. . . . (Revised Statutes of Canada, 1886, vol. I, § 246.)

The bonding of merchandise in transit through Canada was authorized by Act of Congress of July 28, 1866, and embodied in section 3006 of the Revised Statutes of the United States, which is as follows:

Imported merchandise in bond, or duty paid, and products or manufactures of the United States, may, with the consent of the proper authorities of the British Provinces or Republic of Mexico, be transported from one port in the United States to another port therein, over the territory of such provinces or republic, by such routes, and under such rules, regulations and conditions as the Secretary of the Treasury may prescribe; and the merchandise so transported shall, upon arrival in the United States from such Provinces or Republic, be treated in regard to the liability to or exemption from duty or tax as if the transportation had taken place entirely within the limits of the United States.

The term "port" is defined by section 2767 of the Revised Statutes as follows:

The word "port," as used in this title, may include any place from which merchandise can be
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shipped for importation, or at which merchandise can be imported.

The regulations of the Treasury Department in relation to this provision are as follows:

Article 836. Merchandise of domestic origin, duty paid or free of duty, may be transported from one port to another of the United States, over the territory of the Dominion of Canada, with the consent of the proper authorities, by routes duly designated and bonded for such purpose. Cars, compartments of cars, or safes must be specially appropriated for such transportation, placed under customs seal by an officer of the customs at the port of departure in the United States, and remain thus sealed until they shall have passed through such foreign territory and again arrived in the United States. (§ 3041.)

It is understood that, under the regulations of the Treasury Department, a license is issued by the Secretary to Canadian carriers under the privilege provided for by law to transport goods in bond through Canadian territory.

The sixth section of the Act to Regulate Commerce contains this provision:

And any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production; and any law in conflict with this section is hereby repealed.

This only relates to the making public of the through rates, and leaves open for controversy the question of the amount of the through rate and its relations to the contemporaneous rates of our carriers.

In view of the fact that this whole subject has undergone thorough investigation by an honorable committee of one of the Houses of Congress, this Commission offers no recommendation, and only sets forth some of the leading facts and circumstances brought to its attention in the performance of its duties.

PROPERTY TRANSPORTED BY CARRIERS SUBJECT TO THE ACT TO REGULATE COMMERCE TO PORTS OF TRANSHIPMENT FOR PURPOSES OF EXPORT.

Among the subjects of regulation provided for by the Act to Regulate Commerce is property transported to seaports for the purposes of export. The first instance arising in the exercise of this jurisdiction on the part of the Commission occurred in the month of April, 1887, *and was upon an application made by three railroad companies having terminal lines at the City of Boston to be allowed to continue a method theretofore practiced and then existing of making their rates from interior western points on grain and provisions to Boston for export through that port the same as the rates from such western points to New York, although the distance was somewhat greater, and the rates upon the same articles to Boston for local consumption were higher. A person interested in the local grain and provision trade of Boston, though not a party to the proceeding, was heard in favor of the contention that any concessions made in favor of the export trade of Boston ought, in fairness,

*See *Re Export Trade of Boston*, 1 Inters. Com. Rep. 25.

to be extended to all other persons to whom grain and provisions might be consigned to that city from interior western markets.

In that proceeding the Commission held that, as explained by the petitions and the evidence adduced in their support, the rebate or difference made in favor of the export traffic had for its purpose the correction of an inequality that would otherwise exist, and which inequality, by making the cost of foreign shipments by way of Boston greater than by way of New York, would practically exclude shippers from the advantages of the Boston route, though the distance from the interior points to the foreign market would, practically, be no greater by that route than by the other; and if such purpose was only to do indirectly what might directly be done by a bill of lading issued at the interior point of shipment for delivery of goods at the foreign destination, and no discrimination was made between persons engaged in foreign traffic, but the rebate or difference was made impartially and only as a means of protecting the Boston route for the export trade against an excess in charge that would be ruinous to it, then it was obvious that there was no occasion for calling upon the Commission to give sanction to a practice that would be legal without it; that any legal ground for affirmative action on the part of the Commission was precluded in a proceeding of this character when those who brought the practice to its attention did so with explanations of its propriety and insisting upon its lawfulness.

It was further held by the Commission in that proceeding that, if what was paid under the name of a rebate was a rebate in fact, as understood by the second section of the Interstate Commerce Law, and if the effect of allowing it was to impose upon some classes of persons a greater charge for the service rendered than was imposed upon others for a like and contemporaneous service under similar circumstances and conditions, and so effected what is described in the Law as an unjust discrimination, it would be neither legal in itself nor could it be made legal by any order, assent or permission given by the Commission. And the Commission further held that if the exactions from Boston on local traffic were excessive, that fact could only be adjudicated when some one questions them in a proceeding instituted for the purpose of a regular investigation. Leave was given to the petitioners to withdraw their petitions, and they did so. No complaint to the Commission has ever been made against this method of dealing with export rates at Boston on the part of those interested or engaged in local trade there, and it has continued to exist to this time.

On the 8th day of March, 1888, the Commission issued a general order on this subject as follows: [Here follows the order, of which a full copy may be found at page 9, *ante*. Ed.]

Shortly after this a complaint* was made to the Commission averring, in substance, among other things, that the trunk lines, so called, under resolutions of their association, had been and were making export rates of which the inland proportion accepted by them was, at the

Port of New York, often 10 cents or more per hundred pounds less on like traffic than the published tariff rates charged at the same time to the same port from the interior points consigned to New York as its final destination, and charging that this was an unjust discrimination against the trade and business of New York. In this and other respects this contention involved the rules that ought to govern in making export rates through the Port of New York. After a full investigation of the evidence and questions involved, the Commission decided that the difference made by the carriers between the proportion of the through rate from the interior points to New York on export traffic destined to foreign countries, and the rate charged contemporaneously on the like kind of traffic from the same interior points destined to New York, was not justified by any circumstances tending to show that it was just and proper, and further decided that it was an unjust and unlawful discrimination against the transportation terminating at that port.

The Commission further held that, under the amendments of March 2, 1889, to the Statute, requiring ten days' previous notice of advances and three days' previous notice of reductions in rates, they cannot be varied from day to day, or oftener, to meet fluctuations in ocean rates. It was further decided by the Commission in that proceeding that the only practicable mode yet devised for making through export rates on shipments from the interior through that port, as has appeared by past experience, is to add to the established inland rates from the interior to the seaboard, the current ocean rates, and that the published tariffs of the carrier should show the rate charged by the inland carrier or carriers to New York on freight billed or intended to be billed for export, including all terminal changes and expenses, and should also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate, from time to time prevailing, or how otherwise.

On the 8th of March, 1889, the Commission summoned† each of the railway carriers composing what is known as the Trunk Line Association, to appear before the Commission on the 16th of that month, for the purpose of showing what their export rates were, and how these export rates were made by each of them, and also to give these carriers an opportunity to be heard concerning the manner of making and publishing said rates in order to comply with the provisions of the Act to Regulate Commerce, as amended March 2, 1889. At the time appointed these carriers appeared before the Commission, and after an elaborate investigation it appeared that all of them, except a few, found no difficulty in publishing their joint tariffs as required by the amended Statute.

Subsequently, on the 23d of March, 1889, the Commission made a general order‡ in reference to the publication, under the amendment of March 2, 1889, of the Act to Regulate Commerce, of advances and reductions in joint rates, fares and charges, in which, among other things, it was stated that the Commission understands

*See complaint in *New York Produce Exchange v. N. Y. C. & H. R. R. Co.* *ante*, p. 13, and report and opinion of the Commission, *ante*, p. 553.

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†See summons, *ante*, p. 496.

‡See order, *ante*, p. 453.

that tariffs now on file in its office, established by carriers accepting merchandise billed or intended for export by sea, are made in compliance with its order of the date of March 8, 1888, and whether they be individual or joint tariffs the requirement of notice of any change therein is the same as in the case of other tariffs, and that imported traffic transported to any place in the United States from a port of entry or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freight.

After the publication of this last order a large number of interstate carriers in the States south of the Potomac and Ohio Rivers requested an opportunity to be heard before the Commission in regard to the application of this general order to their export traffic. Accordingly notice was given to them to appear, and they appeared before the Commission in a general conference in regard to this matter.

In this conference it appeared that the principal article of export to the various southern ports reached by these carriers is cotton, though there were exports of tobacco and some other commodities, and that the circumstances and conditions that had most influence in affecting rates and producing frequent fluctuations that interfered with the stability of the inland tariffs was the vessel service at the southern ports. It was claimed by these carriers that the vessel service at the trunk line ports being more ample, no material difficulty was found in the transportation of exports to the seaboard at the established tariffs, but that the vessel service at the southern ports being more limited, it had been necessary to apply various methods to secure ocean carriage for export business. On account of the scarcity of sea-going vessels at these southern ports, it was claimed that this gave rise to irregularity in rates, from the fact that in the absence of competition vessels were largely able to exact terms to suit themselves, and the fluctuations in ocean rates affected the stability of the railroad proportions of the through rates; and ocean service in such cases, it was claimed, must in general be procured by charter at a round sum by contract for their tonnage capacity with guaranty of a cargo, or by some form of subsidy.

The real difficulties in the way of maintaining fixed inland rates on export traffic under such conditions, it was claimed, were very great, if not insuperable, and that the inland rates became subject to the varying conditions of the ocean carriage. When a ship is procured at such a port by charter or any of the other methods named, it becomes necessary to furnish a cargo as speedily as possible in order to save charges for demurrage, and the consignment of this freight is hastened to the port to fill the vessel quickly, and even taken at a reduced through rate, in some instances shrinking considerably the inland proportion, and the same vessel frequently carries the same kind of goods at many different rates.

In consequence of these conditions, a method came into use, and has prevailed over a large number of the Southern States, of an export rate made every day to be in force as to export rates for the succeeding twenty-four hours,

based on the vessel facilities in the southern ports and their ocean rates, and on the lowest combination of the inland and ocean rates from the interior point of shipment to the foreign market on a through rate made up in this manner. The through rate thus made has no reference to the established inland rate for consignment at the seaboard, and this method, it was claimed, had worked satisfactorily, had produced no friction or competitive contentions among the rail lines, and was maintained by all of them.

The ports at which the conditions described were claimed to exist are all Atlantic and Gulf ports from the Chesapeake Bay to those in Texas, and the property upon which the rates are affected by these conditions is chiefly cotton, although they apply to some extent to tobacco. Cotton formerly had its chief outlets for export through New Orleans and Mobile; it also went to a considerable extent through Savannah and Charleston. The enlargement of the territory in which cotton is produced and the greatly increased rail facilities over which it is transported at low rates have materially changed former conditions, and cities and towns in the interior, like Memphis and others, have become points of shipment on through bills to foreign countries, and a large proportion of the product is shipped in that manner.

There was evidence tending to show the existence of the claims thus insisted upon by these carriers, while on the other hand some of the roads in Arkansas and Texas found no difficulty in maintaining rates for ten days; and that the Law requiring notice of ten days for advances and three days for reductions could be complied with without detriment to their business. But the investigation was not completed for causes hereinafter stated.

On this account, and in view of the fact that the Commission had recognized that there might be substantially different conditions and circumstances affecting export traffic in different parts of the country, as was indicated by the decision of the Commission in the case of the Port of Boston above mentioned, the Commission has not yet made any decision in regard to the southern export traffic, but has waited until there could be further investigation and consideration of that subject. The local consignments of cotton to these southern ports were small as compared with the through export traffic, and no complaint whatever had been made against the difference in these rates. Further investigation of it was a matter therefore of far less importance than many others which were pending, and which since then have continually engrossed the attention of the Commission, and for want of time originating from these causes this investigation has not been completed. It is not apprehended that this adjustment will be attended by the difficulties that many of the carriers imagine. No opinion in regard to it is now expressed by the Commission for obvious reasons plainly indicated by the facts stated. At the same time, it is deemed proper to lay the substance of the evidence thus taken before Congress in this annual Report.

Questions arising in regard to export rates are and must continue to be of very great im-

portance, and often extremely embarrassing, until this subject is finally determined and settled at ports upon the different coast lines of the country. Thus far no question of this kind has come before us as to export traffic going through the ports on the Pacific slope, in which there is indeed a large and growing commerce.

If the Statute should expressly provide that the published tariff rate from interior points to seaports must be the same whether the property transported is for local delivery at such seaport or for the purposes of export from such seaport, leaving the rates from such port to the foreign destination to be such as the unrestrained competition of vessels might settle, then there would be no more difficulty in regulating inland transportation of property to a seaport for the purposes of export than there would be in the case of domestic traffic. The difficulty in its regulation under the Statute at present arises in cases where a through rate is charged from the interior point of shipment through the port of transshipment to the foreign market, made sometimes as a gross through rate, but most usually as a through rate in which the inland rate is added to the prevailing ocean rate.

In either event, as the ocean rates daily and often hourly fluctuate in the competitive strife of vessels, and are subject to no regulation whatever, the inland or rail proportion of the through rate has no fixed stability, but fluctuates with the ocean rates, and by manipulation of the vessel rates a margin may be created for preferential rates and secret arrangements for the benefit of individuals or of traffic by which the Law can easily be violated without detection. At the Port of New York the Commission met this, as far as possible, by requiring that inland rates of rail carriers to that port should be the same on traffic for export as on that intended for local consignment there. And at New York, as well as other ports, the Commission met this, as far as possible, by requiring the published tariffs of the rail carriers to show the proportion of the through rate from the interior points of shipment to the port of transshipment. But as remedies these are not sufficient to adequately check the evils we have enumerated. Whatever the rule of the Statute is to be upon a subject like this should be indicated in plain and unmistakable terms. Whether that rule as above made at the Port of New York shall be the same for all the ports of the country, namely, that the proportion of the inland rate on export traffic shall not be less than the inland tariff rate to the port of transshipment on traffic not for export, or whether the Law shall be held flexible as to the modes of business of carriers at some of these ports under the conditions by which they are surrounded, or what the rule shall be upon the entire subject, is respectfully submitted to the wisdom of Congress, to determine now or after further investigation and report of the Commission in the future.

THE RELATIONS OF LAKE AND RAIL TRANSPORTATION.

When the Congress was given power to regulate commerce among the States, railroads had no existence. To whatever extent the regulation so provided for was intended to in-

clude transportation or transportation charges, it must have had special reference to the then existing transportation methods, which were mainly by lake, river or coastwise carriers.

The regulation for which provision is made in the Act to Regulate Commerce does not apply to commerce as it was conducted when the power to regulate was conferred. The Act applies to water transportation only when "used under a common control, management or arrangement for a continuous carriage or shipment" in connection with a railroad and as part of a line or route of which another part is a railroad, and leaves carriers engaged in transportation wholly by water independent of regulation.

The exemption of so considerable a part of transportation from the operations of the Law is a serious hindrance to the regulation of that which the Act includes.

The construction and maintenance of the way or track is a principal item in the cost of railway transportation, while the permanent way over navigable waters is free from expense or is maintained at public cost. In water transportation, carriers provide only the vessel or vehicle of carriage. There is therefore a wide difference in the cost of rail and boat service, and water transportation charges can be very much the lower and be remunerative.

Carriers by water are not required to publish rates, and are under no restrictions as to rebates, discriminations, or as to charges proportioned to distance. No stability is required in their charges, which may fluctuate as often as the exigencies of business rivalries dictate or the necessities for traffic render expedient. Whenever rail and water transportation are in direct competition, a reduction of rail rates to meet the water charges is regarded as essential to secure any part of the traffic. Independent or unregulated water transportation in parts of the country is so influential in many ways as to be the cause of demoralization in rail rates as well as to afford the basis of inequalities between localities having the appearance of unjust preference.

These are some of the effects of unregulated water transportation. Its usefulness must not be in the least impaired, but it is both expedient and just that it should be so far regulated as to prevent its demoralization of other transportation. This requires carriers by lake, river and coastwise to publish and maintain tariffs as do carriers by rail, and be alike subject to the general provisions of the Act.

Only one of the five great lakes on our northern border is wholly within our territorial limits, but upon all the fluctuations of unregulated rates and charges are so frequent as to create confusion and uncertainty in charges on railroad traffic. The "trunk lines," or railroad carriers from the lakes to the Atlantic coast, own and control eighty or more boats, with an estimated tonnage capacity for the season approximating 200,000,000 tons. These boats are used in connection with the roads and under a common control or management for continuous carriage or shipment from Chicago, Duluth and other western lake ports to tidewater at New York, Philadelphia and other eastern cities. These continuous carriers, lake and rail, are thus made subject to the Act and required to publish

their rates and charges, together with proposed increases or reductions. Some of the roads west of the lakes are operated in connection with boats under a common control for continuous shipments to Buffalo, Erie and eastern lake ports, thus forming a line, part rail and part water, subject to the Act.

In addition to the boats used in through transportation in connection with the roads and subject to the Act, a large part of the lake transportation is by independent transit companies or individual and separate vessels not subject to the Act. Two or more of the roads which carry between lake ports and tidewater cities are each wholly within one State, and when carrying locally between points in the same State from lake to sea are not subject to the Act.

The carriage of products is large from lake ports in Minnesota, Wisconsin and Illinois to sea-going vessels at Montreal by lake, canal and river, all independent of regulation. Transportation, part rail and part water, not subject to regulation, is conducted by lake boats, in connection with Canadian roads or roads partly in Canada, from western lake ports to eastern lake ports in the United States and in Canada.

Boats cross the lake in three or four days. They carry package and general freights, but the tonnage is largely grain, flour and provisions—very largely bulk grain. In a recent investigation it was claimed on the authority of the Chicago Board of Trade reports that of 47,000,000 bushels of corn shipped east from Chicago last year 7 of every 10 were by lake.

The customary lake and rail rates from Chicago and western lake ports to New York and other eastern seaport cities are about one fifth lower than the all-rail rates. While that relation is maintained the rates are considered regular. When agreements to maintain rates have been made between all-rail and part-rail and water carriers, it has been usually on something like that basis. This conceded difference in rates indicates the estimate of the advantages of rail shipments and of the lower cost of lake transportation.

Under the present state of the Law, products may be carried from States west of the lakes to Montreal and other Canadian ports, as also to New York and Philadelphia, for consumption, distribution or export, by routes so free from all regulation that carriers over regulated routes may not know the rates with which they must compete. Grain can be shipped from western Minnesota over a road wholly within that State to the lake, over the lakes to Buffalo, and from thence over a road wholly within one State to the seaboard. It can be shipped in the same way to and across the lakes to Erie, Pa., thence to tidewater at Philadelphia, the carriage in both cases, when not under a common arrangement, being free from regulation. The all-rail carrier of freight between the same places must conform to the provisions of the Act on every one of the 1,500 miles over which the freight must pass.

A very small reduction in regular rates by lake or rail carriers not subject to regulation is sufficient to divert traffic from the lines of rival carriers by lake or rail, or both combined. Such reductions need not be published, but

may be, and are, made without notice to competing carriers required by the Act to publish their rates and any intended reductions. To carriers finding their business so diverted the temptation is strong to recover a share of the business, frequently stronger than the restraining provisions of the Law, which does not apply to their competitors and rivals. The result is disturbance and disorder in railroad service, with uncertainty, instability and inequality in rates and charges.

RAIL TRANSPORTATION NOT SUBJECT TO THE LAW.

In former Reports the Commission has called attention to the fact that not all transportation by rail is made subject to the Act to Regulate Commerce. The Act carefully limits its operation to certain specified carriers, and the terms are such as are believed not to include the express companies regarded as common carriers. Carriers exclusively by water are also omitted. These omissions extend to a considerable part of the internal commerce of the country, and must therefore prove to some extent an embarrassment in the enforcement of the Act. This subject, having been sufficiently covered by what has been said heretofore, is alluded to in this place only for its bearings upon what will be said in this connection regarding transportation by rail by those carriers not made subject to the Act. Independent water transportation is treated elsewhere in this Report.

As regards transportation by rail by carriers not subject to the Act, it is proper, in the opinion of the Commission, that a free and full expression of the embarrassments attending their exclusion should be placed before Congress. This is not done for the purpose of asking any additional or different legislation from what now exists, but only that the subject may be fully understood in relations not hitherto explained. The Constitution of the United States, in section VIII. of article I., provides that the Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." No question, therefore, can arise of the authority of Congress to make its legislation as broad as the power itself. In undertaking the regulation of commerce by rail, legislators, both state and national, have been dealing with a subject that in many respects was so different from any other with which they have occasion to deal, that the ordinary rules and analogies could not possibly be applied to the full extent; every step taken has been persistently opposed by the interests to be affected; and it has been universally felt that the legislation hitherto adopted could not in all respects be final, but has been rather initial, and, though important and in the right direction, constitutes only steps towards an ultimate solution of what is commonly spoken of as the "railroad problem." No one who has given proper thought to the subject now deems that problem fully solved; every one who has studied it candidly sees that further action in the line of the existing Statute is necessary for the purposes of a complete solution.

When the Act to Regulate Commerce was adopted, there were in many of the States and Territories laws for the regulation of state and

territorial commerce by rail. These laws preceded any action by the general government on the subject, and in many respects, unquestionably, there has been useful state and territorial regulation. There is no doubt in the minds of the Commission that very valuable service has been performed by these state and territorial boards under the laws conferring powers upon them. In some cases the benefits have been universally acknowledged, and in others, where complaints have been made against them, it is probable that these have been exaggerated and sometimes unfounded. When the Act was passed Congress was very careful not to interfere with the working of these commissions, and shaped its legislation so as to leave a clear field for action to the state and territorial authorities. No doubt this was in part from a recognition of the valuable work these authorities had performed. It may also in part have come from a well-founded belief, in which this Commission fully shares, that no single body of men acting as a national commission, could, with any strong probability of success, undertake the regulation of commerce by rail for the whole country without the assistance of state or other local commissions or boards. There may likewise have been constitutional considerations. But whatever the motives were, it is plain that the Act to Regulate Commerce falls short of completely covering the field of regulation.

The railroads of the country do not constitute one separate national system and separate state and territorial systems operating independently of each other. There are a great many railroads in the country that do not extend beyond the limits of a single State, but there are very few of them that are not by affiliation and at least partial control connected with roads that are interstate. It is doubtful if there is a single railroad in the country that does not to some extent participate in interstate traffic, and which, if left to be a law to itself, or subjected to laws which differ from the Act to Regulate Commerce, may not be a disturbing element in the enforcement of that Act. There is no such thing as a complete and harmonious regulation of interstate commerce by rail when a part of the carriers by rail are governed by one set of laws and other parts are left to the regulation of laws which are materially different. Still less can there be complete and harmonious regulation when even upon interstate roads there is regulation of a part of the traffic by one set of laws and another part by another materially different. An interstate road takes little or no notice of state lines in the management of its business. State traffic and interstate traffic are taken upon the same trains, under the same management; the freight and passage moneys are received into the same treasury; the expenses of transportation are paid by the same officers, from the same fund; and it would be impossible for the officers of the road to determine with accuracy the cost or the profit of the state business as distinguished from the interstate.

The state regulation, unless the state law should be substantially identical with the Federal Law to Regulate Commerce in all essential points, would, of necessity, if enforced, constitute to some extent a regulation of the interstate traffic. State rates must often necessarily

affect interstate rates. The state rate from East St. Louis, for example, to Chicago might affect the interstate rate to Chicago and to Milwaukee as well; and it might affect the interstate rates to all towns that to any extent are the competitors of Chicago in the traffic to which they relate. Indeed, to some extent it might often affect rates from the Missouri River to the Atlantic seaboard. State regulation in regard to safety appliances might, if enforced, constitute a regulation of interstate traffic to some extent, unless the railroads were required to separate in their trains all state from interstate traffic; but this could not be done without greatly increasing the present cost of rail transportation. We shall not take the space to multiply instances here, though we might give them in great number, to show how state regulations might enter and occupy the sphere of congressional power. One illustration in this connection, however, we deem it proper to mention.

The Act to Regulate Commerce was intended to bring to an end the gross abuses attending the free transportation of persons. To a considerable extent it has done so. But very largely the carriers, and especially the strong systems, where the abuse has been greatest, have endeavored to avoid the Law by falling back upon state protection, and shielding themselves under an unrestricted authority to issue passes as they pleased within the limits of a single State. Three of the large railroad systems of the country, when called upon by the Commission to make an exhibit of the passes issued by them, declined to do so, on the ground that the passes issued were limited in their operation to the bounds of a single State, and therefore, as was claimed, this Commission could take no cognizance of them. The Commission believes that if this position can be maintained it greatly impairs the efficiency of the Law, and the abuses, the discriminations, and the corruptions, which before were so flagrant, will, to some extent, at least, continue. If the New York Central or the Pennsylvania Railroad Companies can thus issue passes at discretion, it is impracticable to enforce the Law as against their competitors. It is idle to say the passes do not affect interstate traffic. There is generally some purpose of indirect profit or advantage in issuing them, and the managers of the roads who make the issue do not attempt to limit the benefit to any one class of the traffic, and could not if they would. And if they in this manner avoid the Law, it cannot be effectively enforced against their competitors, even if the latter did not dispute their obligation to comply with it strictly.

What is said as to free transportation may be said as to rebates also. Sometimes in cases which come before the Commission a carrier admits that it gives rebates on the traffic taken up and laid down within a State, but insists upon its right to do so, because there is no law of the State prohibiting it. Nevertheless this rebate affects the rates upon interstate traffic, and a competing road whose traffic is taken a little further, and over the state line, may be compelled to give rebates accordingly, or to surrender important business. It certainly cannot be expected to surrender the business willingly; and, while the state law permits the rebate, the interstate carrier will see no moral

wrong in giving one also. Indeed it may be said that in all particulars where the Act to Regulate Commerce contains prohibitions, or establishes penalties which do not exist under state laws for corresponding conduct, the interstate carrier is tempted to find excuses for violations and evasions under shelter of the less stringent state laws.

By reference to the brief notice of the meeting with state railway commissioners, which will be found in another part of this Report, it will be seen that the state commissions have felt the great difficulties attending the want of entire harmony between state and national laws, and a committee of five state railroad commissioners was then appointed to consider the subject and report to the next conference upon the best plan to obtain harmony in railroad legislation. The time has not yet been fixed for the meeting of the conference to which that committee will report, but it will probably be held next spring. The bringing about of that harmony by a substantial re-enactment of the Act to Regulate Commerce by all the States and Territories would to a large extent relieve the whole subject of the difficulties at present attending it, and would go very far towards a solution of the railroad problem. Possibly such a re-enactment may in time occur, but we have deemed it our duty at this time, and, as accounting in great part for any imperfect execution of the Law, to bring to the notice of Congress some of the difficulties necessarily encountered by reason of the fact that the Act to Regulate Commerce does not cover the whole transportation business of the country. A statement showing state roads that claim they are not subject to the Act, and therefore not required to report to the Commission, is given in Appendix 9.

CONSOLIDATION—ABSORPTION OF WEAKER LINES BY THE STRONGER.

The tendency in recent years towards the aggregation and combination of capital invested in various of the larger business pursuits has been so marked—such aggregations are so subject to misuse, and when misused are so potent for mischief—that every new indication of the growth of this tendency leaves the public less free from apprehension. This is so true as to all transactions between railroad corporations that any working arrangement or agreement for the establishment of through lines, by which expense may be avoided and the public served, is subject to more or less distrust.

Whether because of some abuses in railroad management when in conducting interstate commerce the carriers were a law unto themselves, or whether for some other reason, the fact seems to be that every railroad combination in the direction of unity of interest or unity of control provokes such suspicion as to warrant, if it does not require, explanation.

The tendency to consolidation of railroads and to the absorption of the weaker by the stronger lines has been sometimes ascribed to the Act to Regulate Commerce or some of its provisions. It has been so ascribed by those of such experience as to entitle their opinions to consideration.

The tendency to the combination and concen-

tration of other great interests is scarcely older than the Act to Regulate Commerce, to which such interests are not subject.

Combinations and unifications of railroad properties had their origin as early as railroad investment was of sufficient magnitude to invite them. They had so advanced when the Act was passed that the railroads outnumbered the companies operating them two to one. Both before and since the Act was in force the tendency to such combination and unity has kept well up with the increasing ability of the proprietors and managers of one road to buy or control another.

With an average annual railroad investment approximating \$400,000,000, and a corresponding increased railroad mileage, there are each year more roads for consolidation, increased opportunities for absorption, new and greater inducements for combination. Yet the proportion of combinations effected was greater before than after the Act. Considered separately for the period of nine years since the last census, the number of roads merged annually in the seven years before the Act was nearly double the number annually merged in the two years thereafter. The combinations for these nine years, and how affected, appear in the following statement, which, with the subsequent statements, is taken from the best obtainable data:

CONSOLIDATIONS, ETC., TO DECEMBER 31, 1888, OF ROADS THAT WERE OPERATING COMPANIES ON JUNE 30, 1880.

| How acquired. | 1880. | 1881. | 1882. | 1883. | 1884. | 1885. | 1886. | 1887. | 1888. |
|-------------------------------------|-------|-------|-------|-------|-------|-------|-------|-------|-------|
| Consolidated, absorbed and merged | 33 | 53 | 11 | 9 | 7 | 5 | 9 | 9 | 7 |
| Controlled, leased and operated | 69 | 28 | 40 | 22 | 12 | 23 | 12 | 15 | 21 |
| Purchased | 13 | 8 | 3 | 5 | 1 | 2 | 2 | 2 | 4 |
| Total | 115 | 89 | 54 | 36 | 20 | 30 | 23 | 26 | 32 |
| Reorganizations and changes in name | 7 | 7 | 4 | 3 | 5 | 5 | 12 | 11 | 3 |

RECAPITULATION.

| | |
|---|-----|
| Total for nine years | 425 |
| Average per year | 47 |
| Total for seven years preceding 1887 | 367 |
| Average per year | 52 |
| Total for two years (1887 and 1888) | 58 |
| Average per year | 29 |
| Total for three years (1880, 1881 and 1882) | 258 |
| Average per year | 86 |
| Total for three years (1883, 1884 and 1885) | 86 |
| Average per year | 28 |
| Total for three years (1886, 1887 and 1888) | 81 |
| Average per year | 27 |

The latest union of railroad interests which has attracted public attention, and of which this Commission has been advised, is that of the Union Pacific with the Chicago and Northwestern. This alliance is an agreement for the interchange of through business, the establishment of through lines by which the interests of the companies may be promoted and the public convenience served. It provides for the interchange and continuous carriage of freights from the place of shipment to the place of destination over 5,000 miles and more of the Union Pacific system and more than 4,000 miles—all—of the Chicago and Northwestern system. The arrangement as to through carriage and

interchanges for that purpose does little, if any, more than give effect to one purpose of the Law. Such a continuous carriage is favored by the third and seventh sections of the Interstate Commerce Act. Except as to interchange of business and continuous carriage the two companies and systems seem as free from the control of each other as before such union.

Substantially all the consolidations and absorptions made by the two companies or systems preceded the Act, or resulted from contracts which preceded it.

The authorized mileage of the Union Pacific proper, as constructed, was less than 2,000 miles, which was increased to more than 6,000 miles through its affiliated and controlled lines.

The Chicago and Northwestern acquired and commenced operating 119 miles of road at the date of its organization in 1859, and had less than 500 miles in 1866. By absorption, purchase or otherwise, it had acquired control of more than 3,500 miles in 1886.

The Pennsylvania Railroad Company, a corporation of that State, authorized at first to construct a road less than 250 miles long between two of its principal cities, grew into a vast system, extending into and across several States of the Union. Its entire mileage, including main and branch, owned and leased lines, was less than 500 miles in 1861. In 1880 it included nearly 4,000 miles. In every year since then it has added to its mileage, not more annually after than before the Act. By extension, purchase, absorption or other arrangement, its control, directly or through affiliated companies, embraces more than 7,000 miles.

The progress made by the two companies or systems last named, in acquiring control of roads of other companies and increased mileage, is indicated in the following statement:

SUMMARY OF NUMBER AND MILEAGE OF ROADS OF PENNSYLVANIA SYSTEM, ACQUIRED IN YEARS INDICATED, TO JUNE 30, 1889.

[Roads omitted for which proper data are lacking.]

| Year. | Pa. Railroad.* | | Pa. Company.† | | Total.‡ | |
|---------------------|----------------|------------|---------------|------------|---------|------------|
| | No. | Miles. | No. | Miles. | No. | Miles. |
| Prior to 1880 | 826 | \$1,158.87 | 118 | \$2,614.30 | 44 | \$3,773.17 |
| 1880 | 2 | 111.54 | 2 | 243.15 | 4 | 354.69 |
| 1881 | 1 | 47.82 | --- | --- | 1 | 47.82 |
| 1882 | 3 | 181.48 | --- | --- | 3 | 181.48 |
| 1883 | 1 | 6.75 | --- | --- | 1 | 6.75 |
| 1884 | 3 | 99.40 | --- | --- | 3 | 99.40 |
| 1885 | 2 | 128.36 | 1 | 28.15 | 3 | 156.51 |
| 1886 | 3 | 60.26 | --- | --- | 3 | 60.26 |
| 1887 | 2 | 14.24 | 1 | 122.08 | 3 | 136.32 |
| 1888 | 2 | 115.57 | 2 | 67.53 | 4 | 183.10 |
| 1889 | 4 | 7.95 | --- | --- | 4 | 7.95 |
| Total | 49 | 1,932.24 | 24 | 3,075.21 | 73 | \$5,007.45 |

*The charter (1846) authorized the construction of a road from Harrisburg, Pa., to Pittsburgh, Pa., the length of which, when completed, was 248.2 miles; the first section, from Harrisburg, Pa., to Lewisville, Pa., 60.6 miles, was opened September 1, 1849. Mileage owned and controlled June 30, 1889, approximately, 4,113.75.

†Mileage in 1871, the year of organization, 796.20. Mileage June 30, 1889, approximately, 3,381.27.

‡Total mileage owned and controlled by Pennsylvania system June 30, 1889, approximately, 7,495.02.

§Subsequent to 1860.

¶Subsequent to 1868. Includes ten roads, 1,556.25 miles, controlled through ownership of stock; no information as to date acquired.

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SUMMARY OF NUMBER AND MILEAGE OF ROADS OF CHICAGO AND NORTHWESTERN RAILWAY COMPANY, ACQUIRED IN YEARS INDICATED, TO JUNE 30, 1889.

[Roads omitted for which proper data are lacking.]

| Year. | No. | Miles. | Year. | No. | Miles. |
|------------|-----|--------|-------------|-----|------------|
| 1864 | 3 | 486.70 | 1884 | 11 | 2,083.02 |
| 1867 | 1 | 105.00 | 1885 | --- | --- |
| 1871 | 1 | 48.80 | 1886 | --- | --- |
| 1877 | 1 | 28.00 | 1887 | 5 | 109.40 |
| 1880 | 2 | 72.72 | 1888 | 2 | 79.64 |
| 1881 | --- | --- | 1889 | 2 | 41.16 |
| 1882 | 3 | 487.44 | Total | 35 | \$3,731.91 |
| 1883 | 4 | 190.03 | | | |

*In addition to what appears in table, it should be stated that this company owns stock of the Chicago, St. Paul, Minneapolis, and Omaha Railway Company, 1,310.52 miles, to the amount of \$14,700,000 in total stock of \$34,050,126.66, over \$10,000,000 of said owned stock having been acquired in 1882. Mileage of Chicago and Northwestern Railway Company at date of organization, June 7, 1859, 119.80; mileage owned and controlled June 30, 1889, 4,250.38.

What is said of the Chicago and Northwestern and of the Pennsylvania may be said of the Louisville and Nashville, the Lake Shore and Michigan Southern, the New York Central, and is substantially true of the railroad system of this country as well as of other countries. Railroad consolidations and combinations first challenged public attention in other countries, where they were the cause of great apprehension. Twenty years ago they were made the subject of investigation by a royal commission in England.

In view of the facts, it would seem that the cause for railroad consolidations must be looked for elsewhere than in the restrictive provisions of the Interstate Commerce Act, while it is suggested with much reason that these restrictive provisions are themselves the result of behavior in railroad management.

The Act in its main provisions declares in substance that—

To be lawful, charges for railroad services must be reasonable and just.

To take a greater or less compensation from one person than from another for a like service is unjust discrimination and unlawful.

To give unreasonable preference to persons, localities or kinds of traffic, to the disadvantage of other persons, localities or kinds of traffic, is unlawful.

To make the greater charge for a shorter-distance transportation service lawful there must be exceptional circumstances which make it just.

Combinations, contracts and agreements between different and competing roads for pooling their freights or dividing any part of their earnings are unlawful.

To be lawful, schedules of fares and charges, as well as of increases and reductions in fares and charges, must be posted and kept open to public inspection.

Combinations, contracts, agreements or devices to prevent the carriage of freights being continuous from place of shipment to place of destination, are unlawful.

A provision of the third section of the Act declares:

Every common carrier subject to the provisions of this Act shall, according to their respective pow-

ers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines.

Of the restrictive and chief provision of the Act given above, that which makes the pooling of freights and the division of earnings of competing lines unlawful is usually credited with being the efficient cause as well of objectionable railroad consolidations and absorptions as of hurtful instability of fares and charges. It is so credited on the assumption that hurtful competition, especially between stronger and weaker lines, can only be prevented by the pooling of freights, the division of earnings, and the guaranties to be secured through such poolings and divisions. Weaker lines are indirect lines, longer lines, and lines requiring more time and affording inferior facilities and accommodations. Previous to the enactment of these restrictive measures prohibiting pooling and the division of freights and earnings of competing lines it was, in consideration of the maintenance of agreed fares and charges between the stronger and weaker lines, the practice of the stronger to guarantee to the weaker an agreed division, share or proportion of business. When shippers patronized the stronger lines at the agreed rates to such extent that the weaker lines failed to obtain their conceded share of the business and earnings, the stronger lines accounted for and made good the deficiency from their own receipts. On the assumption that the agreed rates were no more than reasonable, the amount realized by the stronger lines was less than reasonable compensation for their services to the extent of such deficiency. But it being assumed that reasonable compensation for the transportation services they rendered remained to the stronger lines after making good the guaranty to the weaker, the amount necessary to make good such deficiency was necessarily derived from charges in excess of such reasonable compensation. In this view, the practice was interpreted as resulting in excessive charges on shipments made by the public as a means of paying weaker lines for joining the stronger in maintaining exorbitant rates. So interpreted, the practice, or guaranty based on agreed divisions of business, was condemned and prohibited by the Act to Regulate Commerce.

This provision of the Act making it unlawful to divide business or earnings deprived the stronger lines as well of the ability as of the legal right to guarantee to the weaker lines a conceded share of business when the guaranty could no longer be made good from charges regarded as excessive.

CONSOLIDATION—INTERCHANGE OF TRAFFIC.

For any advantage of which the roads were deprived by these restrictive provisions it is believed an equivalent was intended to be given in the equal facilities for the interchange of traffic and for receiving and forwarding persons and property under the above-cited provision of section 3 of the Act.

Since its last annual Report to the Congress the Commission has made investigation of a
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complaint under this provision of section 3 of the Act, made by the Little Rock and Memphis Railroad Company against the East Tennessee, Virginia and Georgia Railroad Company and the Iron Mountain and Southern Railway Company.*

The western terminus of one line of the East Tennessee, Virginia and Georgia Railroad Company is Memphis, Tenn. From Memphis the road of the Little Rock and Memphis Railroad Company extends to Little Rock, Ark. From Little Rock a division of the road of the St. Louis, Iron Mountain and Southern Railway Company runs to Texarkana and other points in Texas and the southwest.

These companies had, previous to June, 1888, established, and until then maintained, a through line over their several roads or lines for the transportation of persons and property from and to points on the lines of said companies, or any of them, and connections in the States west of the Mississippi River to and from points on said companies' lines and connections east of the Mississippi. When, in June, 1888, said Iron Mountain Company had constructed and completed a line of its own from Little Rock to Memphis it would no longer maintain the through line over the road of the Little Rock Company; but claiming that the public could be well served over a through line from Texas and points west to Tennessee and points east, of which through line its own line from Little Rock to Memphis should be part, the Iron Mountain Company insisted on the substitution of the Little Rock and Memphis section of its own line for the line of the Little Rock Company.

The East Tennessee, Virginia, and Georgia joined the Iron Mountain Company in establishing such a through line, and thereafter both refused to interchange with the Little Rock Company traffic passing over it and desisted to points on the through line they had maintained with it previous to June, 1888.

The Little Rock Company complained of this as a refusal to afford it the equal facilities for the interchange of traffic which it alleged to be its lawful right under said provision of section 3 of the Act, and insisted that the other companies should afford it facilities equal to the facilities they afford each other and for the same equal rates and charges.

On investigation, the Commission found the through line or route of which the Little Rock and Memphis Company's line had been a part to be more direct and shorter than that substituted for it, that it was a reasonable and convenient route, and its re-establishment would be in the public interest. Its discontinuance by the other companies subjected the public to increased costs and greater delays in transportation. Their refusal to continue or re-establish it, while they maintained another through line from and to the same points, was a denial of proper and equal facilities for the interchange of traffic, for receiving, forwarding and delivering passengers and property, and a discrimination in rates and charges between connecting lines. The opinion of the Commission expressed the belief that under such conditions it was the intention of the Congress in the third

*See report of this case, *ante*, p. 454.

section of the Act to secure to the Little Rock and Memphis Company, or other companies under like conditions, the proper and equal facilities so denied by providing for the establishment and maintenance of through lines over connecting lines without discrimination in rates and charges as between such connecting lines; but the Commission held that when, as in this case, the companies having connecting lines objected to forming through lines with another company some method of procedure was necessary to establish such through line and fix the terms upon which it was to be maintained, and the Act provided no procedure to fix such terms or by which such through line could be established.

The omission to make legal provision for through lines limits transportation over the line of the Little Rock and Memphis Company to local traffic. This results primarily from the construction of a line between Memphis and Little Rock by the Iron Mountain Company, when the line of the Little Rock Company was ample for the traffic, through as well as local. The Iron Mountain Company now has substantially all the through business. The business of the Little Rock Company had been largely through traffic, without which the local business was, and still is, insufficient for the successful operation of its road. To obtain through business under the present state of the Law, the company must extend its line from Little Rock to Texas and southwestern territory already reached and adequately served by the Iron Mountain line. A necessary result would be the support and maintenance of two roads where one is ample for the traffic, and can render the service with more profit to the carrier and lower cost to the public. A result not unheard of would be a hostile and possible disastrous competition between the companies, to be followed by an alliance hostile to the public.

Should the Little Rock Company, in view of necessary or possible results, find itself unable or unwilling to so extend its line, it must await the development of a traffic merely local and yet inadequate to the suitable and proper maintenance of its road, or submit to the absorption of its line as an affiliated line or feeder to a stronger line.

The status of the Little Rock and Memphis Railroad Company in its relations to connecting lines and the results of such relations is sufficiently explanatory of the status and relations of all other independent roads, or roads of a local character, in respect of their relations with connecting lines, which are the same as they were before the Act to Regulate Commerce.

COMPLAINTS AGAINST THE WORKINGS OF THE LAW.

In some cases within the year complaint has been publicly made by manufacturers, or other large dealers whose business has not been satisfactorily profitable, that the fact was due wholly or in part to the Interstate Commerce Law, which was wrong in theory, because it took from the carriers the power to sell their services at pleasure. Such a complaint is aimed at the vital principle of the Law; it does unquestionably take away from the carriers

the power to sell their services at pleasure and require them to perform service for all persons, trades, occupations, localities and communities with entire impartiality. It was chiefly because they formerly, in selling their services at pleasure, discriminated grossly, generally in favor of large dealers, that the government interfered. Common justice required the interference. The discriminations were sometimes so great that the difference in the rates paid by two dealers sharply competing in the same line of business were sufficient to make the one prosperous and send the other to bankruptcy; and, as in the bargain for services the larger dealer always had the most to offer, it was the smaller dealer that was commonly pushed to the wall; so that the sale of their services at pleasure by the carriers was continually adding to the force of other circumstances which, without regard to merit or ability, were assisting to make the rich richer and the poor poorer. It was the belief of Congress that, in so far as the requirement of impartiality in the service of carriers by rail would have that effect, this tendency should be checked; and, the Law being just in itself, the complaint of a dealer that it takes away his ability to build up a prosperity on the special bargains he could make with carriers is a compliment to the Law, not a reproach.

Other complaints have occasionally been made, traceable to a discontinuance of methods or practices intended to be corrected by the Law. Quite naturally the Law will be complained of by any interest that has profited either by sharing the earnings of the railroads or by any special advantages. Such interests have much at stake, and are therefore desirous to be let alone. The Law is looked upon unfavorably when it interferes to protect the public directly by its prohibitions, or indirectly by liberating carriers from injurious methods. The primary purpose of the Law doubtless is that the service of the public by the carriers shall be just and impartial. But that is not all. It contemplates that carriers shall free themselves from burdens that diminish their capacity for cheaper and better service to the public. An enumeration of these includes ticket brokers, commissions to ticket agents and to freight solicitors, special cars owned by shippers or by private car companies, with payment of excessive car mileage, adjunct properties of doubtful value owned or invested in by managers, service for express companies, free transportation of persons, and others that might be named.

Complaints that have their origin in a misuse of corporate powers, or practices injurious to carriers or to the public, are not arguments against the propriety of the Law. Railroads are public instrumentalities, and the public is concerned in the manner in which their affairs are managed, as well as the service they render. As common carriers they are expected to supply suitable and adequate accommodations for the business on their lines, and to so perform their service as not to afford preference to some or cause prejudice to others. They are expected to do their business with their own corporate agencies, and not to delegate their duties to independent and often irresponsible parties acting as middle-men between the carriers and the

public. For continuous carriage by connecting routes all reasonable facilities are expected to be afforded. In short, railroads, as the necessary highways of the country, are expected to keep in view the purpose for which their franchises were granted, and, while guarding their revenues with fidelity to their corporate interests, to make the public service their constant aim, and to so manage their affairs that the service shall be impartial and reasonable.

FEDERAL REGULATION OF SAFETY APPLIANCES.

Personally concerned as every man is in the safety of travel, the subject of railroad accidents has always had the greatest popular interest. That the facts are quite sufficient to warrant this interest may be seen from the following figures taken from the annual reports of the railroads of the country to the Commission for the year ending June 30, 1888. There were reported for that year deaths and injuries to persons as follows:

| | |
|----------------------------|--------|
| Passengers killed..... | 315 |
| Passengers injured..... | 2,138 |
| Employés killed..... | 2,070 |
| Employés injured..... | 20,148 |
| Other persons killed..... | 2,897 |
| Other persons injured..... | 3,602 |
| Total persons killed..... | 5,282 |
| Total persons injured..... | 25,888 |

But the reports do not cover the total mileage of the country; only 92.792 per cent of it. If the accident rate was the same on the roads not reporting, the total number killed was 5,693, and the total injured 27,898. These are the returns made by the railroad companies themselves, and they cannot well be suspected of exaggeration. Neither is there, on the other hand, any reason to suppose that they are not, in most cases, complete and prepared with perfect good faith.

A thought strikingly suggested by these figures is that accidents to passengers take up an undue proportion of the public attention. Not only are casualties to employés several times more numerous, but they are concentrated upon a comparatively small class, each individual of which undergoes considerable hazard. Some estimate of how great this hazard is in the case of one class of employés may be made from the records of the Brotherhood of Railroad Brakemen, an organization that has for one of its objects the insurance of its members against death or total disability. During the year 1888 the average membership of this Brotherhood was 10,052.5. Insurance has been paid upon 114 deaths and 53 total disabilities, the result of injuries received from railroad cars during that year. In the same time there were only 31 deaths and 6 total disabilities from natural causes. These data are taken from the printed assessment notices of the order. Thus one in every 88 of the members of this organization is killed yearly, and one in 60 suffers either death or total disability. It appears also that a brakemen has only 31 chances in 145 or 1 in 4.7 of being allowed to die a natural death.

Exception may perhaps be taken to this conclusion on the ground that brakemen are mostly young and vigorous men not likely to die from natural causes, but surely this view of the case is not more satisfactory than the other. No

record is kept showing the number of lesser injuries received, but if the ratio of killed to wounded is taken as the same as that which, according to the figures quoted above, holds good in accidents to railroad employés over the country at large, namely, 1 to 9.73, the number of those receiving injuries serious enough to be reported to the Commission would be, exclusive of the killed, 1,109, or 1 in 9 of the members of the order. It would appear from this result that, besides running great danger of death, a brakeman will, on the average, be injured once for every nine years of service. It should be said that this Brotherhood includes quite a number of conductors and others whose occupation is less dangerous than that of brakemen, so that the hazard to brakemen is presumably somewhat greater than here shown. It is probable that no occupation followed in this country by any large class surpasses in danger that of the railway brakemen.

It having been urged upon the Commission from several quarters, but more particularly by the state railroad commissioners at the convention in March, that there was a necessity for some sort of national action in matters relating to safety on railroads, an investigation of the subject was begun in the spring of the present year. Although information has been obtained principally from miscellaneous sources, two circulars have been issued making inquiry concerning matters of special importance. The first, dated April 1, *dealt especially with automatic freight-car couplers, and called not only for facts but for technical opinion. It was addressed to the heads of the car-building departments of all the leading roads. The second, issued May 17, †concerned the general subject of federal regulation of the mechanical features of railroad working, and was intended to call out from those best informed and most interested the fullest discussion of that subject and of the facts bearing upon it. It was addressed to all state railroad commissioners, to the grand masters of the chief organizations of railroad employés, and to a number of railroad experts and others who were known to have made special study of the matters in question. A number of the replies to this circular were prepared with much care and have great value, being in fact thoughtful discussions of the matters suggested by the circular, written from various points of view by men of ability and special knowledge. Both of these circulars, together with most of the matter elicited by them, will be found in Appendix 10.

The question of the prevention of loss of life and limb on railways has received study of late years from various quarters. It has been carefully investigated by the various state commissions whose reports have served as a guide to Legislatures, to public sentiment, and often to the railroads themselves. In no direction has inventive and executive mechanical genius been more active or, on the whole, more successful. Some of the American inventors are not unworthy to be classed with Stephenson himself for what they have done to aid and perfect railway transportation. But

*See ante, p. 676.

†See ante, p. 677.

perhaps the most important work of all, as far as mechanical appliances are concerned, has been done by the Master Car-Builders' Association, an organization little known to the general public, developed by the railway corporations themselves to meet certain requirements of modern railroading. This Association meets annually, and, as regards one of its most important purposes, may be not inappropriately described as a federal assembly of car-shops, in which each railroad corporation has a voice, proportioned to the number of cars it owns, in determining upon those standards of uniform construction which extensive interchange of cars makes necessary. The conclusions of this body are recommendatory and not binding upon its members, its careful methods of procedure, likely to assure the best results, and the economies dependent upon uniform construction being relied upon to support its recommendations. Any improvement in safety appliances, then, which depends for its success upon uniform action by railroads all over the country, and the most important do so depend, must first secure the approval of the Master Car-Builders' Association.

The importance of this Association will further appear in the course of a brief sketch of some of the problems relating to public safety which apparently call for solution through national legislation.

AUTOMATIC FREIGHT-CAR COUPLERS.

The subject of automatic freight-car couplers deserves first mention because of the large number of lives lost and limbs maimed in coupling cars, because these accidents are not of a sort to attract the public attention they deserve, and because there seems to be a practicable remedy. No satisfactory statistics exist of the number killed and injured in this kind of accident. For the year ending June 30, 1888, 326 deaths and 6,827 injuries were reported to the Commission as due to this cause, but these numbers are somewhat less than the true ones, for the reason that part of the roads reporting keep no record which distinguishes coupling accidents from the total number. The danger of stepping in front of a moving car to guide a link into a pocket is sufficiently plain, and such a method of coupling has been considered for many years a reproach upon railroad construction. Nor is the danger of it the only objection to the link-and-pin system. It is both expensive and mechanically defective. The pins, being loose and of some value, are constantly being lost and stolen. The coupling process is cumbrous and slow. If the cars coupled are not of the same height, one tends to hang, as it were, upon the other, often to the damage of both cars. The play or "loose slack" which each link permits causes every car to be started with a jerk, sometimes violent and injurious to both cars and freight.

It is a mistake, however, to imagine that these difficulties are easily remedied or that there have been until very recently automatic devices against which serious or fatal objections could not be brought. Although some thousands of couplers have been patented, the difficulty has been, not to choose among good ones, but to find any good one. Nor can any

mechanic, however great his experience, judge by looking at a coupling device, or by merely mechanical tests, what defects it may have. The conditions are so complex that only various and extended trial in actual service will determine the merits of a coupler, and many which gave the greatest promise have failed in such a trial. Nor is it possible, consistently with public safety or with railroad interest, to neglect the non-mechanical consideration, most difficult of all to satisfy, namely, that automatic couplers to be successful must be of a uniform type throughout the country. It is not at all necessary that they be of the same patent, but they must couple automatically with one another. That this uniformity is essential follows directly from the fact that freight trains are made up of a mixture of cars from many railroads, and that it is more dangerous to couple two automatic couplers of distinct types than to couple with the link and pin. In fact, it is the difficulty of obtaining this uniformity that now offers the most serious obstacle to the progress of automatic couplers and supports the demand of railway employes for some authoritative action.

Although the deaths and mutilations occurring in coupling cars had been repeatedly discussed in the reports of state commissions and railroads had been urged to move more vigorously towards adopting automatic couplers, the first legislative action was taken by Connecticut in 1882. The statute provided that automatic couplers, approved by the railroad commission, must be placed on all new cars, under a penalty. A statute nearly identical in its provisions was enacted by Massachusetts in 1884. In that year also the Legislature of New York passed a law that after July 1, 1886, no couplers other than automatic should be placed upon any new freight car to be built or purchased for use in the State. In 1885 a statute quite similar, naming the same date, July 1, 1886, was enacted in Michigan. Besides these of some years ago we have quite recently a New York statute, approved June 16, 1889, which provides that after November 1, 1892, it shall be unlawful for railroads to run any of their own cars in that State unless equipped with automatic couplers.

It may be said of the earlier statutes that their greatest usefulness was probably in showing the railroad companies that public sentiment was earnest on the subject and required that something be accomplished. Uniformity was not furthered since different commissions approved different couplers. The laws could not well be enforced upon roads only partly in the State. Many persons, including the present Connecticut commissioners, believe that the mixture of link couplings with a number of different automatic types tended to increase rather than diminish coupling accidents.

Attention, however, had been directed to the matter, and in 1884 it was the subject of earnest and thorough discussion by the Master Car Builders' Association and definite progress was then made in the adoption of a resolution that "the vertical-plane type of coupler was mechanically the best."

A "vertical-plane" coupler, it may be explained, is one that permits an up and down sliding motion between the two parts, making

it impossible for one car to hang or drag down upon another, as may happen with a link coupling. From this time the activity of the Association, chiefly through its executive committee, was continuous and careful. A competitive test held by the committee in September, 1885, one of the conditions of which was that each coupler tested must be fitted as for actual service to at least two cars, resulted in the selection of twelve couplers for further trial. The principal points determined by the test were facility of coupling and uncoupling under difficult conditions, as on sharp curves, and strength to resist concussion.

In 1886 and in the spring of 1887 tests of continuous brakes for freight trains were carried on at Burlington, Iowa, under the direction of a committee of the Master Car Builders' Association, and on a very large scale. These tests had incidentally a great influence on determining the value of different types of couplers, since it was shown in the course of the experiments that, contrary to the previous belief, the same engine could start as many cars provided with the "vertical-plane" couplers, which are a kind of hooks fitting close together and permitting no play between the cars except by compression of the draw-springs ("spring slack"), as it could of cars coupled with links, which have several inches play or "loose slack" between every two cars. It had before been urged, and generally believed, that the "loose slack," causing the cars to be started successively and permitting the engine to move several feet before starting all the cars, was a necessity in the handling of the heaviest trains.

The breaking down of this objection was, when added to other considerations, regarded by the committee as decisive, and at the Master Car Builders' convention in 1887 they submitted an elaborate report recommending one of the types of vertical-plane hook couplers as the standard of the Association. To determine what patent couplers came within the type it was suggested that an approved coupler be obtained from one of the manufacturers, and all others coupling with it in a satisfactory manner be regarded as belonging to the type. The next step was for the Association to take a formal vote upon the standard thus recommended. Such votes are taken by letter ballot, a two-thirds majority being necessary to adoption. Each member representing a railroad is entitled to one vote and to an additional vote for each one thousand cars owned by the railroad. Upon a ballot of this sort the proposed coupler became a standard by a vote of 474 to 194. The precise form of the hook was left to a committee, and was published in April, 1888.

The standard of automatic freight-car couplers thus adopted by the Master Car Builders' Association is not strictly a single coupler, but a type or genus under which there may be an indefinite variety of patent couplers, differing materially in some respects, yet each capable of coupling automatically with every other. There are now perhaps a dozen patents under the type, and there will no doubt be more, so that it cannot be said that its general acceptance would involve giving a monopoly to any patentee.

The activity of railroads in fitting their cars with these couplers has not, however, been sat-

isfactory or as great as was generally expected. The natural way of introducing such an appliance is to have it placed upon all new cars and upon all old cars needing new draught rigging. A few roads only are doing this, though the Pennsylvania and other large systems are of the number. The first cost of the standard couplers is considerable, from \$20 to \$25 a car, as against \$10 to \$15 for the link-and-pin form, and is alone sufficient to deter many roads from adopting them. The movement for their introduction, too, is actively opposed by all interested in patent couplers which they would supersede. Some look upon the action of the Association as premature and doubt its wisdom. Many are experimenting upon a small scale to determine which to choose of the patent couplers belonging to the type. The principal obstacle, however, is quite generally stated to be the need of uniform action. Automatic couplers serve no good purpose unless their use is so general that cars fitted with them come together in actual service, and are not lost among the multitude of cars fitted with link and pin. The automatic coupler is automatic only with another automatic coupler, and not with a link. When it meets the link a coupling must be made by hand, and is quite as dangerous, or more so, as that between two cars both rigged for the link and pin. At present only a very small fraction of the couplers in use are automatic. Obviously, then, there is a strong motive for each road to put off spending its money in making the change until assured of general co-operation.

The case may be summarized somewhat as follows: A few large roads have actually adopted some form of the Master Car Builders' coupler, and are bringing it into use as fast as could reasonably be expected. Many others are experimenting with various forms. A few, principally in New England, are actively opposed to the standard. A very large number mildly favor it but are waiting for general action. The smaller, poorer and less progressive roads are generally indifferent to the whole question.

Meanwhile coupling accidents are as numerous and distressing as ever, and the question is raised whether the action of the Master Car Builders should not be seconded by national legislation. That it should is the view that seems to prevail among the employes whose lives are endangered and is held by many others. It derives support from what appears to be the impossibility of securing the necessary uniformity in any other way. On the other hand, there are grave objections to such radical action. Those railroads who are moving slowly in the matter may urge with plausibility that the question is comparatively new and one of great importance and that not only pecuniary interests but those of public safety also will be, in the end, best served if they act cautiously and only after sufficient experiment. The standard was not finally settled and drawings of it published until April of 1888, and some particulars, not, however, essential, were determined only in the present year. However unfortunate the present condition may be it is not likely that any good will result from acting with undue haste. The requirements of a general law, which might be

entirely reasonable for some roads, would work serious hardship to others and probably result in forcing into use the cheapest and least desirable forms of the standard type.

Closely connected with the question of automatic couplers is that of a standard height above the rail for the coupling head or draw-bar and standard proportions and position for the dead-blocks or buffers which take the shock of violent concussions. The danger of coupling by hand is greatly increased if the parts connected are not of the same height. A standard height was adopted by the Master Car Builders in 1872, and the fact that it is not closely maintained by car builders shows the difficulty of securing uniformity even in a very simple matter. If the dead-blocks are not similarly placed on two colliding cars they fail in their office altogether, and if they are badly placed they imperil the brakeman. In this, as in other matters, uniformity is in itself a principal means of safety, since a man is much less likely to be injured when familiar with the apparatus he is dealing with than when it is strange to him.

CONTINUOUS BRAKES FOR FREIGHT TRAINS.

In this country the use of automatic air-brakes, continuous through the train and operated principally from the engine, is almost universal upon passenger cars. The control of freight trains in the same way, scarcely thought of ten years ago, has of late made considerable progress, and, questions of safety aside, is looked upon as promising one of the greatest advances in railroading that has ever been brought about. As a means of saving life it does not yield in importance to the use of automatic couplers. This saving is effected chiefly in three ways:

First. By diminishing the number of collisions and train accidents of all kinds. A freight train running at high speed can be stopped, if fully equipped with continuous brakes, in a distance less than its own length. If hand-brakes are relied upon it will usually run half a mile or more. It is thus, in the first case, subject to the immediate and efficient control of the engineer, who can stop it in a few seconds on the appearance of danger. Collisions are also frequently prevented by the automatic action of continuous brakes, which, in case a train parts by the failure of a coupling, immediately brings both sections to a stand. With hand-brakes, and especially on a steep grade, such accidents, which are quite common, often result in a collision between the parts of the broken train.

Second. The destructive effects of derailment are greatly decreased, since any displacement of cars sufficient to break the air-hose connecting two of them at once sets the brakes throughout the train and brings it to a stop, perhaps when as yet only a few cars have had time to leave the track.

Third. Continuous brakes do away for the most part with the necessity for traversing the tops of moving trains. Under the old system, which is still the general one, the men are out on the darkest nights and in the coldest weather, sometimes when the roofs are covered with ice, making their way from car to car, setting or loosing the brakes. The returns to

the Commission do not show the number of men killed and injured in falling from cars, but an estimate may be made by taking that proportion of the totals which is usually found to be due to this cause. Such a process gives: Killed, 613; injured, 4,025.

Besides preventing and mitigating accidents continuous brakes make it possible to run heavier trains, a greater number of them, and at a higher rate of speed than would otherwise be safe.

In their development they afford an interesting exemplification of the high degree of organization attained by the mechanical branch of the railroad interest and of the magnitude of the experiments it is in a position to undertake to determine the value of appliances. At the tests held in July, 1886, and May, 1887, near Burlington, Iowa, upon the Chicago, Burlington and Quincy road, and under the direction of the Master Car Builders' Association, each competing brake company was required to furnish a complete train of fifty cars fitted with the appliances to be tested. The test upon each of the two occasions lasted three weeks; the trains were put through the most various and trying evolutions, every significant fact capable of measurement being recorded by carefully prepared apparatus. Since then long trains fitted out by brake manufacturers have on several occasions traversed the country merely for the purpose of testing and advertising some form of continuous brakes.

The outcome of these experiments and of the improvements resulting from them has been a high degree of efficiency.

The obstacles to the introduction of continuous brakes are much the same as those in the case of automatic couplers; first cost, about \$50 per car, and the need of simultaneous action by many railroads. The continuous brake apparatus on any one car depends for its usefulness upon other cars being equipped in the same way. Any car not so equipped cuts off all behind it from communication with the air-pump on the engine, and without this communication the brakes are worthless. The apparatus begins to be effective only when a number of cars provided with it are brought together at the head of the train. Consequently the capital invested before the movement becomes somewhat general must in large part lie idle.

Wherever freight trains are run for long distances without being broken up upon roads which do not employ a large proportion of foreign cars, the conditions are favorable for continuous brakes. The greater part now in use are found west of the Missouri River. On the other hand, short lines doing most of their business in the cars of other roads cannot well adopt them.

The subject of automatic couplers and continuous brakes for freight trains is of especial importance because the fact that these improvements are but slowly and cautiously introduced makes the principal ground for the feeling that the lives and limbs of railroad employés do not receive such consideration in the conduct of railroads as justice requires they should receive. There are forcible papers on this subject in the Appendix.

It is perhaps to be assumed that expensive

changes in equipment are and will be made by railroads only as they are expected to be profitable, and that life-saving is not always given sufficient weight. But it is by no means a fact that railroad officers as a class are indifferent to humane considerations, and much of this sort that is said is wholly unjust. Among them are not infrequently found men by whom the safety of their employes is held of the first importance, and who are willing to make disinterested efforts to secure it. But such feeling is not, perhaps, most commonly found among those who have power to appropriate sums of money to carry out their wishes. With the higher officers and with the board of directors the safety of trainmen is likely to be a somewhat vague consideration, not forced upon the attention by personal observation and not so distinctly brought to their attention as are the facts pertaining to their pecuniary interest.

Nor should much weight be given to the statements sometimes made that employes cannot be protected; that they are usually themselves responsible for accidents, being reckless and unwilling to take the precautions that would save them. It need not be claimed for them that they are more cautious than other men, but only that their duties should, when possible, be made such that a reasonable degree of caution will protect them. It is not easy to see that a man whose foot catches in a frog while his attention is concentrated upon effecting a coupling, or who slips from a car on an icy night, is necessarily reckless. There is no reason for supposing that trainmen value their lives less than other people or are less careful of them. A brakeman is as cautious as a general manager would be with the same duties, the same haste, exhaustion and exposure. It is surprising that such arguments should have weight with anyone.

HEATING OF PASSENGER CARS.

Early in the year 1887 the phrase "the deadly car stove" began to be familiar. Its deadly nature was not then a new discovery. Often before, as at Ashtabula, in December, 1876, it had added the horror of fire to the others which attend a railroad accident. But as yet no persistent public demand had been made for its abolition, possibly because the public had not realized that a substitute was practicable. But the winter of 1886-87 brought a series of accidents, which, being detailed in the press, made the public familiar with the picture of living men and women held beneath the timbers of a wrecked car and slowly burned. The Rio disaster on the St. Paul road, October 28, 1886, when seventeen persons were burned to death, was followed January 4, 1887, by the burning of thirteen in a wreck at Republic, Ohio, and February 5 by the crushing and burning to death of thirty more at White River, Vermont. Lesser horrors of the same kind were not wanting. At that time systems of heating which do not require a fire in the cars were little in use except upon the New York Elevated Railroad, where cars were heated by steam from the engine.

As soon, however, as the traveling public began to believe that stoves were dangerous and could be dispensed with it became the aim

of every enterprising road, solicitous for its popularity, to do away with them as fast as possible. Nor was the public in all cases content until its protests had taken an authoritative form. In Massachusetts, New York and Michigan statutes were passed in 1887, the aim of which was to make the use of common stoves in passenger cars illegal after the winter of 1887-88. The result of this agitation was great activity on the part of railroads and inventors in originating and improving heating devices and in experimenting with them. Safety heaters, which, though requiring a fire in each car, were constructed with special reference to preventing its spread in case of wreck, were already in considerable use. These, however, though not forbidden by the statutes of Michigan and Massachusetts, were looked upon with some suspicion and thought was for the most part directed to devising plans for heating cars by steam from the engine.

The problem whose solution was thus undertaken is a difficult and complex one, and is, after two winters' experience, though greatly advanced, still in an experimental stage. The legislators of 1887 over-estimated in some cases what it was practicable for the railroads to do. The Statute of New York required that after November 1, 1888, cars must not be heated by any form of stove or furnace kept in the car. In 1888, however, it was amended so as to give the railroad commissioners power to extend the time, in special cases, for a year longer. In Connecticut the commissioners, empowered by the Legislature, issued in December, 1887, an order that all new passenger cars built or purchased for use in the State must be equipped for continuous heating. This order was generally disobeyed, and the commission, after further investigation, condones, in its last report, this disobedience on the part of the roads, and intimates that it was justified by the unsatisfactory working of continuous heating appliances.

A mere mention of some of the more obvious difficulties of continuous heating may serve to show that the problem is not an easy one. It has been claimed that in case of wreck the steam escaping from the broken pipe would scald to death imprisoned passengers. There is doubt if this danger be a serious one, but to diminish it steam is usually carried at low pressure. It is often necessary to heat cars which are not connected with an engine. This is the case with sleeping cars standing at stations and may be the case with a train on the road and in the coldest weather, as when the track is blocked by snow and the engine is sent for help. A stove and fuel, as a provision against the latter emergency, should be carried in every car. The maintenance of a uniform temperature throughout long trains offers also considerable difficulties. Probably the most serious difficulty, however, concerns, just as in the case of automatic couplers and of continuous brakes, a question of uniformity. Through cars, especially sleepers, traverse several roads and can use no system of continuous heating which is not the same, in certain important respects, as that of each of the roads over which they pass. In these respects, where uniformity is important, there is at present the greatest diversity. There have been vari-

ous attempts by those interested to bring about an agreement upon the form of steam hose coupling to be used between the cars, but so far without any promise of success.

There are now a dozen or more couplers upon the market and a committee of the Master Car Builders, appointed in 1888 to recommend one as a standard, found the difficulties so great that in their report this year they refused to do so. Some systems of heating use two pipes throughout the train, making a complete circuit from the engine to the rear car and back. Some have only one pipe. Some make the connections between cars below the platforms, some above, some at the roof of the car. It is plain that cars differently fitted in these respects cannot be connected for continuous heating.

Upon the whole it appears that the more progressive railroad managers have shown energy in this matter and a sincere purpose to extend the use of continuous heating as fast as practicable. The present condition, however, is far from satisfactory, and towards the essential point of uniformity it is not apparent that any real progress has been made.

The problems of light and ventilation are naturally suggested by that of heating, but to cover, even in the most cursory manner, the whole subject of safety and comfort on railroads would be a tedious task and aside from the present purpose, which is to give such brief exposition of some of the more important matters as may help to show why federal regulation has been thought desirable, and perhaps to suggest something of the difficulties it would have to meet.

Brief mention may here be made of the block system and of interlocking, to encourage wider use of which would undoubtedly be a part of the duty of any federal agency taking cognizance of such matters. Under the block system the line of railroad is divided into sections a few miles long called block sections or blocks, so guarded by signals as to prevent two trains being in the same block at the same time. As soon as a train passes into a block at one end the signals for the block are set at danger and remain so until it passes out at the other end. Interlocking is a mechanical device by which the levers actuating a number of signals and switches are brought together and interlocked; that is, made interdependent in their movements, so that the fact that a switch is open will make it impossible for the signal which indicates that the track is all right to be displayed. A draw-bridge and a signal may be interlocked so that when the bridge is open the signal is necessarily at "danger," and the signalman cannot put it at "safety" even if he tries. Or a complicated system of switches and signals, such as is always necessary at freight or passenger stations where much traffic is handled, may be so controlled that it is mechanically impossible that they should occupy dangerous or inconsistent positions.

VIEWS OF STATE COMMISSIONS.

In view of the extensive interchange of cars, both freight and passenger, making it necessary that regulation in such matters as couplers, train-brakes and heating appliances

should be general and uniform in order to be effective, it is not surprising to learn that state regulation has been found unsatisfactory. In its report for 1886 the New York Railroad Commission says:

To attain the main object of an automatic coupler, *i. e.*, to save the lives and limbs of trainmen, it is most desirable that but one device should be in universal use. If there is diversity it will increase rather than diminish the present dangers.

There appear to be but two ways for this to be brought about, one by the operation of the law of the "survival of the fittest," the other by the creation by Congress of a commission to determine upon one coupler and compel its adoption by all companies engaged in interstate commerce.

The first method it would seem will be slow beyond all computation from the present indications. There appears to be no good reason, however, why the second could not be done.

Under its power to "regulate commerce among the several States" Congress has already prescribed rules for the inspection of hulls and boilers of steamships, for the examination of engineers as to their competency, for vessels being provided with boats, life-preservers, and for many similar things to insure the safety of travel by water.

It would seem that the same power could and should be exercised to insure safety in the operation of railroads.

In 1887 the Massachusetts Commission says:

The tendency of opinion among railroad men is toward the selection of some vertical plane coupler. But it seems doubtful whether any one will be universally adopted, unless its use for interstate commerce shall be compelled by congressional action. It would seem, however, that all compulsory state legislation, prescribing the use of any one coupler, must be unconstitutional and void so far as it relates to interstate commerce, for no State can direct the manner in which interstate commerce shall be conducted, and so much of our commerce is interstate that only an insignificant fraction will remain subject to the restrictions of local legislation in this respect. If this be so, it is probable that efforts will be made to provide mechanical safeguards to the great volume of traffic which is subject to interstate and international law.

In the report of the Commissioners of New Hampshire for 1888, we read:

No commission whose authority is bounded by state lines can go fast or far in compelling the roads within its jurisdiction to adopt safety devices and appliances necessary for the protection of employes and passengers, such as steam heaters, electric lights and automatic couplers. Even if we assume that a State may delegate to a commission the power to prohibit upon its territory any but approved equipment upon cars used in interstate traffic, it is absolutely necessary that such equipment should be uniform upon all roads constituting a through line, and the obstacles in securing uniformity by the action of the several States through which such roads pass are apparent.

The regulation of these matters may properly be, and indeed must be, left to Congress or the Interstate Commission, which can prescribe rules applicable to the entire country, and make orders that can be enforced upon entire railway systems. With this in view the board has this year joined the commissions of other States in addressing to Congress a petition asking that the Interstate Commission be required to investigate the subject and propose some plan by which the desired results can be secured.

The same feeling was expressed in the resolution passed by the convention of railroad commissioners held at Washington in March of the present year:

Whereas thousands of railroad employes every year are killed or injured in coupling or uncoupling freight cars used in interstate traffic and in handling the brakes of such cars, and most of these accidents can be avoided by the use of uniform couplers and train-brakes; and

Whereas the success and growth of the system of heating cars by steam from the locomotive or other single source largely depends on the adoption in interstate traffic of a uniform steam coupler; and

Whereas these subjects are believed to be of pressing importance and within the proper scope of the powers of the Congress of the United States, while attempts on the part of the individual States to deal with them have resulted and must continue to result in conflicting regulations:

Resolved, That we do respectfully and earnestly urge the Interstate Commerce Commission to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars used in interstate commerce, and in handling the brakes of such cars, and in what way the growth of the system of heating passenger cars from the locomotive or other single source can be promoted, to the end that said Commission may make recommendations in the premises to the various railroads within its jurisdiction and make such suggestions as to legislation on said subjects as may seem to it necessary and expedient.

PROBLEM OF FEDERAL REGULATION.

If it is assumed that the condition of things thus briefly outlined calls for some Federal action in the interest of safety, particularly of the safety of workmen in railroad employ, it remains to consider what that action should be.

Two distinct ways of proceeding are naturally suggested. Congress may, should it see fit, pass definite statutes requiring that certain appliances be brought into use upon all the railroads of the country within a certain time; or, having in view the difficulty and importance of the question, it may prefer to make some provision for its further investigation, trusting that the mere fact that such an investigation is in progress will not be without immediate results.

This Commission is not prepared to recommend a national law prescribing appliances. It does not assume to say that such legislation will never be advisable, but it is not prepared to say that it is advisable at present. The difficulties of formulating a law from which good results could be expected are certainly very great, if not insurmountable, and, although pains have been taken to secure the views of all interested, no legislation of this sort has been suggested that seems plainly to be wise and safe. A statute requiring that all freight cars be fitted with automatic couplers by a certain date—a requirement against which it is probable that less could be urged than against any others suggested—has already been shown to be open to serious objections. It is impossible to say what the results of such a law would be, but there is no certainty that they would be good. If it did not bring about uniformity—and there is no assurance that it would—it would be most injurious to all in-

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terests involved, including those of public safety.

While it is no doubt highly desirable that results be reached as soon as possible, it is still more desirable that no mistakes be made. Nothing could be more unfortunate than a repetition, on an enormous scale, of the unsatisfactory results of state legislation. If the state statutes of a few years ago regarding couplers had been national statutes, it seems plain that the question would be in less hopeful condition than it is at present. The effect of that legislation was to hasten the adoption of a variety of automatic couplers, most of which must of course be set aside if uniformity is to be attained. In fact, the strongest opposition to the Master Car Builders' type of coupler—the one that, so far as can be seen, has most chance of uniform adoption—is found in New England, where, as a result of state legislation, automatic couplers not of that type have secured a strong hold. A reasonable prudence and regard for the lessons of previous experience require that action involving the compulsory use of particular appliances should be undertaken only with the greatest caution and upon more thorough investigation than has as yet been practicable. It has been suggested that for the present, at least, the interests of safety would be better served by providing for a board of specialists, so constituted as to command respect from both the railroads and the public, whose business it would be to make investigations and recommendations relating to railroad casualties.

To determine in detail precisely how such a board or bureau should be organized, just how much it should be expected to accomplish, and what powers should be given it, is a matter of much delicacy, in the study of which careful attention should be given to bodies of a similar sort now in existence.

Although we have had in this country no national inspection of railways, we have had for nearly fifty years something closely analogous to it in the steamboat inspection service. And to find a nation which undertakes the inspection of railways with a view to the protection of human life we need go no farther than England, a country where the relations between railways and the government are in many respects similar to what we have at home. Such inspection is also undertaken in the countries of the Continent of Europe, but as the conditions in those countries are much less like our own than those in England, their methods are not so instructive. These two examples of effort on the part of government to increase the security of human life, the steamboat inspection service of the United States and the English system of railway inspection, may profitably be regarded as representative of two distinct principles, both of which may be usefully studied in dealing with the subject now under consideration. In the former we have an example of an inspecting agency which not only investigates safety appliances and makes recommendations and reports, but also has considerable powers of actual interference and control. In the English Statute under which inspectors are appointed it is expressly provided that "no person so appointed shall exercise any powers of interference in the affairs of any

company." Both systems are successful, but it is clear that this success must be achieved in somewhat different manners. It is clear also that the inspecting agency, which has the more power, will require the more elaborate organization and incur the greater responsibilities. The system of steamboat inspection under our own laws is assumed to be familiar; a brief statement of the system of railway inspection in England is here given.

Although the English system of inspection of railways by officers acting under the direction of the Board of Trade dates back to 1840, the Statute determining the powers and duties of the present inspectors was passed, like our Act to Regulate Steam Vessels, in 1871. That Statute, after authorizing the appointment of inspectors, "provided that no person so appointed shall exercise any powers of interference in the affairs of any company," gives each inspector power to inspect any railway, and all its stations, works, buildings, rolling stock, etc.; to require the attendance before him of any person in the management or employ of a company; to require such person to answer his inquiries, and to enforce the production of any papers he considers important for his purpose. Provision is also made for a more formal investigation in very serious cases to be conducted by a court, consisting of an inspector and persons designated by the Board of Trade to assist him. Such a court has no power beyond what is necessary for investigation. Its function ends when it submits a report of its findings to the Board of Trade.

Under this Act the Board of Trade appoints as inspectors three officers detailed from the Royal Engineers.

Their position is practically a permanent one, and they are of course men whose character and abilities command respect from all quarters. Whenever an accident occurs in the United Kingdom of which the Board of Trade desire to make investigation (there need not necessarily have been any loss of life) one of these officers is selected to make it. He proceeds to the scene of the accident, conducts his investigation, and makes his report. As soon as this is printed a copy is sent to the management of the company on whose line the accident occurred. A blue book containing these special reports, together with complete accident statistics, is published quarterly. The number of reports for each quarter, of course, varies greatly, but the average is about twenty-five. They enter into minute detail and yet are clear and vigorous. A short account of the accident and the damage done in it comes first; then follows a careful description of the surroundings; then the evidence in a concise form; and finally the concluding portion, in which the accident is discussed, responsibility fixed, and recommendations made.

The only power in the nature of actual interference which inspecting officers exercise is in the case of a new line. Such a line cannot be opened till the Board of Trade gives its sanction, and the inspecting officers can and do require that everything that they think necessary for safety be provided before they recommend that this sanction be given. But when sanction is once given, the Board has no further power. After the line is open the company

may even remove works which it has erected to obtain the Board's sanction; and there is no remedy.

Besides the quarterly publication of returns of accidents already mentioned, two other documents, relating to safety appliances, are regularly issued by the Board of Trade. One is issued half-yearly, and relates to continuous brakes on passenger trains. It is made up chiefly of returns which the companies are by Act of Parliament required to make, showing in the most complete manner the number and proportion of passenger cars fitted with continuous brakes, the kind of brakes used, every case of failure of continuous brakes to act, giving cause of failure in detail, and in general the progress in the use of continuous brakes from year to year. The second document is published yearly and contains similar returns relative to the interlocking of switch and signal levers and the block system. The purpose of these publications seems to be to assure complete publicity, to keep the people and the railroads themselves alive to what the latter are or are not doing, and at the same time to furnish data from which the efficiency of various appliances may be studied. In addition to these regular publications the Board from time to time issues circulars pertaining to matters in which especial pressure seems to be necessary.

Although the success of this unpretentious system of regulation has been very decided, there has frequently, at times when accidents appeared especially numerous, been considerable agitation to have the supervisory authority of the Board of Trade extended. After investigation, however, the proposition to give the Board powers of direct control has invariably been rejected, and none have opposed it more strongly than the Board itself and its inspecting officers. During the past thirty years the prevention of accidents has several times been the subject of parliamentary inquiries, the most thorough of which was made by a royal commission appointed in 1874. Their report, presented three years later, is accompanied by a quarto volume of evidence, containing 1,150 pages. Regarding an extension of the powers of the Board of Trade, they speak as follows:

Large as are the powers now possessed by the Board of Trade and the Railway Commission, in respect of railways, they are so adjusted and so limited as to leave with the companies the undivided responsibility of working their lines. The first and most important question, therefore, which we have had to consider, as affecting the entire character of our report, is whether our investigation leads us to advise a departure from this policy which has heretofore characterized railway legislation.

With this point in view we have given a wide scope to our inquiry. We have not only examined the responsible officers of the Board of Trade and of railway companies, but we have also received the statements of railway servants of every grade. We have, moreover, personally inspected railway premises and works in various places throughout the Kingdom, and investigated on our own behalf certain typical cases of railway accidents. And, in conducting these inquiries, we have given the fullest consideration to the system of railway management, especially with respect to the condition and dangers of railway servants. But upon full consideration we are not prepared to recommend

any legislation authorizing such an interference with railways as would impair in any way the responsibility of the companies for injury or loss of life caused by accident on their lines. To impose on any public department the duty and to intrust it with the necessary powers to exercise a general control over the practical administration of railways would not, in our opinion, be either prudent or desirable. A government authority placed in such a position would be exposed to the danger either of appearing indirectly to guarantee works, appliances and arrangements which might practically prove faulty or insufficient, or else of interfering with railway management to an extent which would soon alienate from it public sympathy and confidence, and thus destroy its moral influence, and with it its capacity for usefulness.

Even the powers now expressed by the Board of Trade in respect of new lines of railway are not wholly free from these objections. Here, however, the practical evils are so slight and the benefits are so considerable and definite that we think the only question is whether these powers might not be still further increased. But once a railway is opened the state now holds the company responsible to maintain it and work the traffic in a manner compatible with the public safety. The government inspecting officers have powers of inspection, and their reports are exceedingly valuable; but to go further and clothe a government department with unlimited powers to interfere in the interests of public safety with the detailed working of traffic upon railways must necessarily create a concurrent responsibility, and in whatever measure this responsibility be cast upon a government board the responsibility now resting upon railway companies will be diminished.

This reasoning seems to be amply supported by the evidence, and, together with the other objections noticed, is believed to be conclusive against the institution of an administrative agency with power to enforce upon railroads the use of particular appliances.

In the consideration of the general subject of railroad inspection and supervision it should not be overlooked that there is in many of the States, if not all, statutory provisions of more or less vigor for the inspection of railroads in the respective States by state officials. The reports of some of the state railroad commissions show that their inspection of the railroad as a structure is very thorough. Some of the reports are also very full and complete as to accidents, showing their cause, nature and extent, and in establishing the individual responsibility thereof when negligence or want of care was the cause. Twenty-six States have already provided for state commissions with powers and duties varying somewhat in degree but of the same general character. The tendency is in the direction of increased power and duties in these boards. Judging from their rapid growth in the past, both in numbers and scope, probably every State will soon have a commission upon which will be imposed, among other things, the duty of thorough annual inspection of the roads in each State, respectively, and of investigation of all matters pertaining to accidents and injuries in railroad operations. The necessity for federal inspection and regulation will exist, as already shown, more especially where uniformity is required in safety appliances in the train equipment.

With these general statements the whole subject is submitted to the wisdom of Congress.

It will be perfectly obvious, on what is stated, that if any system of federal inspection or supervision in respect to railroad appliances is provided for, it must be impossible for the members of this Commission in person to perform the duties of such inspection and supervision.

INSURANCE FUNDS, AND THE RELATIONS OF CORPORATIONS AND THEIR EMPLOYÉES.

Though questions relating to the well-being of men in railroad employ and of their families are not by the Act to Regulate Commerce expressly referred to this Commission, they are not so far foreign to it as to preclude their receiving some attention at our hands. Indeed, the prosperity of railway corporations and the safety and usefulness of the service performed by them is largely connected with the condition of their employés, and it is therefore not only natural that public interest in such condition should be largely enlisted on humanitarian grounds, but that also it should receive the attention of public authorities because of its being a matter of general concern. The number of these employés is very large. Their work is of peculiar importance to the public, and is performed under circumstances of great responsibility and danger. All these circumstances not only give them special claims upon public consideration, but enlist the public attention because of the large interests that all classes of the community have in the safe and judicious performance of their duties, which must always depend in some degree upon their ability to make proper provision for themselves and their families.

A comprehensive view of the relations which exist between them and the corporations by which they are employed is therefore no less interesting than important; and it seems desirable to the Commission that facts should be gathered showing not only what provisions were made in the nature of insurance for the persons and families of employés by organization among themselves, but also to what extent their employers have made provisions for funds to accomplish a like purpose. For this purpose circulars* were addressed to the heads of the most important orders now in existence composed of railroad employés, and also to officials of eighty-five of the leading railway companies. The result of the information gathered by these circulars will appear in an Appendix to this Report.

The main points upon which information was sought from the organizations of employés were: Whether the order or organization provided any sort of insurance or benefit fund for the relief of the families of members in the event of injury, sickness or death of the member; whether any rules of apprenticeship prevailed before admission to the organization; whether grades of service among engineers and conductors were recognized, either by the organization or by their employers, and, if so, what were the conditions of such grades, and whether promotions among shopmen were made from the men so employed or from outsiders.

*See circulars, *ante*, p. 640.

The principal questions asked of railroad managers were substantially the following: Whether an insurance or guaranty fund was provided for employes in case of their disability by accident or illness, or to relieve their families in either event, or in case of death. If so, all facts relating to the mode of accumulating such fund, its maintenance, disbursement and conditions were called for; also, whether eating or lodging houses have been provided for trainmen when from home, or reading-rooms or other resorts; whether the company addressed had an established system of technical training for its men; whether a regular plan of promotion existed as an inducement to the employes to attain a high degree of efficiency; and whether special rules were promulgated to make sure of obtaining competent locomotive engineers and other trainmen.

An exhaustive analysis of the replies sent to the circulars will not be attempted here, but an examination of them will prove interesting and profitable.

On the part of the labor organizations it is made to appear that there has been a very general adoption of something in the nature of a mutual insurance system on the assessment plan, whereby in case of injury or disability from sickness the beneficiary draws a stated weekly allowance, or, if death ensues, his family is made sure of a sum that will at least suffice to remove immediate want. There is every evidence that this insurance feature has the hearty support of the several brotherhoods or orders, and is greatly to the advantage of the members. The only questions made related to the methods to be employed and the persons to whom control should be given. Funds devoted to this purpose seem, so far as may be judged from the reports, to have been well managed, and the success that is claimed to have attended all efforts in this direction may be expected to continue with the spread of the system. An expression adverse to the relief associations organized by certain of the railroads is set forth by the grand secretary and treasurer of the Brotherhood of Railroad Brakemen, whose reasons will be found given in detail in Appendix 11.

In the matter of rules governing apprenticeships no fixed system seems to prevail, nor any desire to interfere with company regulation.

As to promotions, the prevailing sentiment favors making length of service the determining factor, where other things are equal, and the bringing of men from the outside to fill positions is spoken of as a cause of dissatisfaction in one of the brotherhoods. Those who speak for the principal orders are unanimous in expressing their belief in the good results attending such associations, not only to those who are thus banded together, but to the employing companies. It is insisted that a more trustworthy and efficient class of men is secured thereby. One of the organizations, in particular, makes sobriety a condition of membership, and deviation therefrom a cause for expulsion. Harmonious relations between employers and employes are noticed in several communications.

The inquiries addressed to the railroad companies are quite fully answered and embody

much valuable information. All to whom the circular was addressed have responded fully, and, of the eighty-five answering, twelve appear to have instituted insurance funds in the interests of their men; five others have hospital funds; five have benefit associations, supported wholly by employes; one contributes annually \$500 for a like purpose, and one contemplates starting an insurance department at an early day. Fifty per cent of the lines heard from furnish eating or lodging houses to their employes needing them. Twenty of them provide technical education to a greater or less extent, but in all cases where no regular technical training is supplied as such training the apprenticeship system prevails or men are selected who have proved their competency by actual service. It is plain from the responses obtained from both classes that with the growth of closer relations between employes and the corporations not only are the interests of both greatly promoted, but the public is assured of better and more efficient transportation service.

RAILROADS IN FOREIGN COUNTRIES.

In January, 1888, the Commission addressed a communication to the Secretary of State, expressing the desire that the Commission should be furnished with copies of such publications relating to railroads and internal commerce as are issued by foreign governments, and requesting his assistance in procuring the same. In compliance therewith the State Department transmitted to the Commission documents pertaining to railroads in China, Japan, Persia, Norway and Sweden, Netherlands, Dutch Colonial Possessions, Russia, Island of Trinidad, Uruguay and Paraguay, Argentine Republic, Chili and Mexico. Extracts from some of these documents and abstracts of others are attached hereto. (Appendix 12.) The Commission is in possession of much information from other sources in respect of railroads in other foreign countries, which need not however be given at this time.

HOW THE ACT HAS BEEN ADMINISTERED.

The general course pursued by the Commission in the practical administration of the provisions of the Statute, and the scope of its authority, are proper subjects of public interest.

The paramount aim of the Commission has been the object for which the Statute was enacted, namely, to bring the transportation business of the country under the control of its provisions. Undoubtedly the first duty of an administrative officer is to give effect to the law under which he acts. Much depends, however, on the manner in which this is done, and misdirected energy may render a law nugatory. A fanatical or sensational course rarely leads to good results, but, on the contrary, usually provokes antagonisms, and often tends to defiance of the law itself.

When a law relates to great business interests intended to be governed by its provisions throughout the whole extent of a vast country with many diverse characteristics, great care is required to so administer the law that it shall be respected and obeyed. In a matter of such magnitude and importance as the transportation business of this country many other things

are required besides prosecutions for violations. Careful interpretations of the provisions of the Law, correct knowledge of the subjects to which it applies, and of any distinctions in conditions that may modify its application, are necessary, in order that it may be intelligently applied. A reasonable time was also required to enable business interests generally to become familiarized with the changed methods under the Law, and for carriers to adjust their classifications and schedules and their modes of business to the new requirements.

It was deemed a matter of primary importance to bring the interests affected into harmonious relations to the Law, and to understand that, while it revolutionizes certain methods, it is something more than a merely punitive statute, defining crimes and providing for their punishment, and that its ultimate purpose is the general good of the country, not less of the carriers themselves than of the public. This may involve what is sometimes called an educational process, but when many courses of long standing are to be unlearned, as well as right courses to be learned, it is an important process in dealing with intelligent men, not essentially bad nor engaged in criminal pursuits, but whose faults were in many respects wrong methods in the conduct of a legitimate business, in which they had too often been taught that success might be regarded as justifying the methods employed. A standard of right and wrong as well as of legal duty was to be set up, and conformity to this standard induced, if possible, by the conviction that their true interests would be better promoted. The numerous complaints from parties interested, calling for investigation and decision, and the opportunities they afforded for explaining the principles of the Law and pointing out the rules to be observed, it was thought would for a time largely aid in producing this conviction, and perhaps suffice in the form of prosecutions. It was not doubted that, if the carriers of the country, managed in great part by well-informed and able men, could become convinced that compliance with the Law would result in better relations between themselves and between carriers as a class and the public, and that their interests would be subserved in consequence, only exceptional instances would remain to be dealt with by punitive methods.

Much attention, therefore, has been given to this aspect of administration, and the Commission believes that upon the whole good results have followed, and that the body of the carriers of the country are in accord with its efforts in this direction and desirous in general to co-operate in the enforcement of the Law.

In consideration of the motives that usually influence human conduct in great business affairs in which the whole country is concerned, it was believed that at the outset at least, and until leading principles were fairly settled, it would be more profitable for the Commission for the most part to lay down rules of conduct for the present and future, and by frequent conference and intercourse with managers to have those rules observed, than to devote its time mainly to instituting and conducting penal and criminal prosecutions. There is also in the public mind a sense of incongruity be-

tween the prosecuting function, involving as it does detective methods and an attitude of hostility, and the judicial function, rightly expected to require impartial and just investigation and decision of controverted questions of law and fact. It is a fundamental principle, and generally provided for by statutes, that every man shall have a fair trial before a tribunal free from any possible bias that might arise from relationship, interest in the result, or partisan connection as attorney or counsel, or who may become a prosecutor in the transaction.

It is not intended to be implied that official prosecutions should not be instituted directly by the Commission. The enforcement of the law by the methods provided for in the Act is part, and a material part, of its duty, and prosecutions constitute one of those methods. It is only meant that prosecutions in the courts, inaugurated and carried on by the Commission, would necessarily have superseded other duties that were more useful and apparently more important. The preparation and conduct of prosecutions, if made the main duty, would inevitably occupy nearly the whole time of the Commission, and leave little opportunity for other matters. Such prosecutions must take place in the United States courts. They are not cognizable before the Commission. The jurisdiction of the Commission does not cover suits for penalties or criminal indictments. The theory of the Act is similar to that upon which several state commissions have been created, that the Commission shall investigate and report its conclusions of fact and law, and in certain instances award reparation for damages, but that its determinations are only enforceable in the courts, for which purpose its conclusions of fact are *prima facie* evidence.

The publicity that ensues from the exposure of practices or acts that are wrong, or in contravention of the Statute, brings the force of public opinion to bear upon them, an element of great importance in the administration of all laws, and the conclusions, or even suggestions, of the Commission are almost invariably acquiesced in by the carriers.

Any person is at liberty to prosecute in the courts for penalties or crimes under the Act, or for infractions of its provisions; and any party to a proceeding before the Commission may resort to the courts to have its conclusions or awards enforced in a summary way. One serious difficulty, however, that exists in penal and criminal prosecutions, is in procuring testimony to show violations of the Statute. The more public violations, such as failures to file and publish tariff schedules, or greater charges for shorter than for longer distances when not claimed to be justified under the Law, are of rare occurrence, and no one is a party to them except the carrier; but violations of a more private character, such as rebates or discriminations in rates for freight or passengers, or underbilling or false billing of traffic, cannot exist without complicity between the shippers and the carriers. These are never open or public, but secret. The interest of both parties to the transaction requires concealment, as well to escape the penalties of the Law as for other reasons. Proof of such cases is obviously difficult to obtain. Instances occur in which

the inference is strong that some feature of the Law has been violated or evaded, but inferences to warrant convictions must be drawn from facts and circumstances proved, and when both parties to such transactions are interested in keeping them secret, or liable to similar punishment, the necessary evidence of the facts tending to show culpability of a carrier, or of some officer or agent, is not easily procured. And the settled principle of our jurisprudence that protects a man from giving compulsory evidence criminating himself is a shield under which offenses may frequently hide.

The provision in the Act that the claim that testimony may tend to criminate the witness shall not excuse him from testifying, but that his evidence shall not be used against him on the trial of any criminal proceeding, does not entirely meet this difficulty.

These observations indicate, in a general way, the considerations that for a time have governed the action of the Commission. The time has come, however, when more aggressive steps can properly be taken. No excuse can longer be made that the Law is not understood or that sufficient time has not elapsed to give the carriers opportunity to conform their methods to its requirements.

AMENDMENTS TO THE ACT.

The twenty-first section of the Statute requires the Commission to report to Congress such recommendations as to additional legislation relating to the regulation of commerce as it may deem necessary. Pursuant to this requirement, the Commission reports that, in the practical administration of the Law, it has become convinced that certain additional legislation, some in the form of amendments to existing sections, and others in the form of additional sections, is important and necessary.

These may be briefly summarized as follows:

(1) An amendment to the first section correcting some ambiguities of language, and making more definite and certain the transportation, both interstate and international, intended to be subject to the provisions of the Act.

(2) An amendment to the third section relating to the routing and the interchanges of traffic between carriers, so as to better provide for through traffic at through rates over connecting lines. This amendment was recommended in the report for the year 1888, and is now repeated.

(3) An amendment to the twelfth section, relating to the attendance of witnesses, and to the taking of testimony by deposition. Objection has been made that the attendance of witnesses cannot be required outside of the judicial district in which they reside. The Commission believes the objection is not well founded, and that the Law could not be effectually administered under such a rule. As the fact that the objection has been made indicates that obstructions and delays may occur, it is better that the language of the Act should be open to no misconstruction.

Depositions are authorized by law to be taken for use in the federal courts, but there is now no provision for taking testimony by deposition to be used before the Commission, and it can

only be done by the consent of parties. This practice has been followed in many instances, but it is obvious that it ought not to be merely voluntary. As the taking of testimony in that manner is a great convenience and lessens expense as well as facilitates business, it should manifestly be authorized.

(4) An amendment to the twenty-second section, providing that the provisions of the Act shall not prevent the free carriage of persons injured in railroad accidents and the physicians and nurses for attendance upon and care of persons so injured, nor prevent the transportation free or at reduced rates of the actual resident members of the families of employes of railroad companies.

Some other matters deemed necessary to be provided for by additional legislation would perhaps be more appropriate for new or supplemental sections to the Act than as amendments to existing sections. These are:

First. The prohibition of the payment of commissions by one railroad company to ticket agents of another railroad company for passenger transportation, and the like prohibition of commissions for soliciting or procuring traffic to outside organizations or persons.

Second. The abolition of ticket brokerage by requiring, as elsewhere suggested in this Report, that every person who sells passenger tickets shall be duly authorized by the company for which he sells, and exhibit his authority, and that the company shall be responsible for his Acts. If deemed practicable, the price at which the ticket may be sold might also be required to be stamped upon the ticket. And further, requiring companies that sell excursion tickets to redeem unused coupons.

Third. The regulation of the payment of car mileage for the use of cars of private companies or individuals.

Fourth. An extension of the Law to make it apply to common carriers by water.

Other subjects upon which legislation may be deemed expedient are discussed in this Report without recommendation, and submitted to the consideration of Congress.

Other documents published in the Appendix, but not heretofore mentioned as a part thereof, are the amended Act to Regulate Commerce and the amended Rules of Practice adopted by the Commission. (Appendix 13 and 14.)

All of which is respectfully submitted.

THOMAS M. COOLEY,
WILLIAM R. MORRISON,
AUGUSTUS SCHOONMAKER,
WALTER L. BRAGG,
WHEELOCK G. VEAZEY,

Interstate Commerce Commissioners.

THE APPENDICES to the foregoing Report are outlined as follows:

APPENDIX 1.

Appropriation, statement of expenditures and persons employed by the Commission.

APPENDIX 2.

Circular of March 12, 1889. (*Ante*, p. 665.)

APPENDIX 3.

Circular of March 23, 1889, superseding that of March, 7, 1889. (*Ante*, p. 453.)

APPENDIX 4.

Statement of points decided by the Commission during the year ending November 30, 1889.

(Here follow the syllabi to all the opinions filed by the Commission during the year mentioned. These appear in their respective places at the head of the opinions, which are all contained in this book, and are pointed to in the index.—Ed.)

Extracts from docket and records of Commission, showing complaints pending during the year, under section 13 of the Act to Regulate Commerce, and disposition or present condition of each.

(These show time of filing complaints and answers, and abstracts of complaints and orders, all of which appear in the preceding pages of this volume.—Ed.)

Statement of important points decided by the Commission since its organization, as follows:

Abstract questions.
Books, papers and documents.
Burden of proof.
Carload rates.
Carriers.
Circumstances and conditions.
Classification.
Commissions on sale of tickets.
Complaints.
Cost of carriage.
Concession of relief.
Construction.
Commerce.
Continuous carriage of freights.
Evidence.
Export rates.
Express companies.
Facilities for traffic.
Interstate commerce.
Interstate Commerce Commission.
Joint tariffs.
Live stock.
Long and short haul clause.
Milage tickets.
Milling in transit.
Parties.
Passengers.
Pending proceedings.
Practice.
Preference and advantage.
Rates.
Rates unreasonably low.
Reasonable rates.
Rehearing.
Relative rates.
Replication.
Reparation.
Subpena duces tecum.
Tariffs.
Through rates.
Tickets.
Underbilling.

Unjust discrimination.
Water and rail lines.
Water competition.

(All these appear, both in the index and preceding pages of this volume.—Ed.)

APPENDIX 5.

Report of investigation of methods of keeping freight accounts.

(While this report, signed by the auditor of the Commission, does not appear in these pages, it is not deemed necessary to insert it or an abstract of it in these Reports, for the reason that it relates more to systematizing for the sake of the convenience of uniformity in the details of the accounting departments of railways, rather than to decisions of the Commission.—Ed.)

APPENDIX 6.

Circular letter of April 10, 1889. (*Ante*, p. 676.)

APPENDIX 7.

Freight classifications.

(This relates to the different classifications of freights in different sections of territory adopted by the railroads and some of the steamship associations of the United States.—Ed.)

APPENDIX 8.

Canadian railways.

(Specifying the important Canadian railways, their location, connections, milage, and the rates and routing to and from American points.)

APPENDIX 9.

List of state railroads claiming not to be subject to the Act to Regulate Commerce, and that they need not make annual reports to the Commission.

APPENDIX 10.

Federal regulation of safety appliances.

(References are here made to and reports given of circular letters of the Commission upon the subject, *ante*, pp. 676, 677, also summary of accidents, hazard to passengers, replies to the circulars, statistics, etc.—Ed.)

APPENDIX 11.

Relations existing between railway corporations and their employes.

(Here is given a copy of the circular letter of August 12, 1889, *ante*, p. 640, sent to eighty-five leading railway corporations, and replies thereto; also letter of August 1, 1889, *ante*, p. 640, sent to labor organizations, under the head "Insurance, Rules of Apprenticeship, and Grades of Service," and replies thereto.—Ed.)

APPENDIX 12.

Railroads in foreign countries.

Abstract of and extracts from papers transmitted from the Department of State to the Inter-

state Commerce Commission upon the subject of foreign railroads.

(Here follow papers conveying information in regard to the railway systems and their extension in China, Japan, Norway and Sweden, the Netherlands, Dutch colonial possessions, Russia, the Island of Trinidad, Uruguay and Paraguay, the Argentine Republic, Chili and Mexico.)

APPENDIX 13.

The Act to Regulate Commerce, approved February 4, 1887, and in effect April 5, 1887 (U. S. Stat. at L. Vol. 24, p. 379—Public No. 41), as amended by Act approved and in effect

March 2, 1889 (U. S. Stat. at L. Vol. 25, p. 855—Public No. 125).

(See original Act, 1 Inters. Com. Rep. 3, and amended Act, Appendix II. in this volume, p. xli).

APPENDIX 14.

Revised and amended Rules of Practice in cases and proceedings before the Commission, with Forms for Complaints, Answers, Notices, etc., adopted June 8, 1889, and copies of §§ 863 and 864 of the Revised Statutes of the United States.

(These Rules and Forms will be found in Appendix IV. to this volume).

INTERSTATE COMMERCE COMMISSION.

Hervy BATES and H. Bates, Jr.,
v.

THE PENNSYLVANIA R. CO. and The
Pennsylvania Co.

(No. 231.)

- 1. The defense of water competition from Chicago and the lake shipping points to seaboard points east, as a justification for an otherwise unjustifiable discrimination in rate between corn and its direct products from Indianapolis to said seaboard points, was held to be untenable, owing to the situation of Indianapolis as to the lakes and to the location of the territory where the corn was mainly raised that was marketed at Indianapolis, and to the other facts established in this case.**
- 2. Where an existing classification and rate are not shown to operate injuriously to the carriers from a given point or to give undue advantage to shippers, a change is not justifiable that materially injures an important industry and a class of shippers at that point who have there built up the industry in reliance upon a continuation of the previous classification and rate first established and long maintained by the carriers themselves without complaint from any quarter. Such change in classification and rate would subject the persons engaged in the industry and the locality and the particular traffic to unreasonable disadvantage within the prohibition of section three of the Act to Regulate Commerce.**
- 3. A discrimination between the rate on corn and its direct products from a given locality resulting from a reduction of the rate on corn below the rate on its direct products, which subjected persons in that locality engaged in the business of manufacturing corn into its direct products and of selling the same to unreasonable prejudice or disadvantage; and was without necessity or advantage to the carrier, or any reason founded on the character or condition**

of the traffic,—*Held, to be in violation of section three of the Act to Regulate Commerce*, notwithstanding the new rate on corn was open to all persons equally and with equal service.

- 4. When carriers other than the respondents of record are committing the same violations of the Act to Regulate Commerce as the respondents, an order may issue against the respondents and the cause be held for the purpose of bringing such other carriers into it to be proceeded against unless they comply with the order.**

(Heard at Indianapolis September 17, 1889.—Leave to appear and be heard granted to the Baltimore & Ohio R. Co. October 31, 1889.—Brief on behalf of Baltimore & Ohio Co. filed November 22, 1889.—Decided February 7, 1890.)

PETITION for relief from alleged unjust discrimination in the rates of transportation of corn and its products from Indianapolis, Ind., to seaboard points. *Granted, and cause retained for the purpose of citing other railroad companies as parties.*

For abstract of complaint filed August 29, 1889, see *ante*, p. 608. It also appears in the opinion. Answers were filed September 12 and 13, 1889, of which the substance is stated in the opinion.

The facts found are also stated in the opinion.

Mr. W. A. Ketcham for complainants.

Mr. J. T. Brooks for defendants.

Messrs. John K. Cowen and Hugh L. Bond, Jr., for Baltimore & O. R. Co.

Veazey, Commissioner:

The complaint in this case charged that Hervy Bates and H. Bates, Jr., are engaged in the business of milling at Indianapolis, Indiana, operating and carrying on the mills known as the Indianapolis Hominy Mills; that the defendants are common carriers by railroad between Indianapolis, in the State of Indiana, and New York, in the State of New York, and subject to the Act to Regulate Commerce; that by the terms of their freight tariff in force they persist in a serious and ruinous discrimination against the business of the complainants, and to the corresponding advantage and profit of certain and all millers making the same, or sim-

ilar goods, at or near the seaboard, or in the various cities at or near the eastern termini of said railroads, in that they charge and collect as freight charges on corn transported from said City of Indianapolis to said City of New York, at the rate of eighteen and one half cents per hundred pounds weight; while contemporaneously and under similar conditions charging and collecting as freight charges on ground corn, cracked corn and corn meal, grits and hominy, and the refuse from the manufacture of said products, called feed, at the rate of twenty-three cents per hundred pounds weight, thereby giving a direct and immediate advantage to millers at or near the eastern termini of said defendants' railroads of four and one half cents per hundred pounds, and placing upon the complainants a disadvantage and consequent loss exactly corresponding to the gain of these eastern competitors; that the goods manufactured by the Indianapolis Hominy Mills are largely and mostly sold in New York and other eastern cities, and that the business of complainants has grown to its present large proportions nurtured through many years by a freight tariff from Indianapolis to the seaboard always equal to and no more than the tariff on the whole grain, and that it is but recently that mills making the same or similar goods have been established in the eastern part of the country. That such discrimination is ruinous in the extreme is shown by the fact that two and eight tenths cents per bushel on the price of corn (5c. per cwt.) is sufficient to absorb the profits of any western mill for the past three years some three or more times.

Each defendant answered separately, but in substance the same, denying all averments of violations of the Interstate Commerce Law by discriminations as alleged in the complaint, but admitting that the rates charged for raw corn and its products were as alleged therein, and averring that the rate of twenty-three cents for transportation of corn products is just and reasonable and the rate of eighteen and one half cents per hundred pounds for transportation of raw corn is not as much as it should be, but denying that the difference in rates for the transportation of corn and corn products is an unlawful discrimination against complainants.

The defendants respectively averred that the rate of eighteen and one half cents per hundred on corn is forced upon them and other railway lines of transportation between Indianapolis and New York City and other eastern cities by northern lines of transportation which are made up wholly of lake and canal or partly lake and canal and partly rail routes; that the price charged by these northern water routes for the transportation of corn to New York City and other eastern cities is much less than eighteen and one half cents per hundred, and unless defendants and other rail routes extending from Indianapolis eastward should reduce their rates for transportation of corn to eighteen and one half cents per hundred, no corn would be offered to defendants for transportation eastward. Defendants further say that the rail routes extending from Indianapolis eastward transport only about six hundred thousand bushels of corn per year, while the northern water routes above mentioned transport annually about fifteen million bushels;

2 INTER S.

and the defendants aver that whatever disadvantage complainants incur in consequence of difference between rates charged on corn and corn products arises from the fact that the northern water routes transport corn eastward in such large quantities and at such low rates in comparison with what the defendant Companies do, and from the further fact that it is impossible for the complainants doing business at Indianapolis to be on an equality with competitors in business who are so situated as to have the advantage of water routes of transportation.

It is found from the evidence that in the railroad official classification of corn and its direct or immediate products, such as ground corn, cracked corn, corn meal, grits, hominy and feed, they have all for twenty years, more or less, been in the sixth class, and were so classified by the defendant Companies and other railroad companies constituting the railroad routes between Indianapolis and eastern seaboard points; that this classification continued until July, 1889, and that until the last-named date there has been no discrimination in rate between raw corn and its immediate products; that on the said 1st of July the rate on raw corn as well as its direct products was and had been previously thereto twenty-five cents per hundred pounds by rail from Chicago to New York and other eastern seaboard points, and that on that basis the charge was and had been twenty-three cents from Indianapolis to New York, as the fair proportion of the rate from Chicago to New York on account of the less distance from Indianapolis; that about the 10th of July a reduced rate was put into effect to the seaboard on corn. This reduced rate was first made by the Baltimore & Ohio Railroad Company and was soon followed by the defendants and other companies. This resulted in negotiations between railroad companies, and an agreement was finally effected to make the rate on corn products between Chicago and eastern seaboard points twenty-five cents per hundred pounds and the rate on raw corn twenty cents, and the rate from Indianapolis to the same points was fixed at eighteen and one half cents on corn and twenty-three cents on its products, this being a fair proportion of the last-named Chicago rates.

It is further found that twenty-three cents per hundred pounds is not an unreasonable charge for the transportation of corn products from Indianapolis to the seaboard and that the rate of eighteen and one half cents per hundred pounds on corn produced but little profit under favorable circumstances, and sometimes none to the carrier, but that the railroad would rather carry it at that rate than not to transport it. The evidence tended to show, and there was no evidence to the contrary, that no reason founded on cost of service existed for difference in rates between corn and corn products, and it is found upon the showing in this case that the defendant Companies could afford to carry the direct corn products at the same rate that they could afford to transport the raw corn.

It is further found that the rate for the transportation of corn from Chicago to New York by water, through lake and canal, is and has always been a varying rate, depending upon supply and demand of traffic and vessels for

the service, but always as low as twenty cents per hundred pounds and generally lower. It was clearly established that the proportion of corn carried east from Chicago by water, as compared with that which is transported by rail, is very much larger. The corn raised easterly of the line of the Chicago & Eastern Illinois Railroad does not to any great extent go to Chicago in its transportation to eastern markets but is carried east by the railroad lines.

The corn raised west of the said described line does, as a rule, find its way to market through Chicago. This was the condition before the said reduction in rates last July and there has been no apparent change since. That is, the same proportion went by Chicago prior to July that has gone since the reduction in the rate on corn was made by taking the corn out of the classification and making a commodity tariff.

One of the complainants testified that this change in the classification of corn and the consequent change in rate thereon affected their business injuriously and it is found that their milling business has suffered materially since that change. One of the complainants testified, and it is so found, that they have been obliged to pay more for corn since said change than they had to pay before. The complainants have been engaged in the milling business in Indianapolis as alleged in their complaint, for the last five years, and marketed the product of their mills largely at seaboard points in the east. There are many similar mills at different places in the east, some constructed more or less recently and others which have been in operation for a great many years. The market for their product and also for that of complainants' mills was mainly in the east.

It having appeared on the trial that the Baltimore and Ohio Railroad Company might be directly or indirectly interested in the determination of the cause, an order was made that said Company be notified of the pendency of the same and be given an opportunity to be heard therein and to signify its purpose in that behalf. In reply thereto said Company signified its desire to be heard and submit an argument, whereupon an order to that effect was issued, and said Company appeared and submitted a printed brief.

Other facts will be alluded to.

Counsel for complainants insisted in argument that the evidence had well established the facts averred in the petition, and denied that it was water competition that forced the alleged discrimination. Therefore they asked, not to have the old rates on corn restored, or the rate on corn products reduced to the rates on corn, but to have the discrimination undone and a classification re-established that would include as formerly both corn and the direct products of corn in the same class.

The counsel for the respondent Companies first protested against a decision regulating only their respective rates on corn and corn products, but leaving their six competitors between Indianapolis and the seaboard free to continue the present classification and rate.

They made the further point in argument as in their respective answers: first, that it was necessary to reduce the rate on raw corn from twenty-three cents per hundred pounds to eight

teen and one half cents from Indianapolis to New York by reason of the water competition by lake and canal from Chicago and other lake points in order to get the traffic; that in short, the reduction was forced by water competition. We take up this point before referring to other matters of defense.

Indianapolis is situated at distances from different lake shipping points of from 154 to 327 miles. The shortest rail route to Chicago is 183 miles; and to Toledo 213 miles. Its situation is to the south of these and the other lake shipping points. The amount of corn going east from or through Indianapolis is comparatively small. Whatever traffic of this kind there was, came from the territory mainly east of the line of the Chicago & Eastern Illinois Railroad, and as to such corn the testimony was undisputed that the Chicago lake routes do not interfere very largely with the traffic coming by rail east of that line. We think it a fair deduction from the evidence that the corn reached by the Indianapolis millers or that found a market at or through that city was not produced in a section where it naturally or advantageously, to much extent, became the subject of water transportation east. Undoubtedly the cheap water transportation from actual lake points east, although so distant from Indianapolis and the region where the corn was mainly raised that had before the reduction found a market at Indianapolis, would naturally influence to some extent railroad companies in making rates east from said city. It would perhaps be difficult to locate a railroad of any considerable length and having a large traffic anywhere in our country outside of all influence of water competition in respect of rates for transportation, at some points along its line. But we are fully satisfied that in view of the distance of Indianapolis from water transportation and of its location as a market for corn brought there for manufacture into its direct products or for sale to the eastern trade, the northern water routes to eastern points were not so potent as to necessitate a reduction of the rate to the point reached in this case in order to enable the railroads running east from Indianapolis to retain their usual corn traffic from that point.

It is quite apparent from intimations of some witnesses in the cause, and from statements in the brief of the Baltimore & Ohio Company, that the purpose of that Company in making the new commodity tariff and rate on corn was to obtain the tariff from Chicago for export at Philadelphia and Baltimore. It may be true, as claimed, that in order to obtain corn for European shipment at those points it was necessary for the railroads reaching them from Chicago to measurably meet the rates by lake and canal or lake and rail between Chicago and New York. On a twenty cents basis per hundred from Chicago to New York the rate to Philadelphia and Baltimore under the established rule of differentials to those cities would be eighteen and seventeen cents respectively. The lines from Chicago having adopted this basis and rate from Chicago, undoubtedly influenced by the action of the Baltimore and Ohio Company, made it apply also to Indianapolis and vicinity. The result was to greatly disturb and injure the milling industry in and about Indianapolis, which used corn pro-

duced in a section so situated as to the lakes that it did not get the benefit of water transportation, and was not the corn that the Baltimore & Ohio and other railroad companies competed for against water transportation. They desired the corn that naturally sought market at and through Chicago, not corn usually collected for the mills at Indianapolis. There was therefore no occasion for reducing the rate on corn below the rate on the direct products of corn, at Indianapolis, for any purpose that the railroads had in view at Chicago. The question is not whether the reduction in rate on corn from Chicago without like reduction on the products of corn was justifiable on the score of water competition. The question is limited to the propriety of the discrimination between the two kinds of traffic from Indianapolis on that ground. On this question we think that water competition was not shown to make it necessary.

The question remains whether the action of the respondent Companies in making a reduction of rate on corn from Indianapolis to seaboard points by taking it out of the classification with the products of corn and making a commodity tariff violated the third section of the Act to Regulate Commerce. One provision of the section is: "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The facts on this point are as follows: The respondent Companies and others operating railroads as common carriers from Indianapolis to the seaboard had previous to the said reduction of last July always included corn and the direct products of corn in the sixth class and thereby given them the same rate. About five years ago the complainants entered upon the business at Indianapolis of buying and grinding corn and selling its direct products in the East or near seaboard points where the principal market for such products exists. Others there and in that vicinity had engaged in the same industry, making investment in plant for the purpose, and all relying upon a continuation of the same classification that the railroads had made and maintained from the first. Suddenly a discrimination was made between corn and its direct products amounting to four and one half cents per hundred pounds in the rate from Indianapolis to the seaboard. The market for the product being in the east it is plain that it would be folly to grind the corn in the west and transport the product, when four and one half cents per hundred pounds could be saved by transporting the corn to the eastern market and grinding it there, when presumably it could be done at about the same cost at both points. It did not need the testimony of witnesses, although it was produced, to prove that the discrimination in rates between corn and its products brought serious injury to the milling industry at the point where the discrimination took effect; it is plain that the result could not

be otherwise. The complainants' investment, made in reliance upon a condition which the railroads had established, became practically valueless. The railroads had and would continue to have the whole transportation of the corn traffic, either as raw corn or in the product, from that point. It was equally valuable to them whether in the one form or in the other. As before stated, water competition was not operative at Indianapolis to the extent required under previous rulings of this Commission, in order to amount to full defense in this case. *Harwell et al. v. C. & W. R. R. Co. et al.* 1 Inters. Com. Rep. 631, 1 I. C. C. Rep. 236. The said change in classification and rate was, so far as shown in this case, without necessity from the railroad standpoint, and arbitrary. It is said in the brief in behalf of the Baltimore & Ohio Company that the old classification was wrong and always had been, and violated some of the conceded principles that should control classification, and that railroads should not be held to existing classifications that were false and wrong in principle. It may be conceded that this last claim as a general proposition is sound, and it is true that the manufactured product of corn is commercially a little more valuable than the corn before manufacture; but notwithstanding that fact and that value is one of the elements that enter into classification, yet the proof is abundant in this case that the increased value of the product over the corn was counterbalanced by other advantages in the transportation of the product, and on the whole the transportation of each at the same rate was equally valuable to the carrier. Of course this Commission would not hold that a classification that was wrong should be adhered to, although its change might work injury to individuals whom the wrong classification had unduly favored. But such is not this case. The point here is whether, where an existing classification and rate are not shown to operate injuriously to the carrier from a given point, or to give undue advantage to shippers, a change is justifiable that materially injures an important industry and a class of shippers at that point who have there built up the industry in reliance upon the continuation of a previous classification and rate first established and long maintained by the carriers themselves without complaint from any quarter. We think not. We think it subjects the persons engaged in the industry and the locality and the particular traffic to unreasonable disadvantage.

It is to be kept in mind that the petitioners do not complain of a reduction in rate but of a discrimination between the two kinds of traffic, the effect of which has been as disastrous to them as though there had been an advance in rate sufficient to materially cripple their industry. Two facts stand undisputed: first, the discrimination; second, the fatal effect upon the industry. We think in addition the evidence utterly fails to show necessity for the change in order to secure the traffic or to show any resulting advantage to the carrier. We have then a disadvantage to persons in a given locality as a result of the discrimination in transportation without necessity or even advantage to the carrier or any reason founded on the character or conditions of the traffic. We think such a disadvantage is unreasonable with-

in the meaning of the term as used in the third section of the Act.

We think that but little importance should be attached to the statement that the price of corn in the territory of its production as reached by the complainants as aforesaid went up after the discrimination in rate was made between corn and its products. The facts are too meagre and the period of time too short to warrant conclusions as to cause and effect in the premises. Indeed, in view of the fact that the eastern millers could avail themselves of a water rate on corn so low, lower even than the reduced rate by rail, it would seem as though a rise in price of corn in the territory described in the testimony could not have been occasioned by the reduction of rate by rail carriers. Values are affected in so many ways that it is often difficult to find the true cause for the constant fluctuations, and it is unsafe to attribute cause to any single circumstance. Testimony as to it must be mere opinion, and the variance of opinions is often commensurate with the number expressed. But even if the reduction in rate enhanced the price, it does not affect the real question in this case, because, as before stated, the complaint here is not of unreasonableness of rate, but of discrimination in rates between the raw corn and its direct products. Under the old classification and rate the miller was just as well off whether his mill was at Indianapolis or New York. He now wants the same advantage restored to him unless good cause can be shown why it should not be restored. Because he has happened to locate his mill at Indianapolis instead of New York he does not want its value destroyed by the arbitrary discrimination of a carrier which its interest does not require. The discrimination adopted affects him the same, whatever may be the price of corn.

But respondent's counsel maintained further that there was no such relation between corn and the direct products of corn that the rate on one should be fixed with reference to the rate on the other; that where one compares the actions of railroad companies in respect to the various kinds of traffic the standard of comparison is clearly recognized; but where one undertakes to compare traffic of one kind with traffic of another the standard is lost and no reliable guide remains; that carriers comply with their duties and obligations under the Law, if, in so far as the products of corn are concerned, they treat all dealers in that product alike; that it was never the intention that the rates on a certain kind of traffic should be fixed with reference to the rates on a different kind of traffic; and that if men engaged in a certain kind of employment are all treated alike in respect to their uniform product, and the facilities which are given to them; and that if equality of service is given as between two localities, engaged in the same business,—that this is all that the Interstate Commerce Act undertakes to do.

The real point of this argument is that whatever the other facts may be, aside from the fact that corn and the direct products of corn are two different articles, and however much disadvantage the thing done by the carrier may operate upon the shipper, and however much it may violate the general fundamental

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idea of equality that underlies the Act to Regulate Commerce, yet the Act is so framed that there can be no remedy in this case. The point raises the legal question of construction pure and simple, irrespective of consequences upon shipper or carrier.

This leads to careful inspection of the language of the clause which is quoted above. The thing declared to be unlawful is, to subject a person, locality or traffic to undue or unreasonable prejudice or disadvantage in any respect whatever. If we are correct in our conclusions upon the other points above discussed, this unlawful thing has been done in substance. The answer made is that it has not been technically done within the meaning of the Act, because in the treatment of corn by the defendants there has been no discrimination as to any particular person or locality or description of traffic. This is perhaps true, if it is proper to ignore all relation between corn and the corn product, and to assume that in interpreting the Statute in its application to the facts in the case, we are to see nothing but corn.

If this is the true idea of the Statute, then it must be so held, notwithstanding it would plainly give carriers such power of manipulation in classification as to utterly destroy and render nugatory the real intent and purpose of the enactment. As stated in *Pyle & Sons v. The East Tennessee, Virginia & Georgia R. Co.* 1 Inters. Com. Rep. 767, 1 I. C. C. Rep. 465, "classification is but a means of arriving at a rate."

The scope of the language of the Statute is to be specially noted: "Any undue or unreasonable prejudice or disadvantage in any respect whatever." This is certainly broad enough to cover the case in hand. It is easy to see a close relation between corn and corn meal; how the price of one must depend on the price of the other, and how quickly benefits or injuries to localities and individuals must result from a change of transportation rate on either alone.

By process of grinding corn takes a new form, but its essential properties are not thereby changed. It is still, in substance, the same article of food. In the construction of a remedial statute a tribunal is not to seek for narrow views that would defeat the underlying principle of the enactment. If a person, locality or traffic has been subjected by an act of the carrier to a disadvantage not imposed by impelling and controlling considerations for which the carrier is not responsible, we think the above clause of the Statute applies, notwithstanding this act of the carrier working the wrong is not limited in terms in the tariff-sheet to particular persons or particular description of traffic. True, the classification and rate complained of is general in form, applying to all persons alike; but in its operation only the individuals of a certain locality suffer from it. It is as to them as essentially a disadvantage as though it was in terms limited to them. In the construction of a clause of a statute containing numerous and varied remedial provisions it must be weighed in connection with the entire enactment. Its meaning and intent must be deduced from the language used, but the general spirit and purpose of the enactment

as a whole should be considered in arriving at the scope of each clause. Keeping in mind this as well as other rules of construction, it seems to us plain that, as to the provision now under consideration, any unjustifiable act of a carrier that subjects a person, locality or particular traffic to the prejudice or disadvantage specified, is within its prohibition.

These are our views on the leading points raised and discussed in this case, upon the evidence produced. Its determination has been delayed by various causes; among them was this: Other cases are pending before this Commission, raising the same general question, but under different circumstances and conditions, and it was hoped they might be heard and decided with this case, as is common where similar cases are pending at the same time, and thereby some general principles broader than those here discussed might be settled. But such other cases have not yet been fully heard and submitted for decision; and we have not felt at liberty to delay this case longer. It should not be overlooked, in view of the pendency of the other cases alluded to, that we have only dealt with this case upon the restricted grounds upon which it was tried, basing the decision upon the precise facts found and about which there was but little dispute.

Our conclusion is that an order issue requiring the Pennsylvania Railroad Company and the Pennsylvania Company and the Baltimore & Ohio Railroad Company to make the transportation rate from Indianapolis to seaboard points on corn and on its direct or immediate products, viz.: ground corn, cracked corn, corn meal, grits, hominy and feed, the same, and that the discrimination in rate now existing between said points between corn and the direct or immediate products of corn, as aforesaid, be discontinued by February 20, 1890; and that the cause be retained by the Commission for the purpose of citing in as parties the other railroad companies leading from Indianapolis to eastern points, viz.: The Lake Erie and Western Railroad, the Ohio, Indiana & Western Railway, the Cincinnati, Hamilton & Indianapolis Railroad, the Cleveland, Cincinnati, Chicago & St. Louis Railway and the Louisville, New Albany & Chicago Railway, unless they comply with the above order in their transportation rates on said articles within the time above specified.

EDWARD KEMBLE

v.

THE LAKE SHORE AND MICHIGAN
SOUTHERN R. CO., The N. Y. C. & H.
R. R. Co. and The B. & A. R. Co.

(No. 251.)

ABSTRACT of complaint filed January 18, 1890, alleging unjust discrimination in freight charges from Chicago in favor of New York City and against Boston; also in favor of points east of Portland, Me., and against points west of there.

Complainant is engaged in carrying on the flour and grain business in Boston under the firm name of Kemble & Hastings.

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Respondents are Railway Companies under laws of Illinois, Indiana, Ohio, Pennsylvania, New York and Massachusetts, which form continuous lines from Chicago to New York City, or from Chicago to Boston, *via* Albany.

From April 5, 1887, to date of petition, respondents have been largely engaged in the transportation of flour and grain, in a continuous carriage thereof, from said Chicago to New York City, or from Chicago to Boston, and come within the provisions of the Interstate Commerce Act.

Such flour and grain have all passed over the line of the L. S. & M. S. Railway.

Complaints of the violation of the provisions of the Interstate Commerce Act in this: that they have charged and received from the shippers, consignees or owners of merchandise, for the transportation thereof from Chicago to Buffalo, unjust, unreasonable and unjustly discriminating rates; and specifies the following facts:

Defendants, during said period, have, for the transportation over the said Lake Shore Line from Chicago to Buffalo, of such flour and grain as were, upon their arrival at Buffalo, to be thence transported to Boston, as aforesaid, charged and collected a larger sum per hundred pounds and per carload than was charged and collected by the two first-named respondent railways for like merchandise destined for New York City, being an excess of about 2c. per 100 lbs., or about six dollars per carload of 30,000 lbs., against Boston and Boston owners and consignees, and in favor of New York and New York owners and consignees.

When such merchandise has been so transported, or billed, as aforesaid, to Boston, and has thence, by subsequent shipment, been transported by water to any ports in the State of Maine east of Portland, special rates or rebates have been, and are now, made or allowed by said railways, on the charge for the transportation from Chicago to Buffalo, the same being, as is believed and therefore averred, equal to about 2c. per 100 lbs., or six dollars per carload of 30,000 lbs.; but, on the other hand, if such merchandise has, on its arrival in Boston, been subsequently sent to Portland, or points on the coast (such as Salem or Lynn) west of Portland, or to any other points whatever in the United States, either on the coast or in the interior, and whether by rail or water, then, in such cases, no such special rates or rebates have been allowed by said railways, thus making unjust discriminations as between localities on the Maine coast east of Portland, and other localities; and between one class of Boston shippers and dealers and all other classes of such shippers and dealers, although the cost of transportation is the same in either case.

The rate from Chicago to New York, made by the two first-named respondent railways, is 25c. per 100 lbs. on sixth-class merchandise, or seventy-five dollars per carload. The rate from Chicago to Boston made by the three respondent railways is 30c. per 100 lbs., or ninety dollars per carload of 30,000 lbs., an excess of fifteen dollars per carload, according to the tariff of rates, for the carload destined to Boston, over and above the carload destined for New York, and the carload destined, by subsequent shipment, for ports in Maine east of Portland.

Of this excess the Lake Shore & Michigan Southern Railway receives about six dollars for no extra service whatever. As a matter of fact, a charge of 3c. per 100 lbs. for "lighterage" in New York is deducted from the through rate of 25c. before pro-rating, leaving 22c. instead of 25c. to be divided; so that the Lake Shore road actually receives only \$36.08 for hauling the New York car, while it receives \$46.56 for hauling the Boston car.

It appears by the premises that the said respondent railways make the charges for transporting said merchandise from Chicago (and other points west of Buffalo) to Buffalo, dependent not on the cost of such transportation, or upon other data which may properly determine such charges, but upon what may be the ultimate destination of such merchandise, or upon whether it is, after leaving the said Lake Shore line at Buffalo, destined for New York or for Boston; or upon whether it is, upon arrival in Boston, to remain there for local consumption and disposition, or destined to ports in the United States east of Portland, or to other ports, and to cities in the United States.

Investigation, etc., are prayed.

THE CHICAGO, ROCK ISLAND & PACIFIC R. CO.

v.

THE CHICAGO & ALTON R. CO.

(No. 224.)

1. **Where property is to be transported by rail by continuous and uninterrupted carriage** from one station to another, there may be sound and legal reasons for making a charge for the through transportation which is less than the sum of the locals for the transportation of like property from point to point between such stations.
2. **But where property is billed from one station to another with the understanding that it is to be unloaded at an intermediate station**, and that whether it shall be reloaded for further carriage will depend upon the volition of the shipper or of anyone who may have become purchaser, the case does not fall within the reasons governing rates on through transportation, and the carrier is not at such intermediate points entitled to have the carriage protected as a through shipment as against competitors.

(Complaint filed August 7, 1889.—Answer filed September 14, 1889.—Heard at Chicago, Ill., September 30 and October 1, 1889.—Decided February 14, 1890.)

PROCEEDING to compel respondent to desist from its alleged practice of transporting live cattle from Kansas City to Chicago at less than published rates. *Complaint dismissed.*

Complaint *ante*, p. 581, the substance of which, with answer, is also indicated in the opinion.

Mr. Thomas F. Withrow for complainant.

Mr. William Brown for defendant.

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Cooley, Chairman:

The petition in this case represents that complainant is a common carrier subject to the Act to Regulate Commerce, having its principal office in Chicago, in the State of Illinois, and engaged in the transportation of passengers and property by railroad between points west of the Missouri River and said City of Chicago.

That the respondent is also a common carrier engaged in the transportation of passengers and property by railroad between points in the State of Missouri and points in the State of Illinois, and as such is also subject to the Act to Regulate Commerce.

That the line of respondent from Kansas City to Chicago is competitive with a portion of complainant's through line between said cities.

That a certain tariff entitled "Joint Through-Freight Tariff Number Four" was issued on behalf of the railroad companies named therein, stating rates on live stock between points in Kansas, Indian Territory, Missouri and Nebraska, and Chicago, St. Louis and common points therewith, taking effect April 1st, 1889; which tariff, on file in the office of the Commission, is referred to. The names of both complainant and respondent appear as parties to said tariff, complainant's line west of the Missouri River being there designated as the Chicago, Kansas & Nebraska Railway. A large number of points west of said Missouri River are marked with a dagger, and a note referred to thereby reads as follows: "Chicago, Kansas & Nebraska rates named to and from Chicago are good only in connection with the C., R. I. & P. Railway."

That said tariff was in effect from April 1st, 1889, to July 12th, 1889, when the same was superseded by certain similar tariffs, which are also referred to, and which bear the following notation stamped in red ink upon their face, to wit: "Joint rates exist only between such lines as have divisions of the through rate."

That since April 1st, 1889, no divisions of through rates have existed between the complainant and respondent, and that the intention and effect of said notations was to advise the public of the fact that a through line did not exist for traffic from the line of complainant west of the Missouri River, over the Chicago & Alton Railroad, to Chicago.

That the course of business in the handling of live cattle traffic is as follows: Shipments of cattle are received in Kansas and Indian Territory, etc., by the complainant's line, which are there consigned by the shippers to Chicago, at the rates named in the above-mentioned tariffs, with the privilege of stopping off at Kansas City, Missouri. If the cattle stopped under this privilege are not sold at the Kansas City market, their transportation is assumed and continued to Chicago on the original billing. The respondent has claimed the right, however, in case such cattle are not sold at Kansas City, to receive the same for transportation to Chicago upon terms whereby no more was paid for the total carriage than the through rate under which they were originally billed by complainant. The through rate, up to a very recent time, was less than the sum of the local rates from originating points to Kansas City and from Kansas City to Chicago.

That cattle carried by complainant and sold at Kansas City, under the aforesaid privilege, were charged the local rate from the points of origin to Kansas City, and the claim of the respondent to accept such cattle for the remainder of the carriage to Chicago, and to protect the original through rate, made it necessary for the respondent to pay the local rates of the complainant to Kansas City, and to receive for its portion of the carriage the remainder of the through rate, which was a sum considerably less than the amount of its local rate from Kansas City to Chicago, as then established and existing, the same being shown in respondent's tariff on file, which is referred to.

And complainant says, whatever may have been the rights of the respondent in the matter of protecting the through rate upon cattle sold in Kansas City, originating upon lines with which it had in existence a joint through rate under said tariff number four, that so far as cattle originating upon complainant's line are concerned, the respondent had no right whatever to carry the same, under any pretense of a joint through rate, but was only entitled to carry the same at its open, public rate aforesaid, in force between Kansas City and Chicago. Nevertheless, the respondent published a circular reading as follows: "Chicago & Alton Railroad Company Freight Tariff Number 537, taking effect June 24th, 1889. The rates to Chicago on live stock, carloads, from stations on the Chicago, Kansas & Nebraska Railway, except those named below, named in Joint Freight Tariff No. 4, dated April 1st, 1889, and amendments or subsequent issues thereof, will apply *via* Kansas City and the Chicago & Alton Railroad, subject to the rules and regulations governing shipments of live stock." (The excepted points being twenty-three points not material to this controversy.) Complainant is informed and believes that since the issue of said circular, respondent has accepted for transportation at Kansas City live stock in carloads, which originated at stations on complainant's line west of the Missouri River, and has protected the rates named in said through joint-freight tariff number four; and proof of such transactions will be made upon the hearing. Complainant avers that respondent had no right whatever to give any notice as party to a joint through-freight tariff with complainant in which it was not in fact a party, and in respect to which complainant has already declined to become a party with respondent. And complainant avers that all shipments of live stock that have been accepted and carried by respondent upon the terms named in its said circular, have been transported in violation of section VI. of the Act to Regulate Commerce, which provides that "when any common carrier shall have established and published its rates, fares and charges in compliance with the provisions of said section it shall be unlawful for such common carrier to charge, demand, collect or receive, from any person or persons, a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

And complainant insists that as to the live

stock originating on its line west of the Missouri River, respondent has no right to transport the same, except under its own local tariff from Kansas City to Chicago.

Wherefore complainant prays that respondent be required to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

Respondent answered the complaint, admitting that the parties respectively are common carriers as stated, and are competitors as alleged; admits the issue of the joint through-freight tariff number four, and that the names of the parties respectively appear to said tariff; that the complainant's line west of the Missouri River was in said tariff designated as the Chicago, Kansas & Nebraska Railroad, and that it is operated by the complainant.

Further answering, respondent says that the notation referred to, on said joint tariff, that Chicago, Kansas & Nebraska rates named to and from Chicago are good only in connection with the Chicago, Rock Island & Pacific Railway, was not placed thereon with the consent or approval of respondent; and it denies that either the said Chicago, Kansas & Nebraska Railroad Company or the complainant had any right to make any such limitation, or to deny to respondent the equal facilities for the interchange of traffic, as is implied by said notation.

Respondent admits that said joint through-freight tariff number four was in force from April 1st to July 12th, 1889, and that it was superseded as stated in the complaint; and that the superseding tariffs bear the notation stamped in red ink upon their faces, stated in the complaint. But it avers that said notation was not stamped thereon with the approval or consent of respondent, but that, on the contrary, it was done against its wishes; and that the intention on the part of the parties procuring it to be done was to injure the trade of respondent.

That such notation is unintelligible to the average shipper, and does not give a clear understanding to the public as to the lines over which freight will be transported at the rates therein mentioned; but, on the contrary, is calculated to perplex and hinder the shipper with regard to the through transportation of his property.

And respondent says that with a view to the public convenience and for the protection of its through business, it caused to be printed, published and filed with this Commission the circular set out in the complaint.

Respondent admits that since the first of April, 1889, the complainant and the said Chicago, Kansas & Nebraska Railroad Company have declined to make a fair and just division of the through rate with respondent, on traffic originating west of Kansas City and destined for Chicago, and to afford to respondent the same facilities for the interchange of business as they afford to others standing in the same relation to them as does respondent.

And respondent denies that by such course complainant has the legal power to deprive respondent of the right and privilege of quoting

to customers the agreed through rate for traffic which the shipper wishes transported over the lines of complainant and respondent, from initial points west of Kansas City, through Kansas City to Chicago.

And respondent maintains and insists upon its right to quote the agreed through rate to shippers and to protect the same in order that the shipper may have the same advantages as he would have by through routes, notwithstanding, by such unfriendly action on the part of complainant towards respondent, respondent may be unable to obtain from it a just and fair proportion of the through rate; and notwithstanding in some instances the proportion of such through rate which respondent receives may be less than its full local rate from Kansas City to Chicago.

And respondent says that notwithstanding the pretense of complainant, under the name of the Chicago, Kansas & Nebraska Railroad Company, that it will not make good the said published through rate on any other line than the Chicago, Rock Island & Pacific Railroad to Chicago, it has not denied the same to all others as it has to respondent, but, on the contrary thereof, has made divisions with another competitor of respondent, to wit, the Chicago, Santa Fe & California Railroad Company, since the said notations were made, and while it has refused to do so with respondent.

And, touching the course of business at Kansas City, respondent says that Kansas City and Chicago are the two great cattle markets of the west and center of the country, and that heretofore it has been the custom of common carriers with roads leading west from Kansas City to join with roads lying east of Kansas City and reaching the City of Chicago, in making a through tariff of rates from points west from Kansas City to Chicago, to do so with the privilege of either stopping and disposing of stock at Kansas City and terminating the shipment there, or of resuming the shipment on to Chicago, after testing the Kansas City market; and this privilege was extended to any purchaser who might buy the stock at Kansas City, under the same billing and at the same through rate; and the through rate was then divided between the two carriers on such basis and upon such proportions of the through rate as the carriers would agree upon; in fixing which said proportions the carriers were not governed by the local tariff on either road as determining its proportion of the whole. In further explanation, respondent says that the shipper was accustomed at the initial point to give shipping directions as to the route, and the road reaching such initial points, or, as it is in other words said, originating said business, would bill the said shipment by such route as the shipper might direct, at the regular through rates, and would allow the secondary carrier such proportion as might be agreed upon.

Respondent says that the proportion which would fall to the secondary carrier taking the shipments from Kansas City to Chicago has been in some instances more, and in other instances less, than the local rate from Kansas City to Chicago; and the whole transaction was regarded as a single one, and the rate as a single rate, from the initial to the terminal point, irrespective of the fact that the same was to be,

and actually was, divided between the two carriers in payment of the service of each. That under this usage the several roads lying east of Kansas City were accustomed to seek business west of Kansas City and procure it to be billed by their respective roads, and to protect the shipper in the agreed through rate, irrespective of whether or not by so doing it would be enabled on such through business to obtain for such services as great a sum as its through rate from Kansas City to Chicago.

That it was upon this basis, and to meet this condition of existing circumstances, that the several tariffs named in the petition were issued, to each of which respondent and its several competitors aforesaid were parties.

Respondent says that such arrangements, whilst injuring no one, have been beneficial alike to the shipper, the Kansas City market and the several companies; and by it the shipper was enabled to exercise his pleasure as to the route he would ship by, without being compelled to pay on through shipments two local rates, and was at the same time enabled to exercise his choice between two markets, and to take the first and offer to the purchaser as an inducement the benefit of his contract for a through rate, which the purchaser might enjoy or abandon at his pleasure.

Respondent says that this course of business continued without interruption until about the 1st day of April, 1889, when one of its competitors, the Chicago, Rock Island & Pacific Railway, under the name of the Chicago, Kansas & Nebraska, caused to be placed on said tariff of rates the notation specified in the complaint; since which time the said Railway Company has been unwilling to make a just and fair division of the through rate upon stock billed over the Chicago, Kansas & Nebraska and respondent, to Chicago, by way of Kansas City. And in order to protect its customers and patrons in agreed through rates from points on said Chicago, Kansas & Nebraska, to Chicago, respondent has been compelled to pay to the Chicago, Kansas & Nebraska local rates to Kansas City, whereby the proportion of the through rate which respondent receives is less than a reasonable one. And respondent has been compelled to submit to such unequal division in order to protect its other business and accommodate its patrons, as well as the Kansas City market; though it alleges that the said Chicago, Kansas & Nebraska Railway does not abide by its notation in its dealings with other roads, and it continues its through traffic rate with respondent from initial points through Kansas City to St. Louis, and to accept a fair proportion of the through rate on such traffic.

Respondent further says it has been the custom for many years, and is now, for dealers in live stock at Kansas City to purchase stock arriving at that point by the various lines leading from the west and southwest, and concentrate their shipments upon one line east of Kansas City, each dealer usually patronizing some one line east of that point, and the lines east and west from Kansas City protecting the through rate on such shipments when they were originally consigned through to Chicago. To restrict such shipments of live stock to the roads east of Kansas City, which have lines

west of Kansas City, simply because they brought the business to Kansas City, would result in a monopoly of the live-stock business by two lines, namely, the Chicago, Rock Island & Pacific Railway and the Atchison, Topeka & Santa Fé Railroad; as the practical working of the policy would be, not only to give those lines the business that they bring to Kansas City, but also the control of the great bulk of the business that arrives at Kansas City by lines that have no road east of Kansas City. Such dealers would desire their shipments to be forwarded from Kansas City together and would not consent to have lots broken up.

Respondent denies the allegation that cattle shipped by complainant and sold at Kansas City under the aforesaid privilege, were charged the local rate from the points of origin to Kansas City when such cattle were originally billed through, except when its action was applied to respondent; and it avers that complainant has so billed cattle as that the respondent, as one of the through carriers, would be charged the local rate and be made to pay the same if such shipments should be continued to Chicago by way of respondent; whereas, if the same were shipped to Chicago by way of the Chicago, Santa Fé & California Railroad, another and much less rate, being a fair proportion only, would be accepted by complainant for transporting the cattle to Kansas City. In order to meet and protect itself against such a condition, respondent has been compelled at times to pay the complainant the local rate, or more than its fair proportion of the through rate.

Respondent further says that, under the usage of the carriers, the through business coming east from points beyond Kansas City and through that point to Chicago, is not regarded as local traffic from Kansas City to Chicago and subject to the local tariffs; and that the object of complainant is to compel respondent to charge local rates from Kansas City to Chicago upon such traffic, whilst complainant, with its favored associates, may treat and charge for the same upon the basis of through traffic, at through rates, thereby depriving respondent of any participation in such traffic, and enabling complainant, together with the competitors of respondent which it favors, to fix the through rate at such sum as they please, and thereby enjoy a complete monopoly of the business.

Respondent says that, whilst regarding its own interest in this behalf, it also desires to favor its shippers to the same extent as carriers having roads both east and west of Kansas City do, so as to give to Kansas City the benefits which can be legitimately obtained by granting to such shippers the privilege of stopping and selling in that market, and of resuming the shipment at the through rate; and that its customers and patrons may be served by it at as good rates as can be obtained from any other carriers.

As to the insistence of complainant, as to live-stock traffic originating in the territory adjacent to its line west of the Missouri River, that respondent has no right to transport the same except under its local tariff, respondent says that complainant has no legal right to exclude others from entering such field and inducing the shipment thereof by way of Kansas

City to Chicago; and that such shipments are often procured by the influence of others than the road so occupying the territory; and that it believes a sound public policy requires that carriers should be permitted to make through contracts for the same, and, when so made, to protect and carry out the same in strictness and good faith, irrespective of whether in each particular instance the transactions should prove profitable or not.

Such is the issue made upon the record, and upon which the parties respectively have presented considerable evidence. The facts in dispute, however, do not seem to be numerous. The questions presented for the consideration of the Commission were questions of law rather than of fact, and they resolved themselves into this: whether a course of business admittedly engaged in by the respondent was in violation of law and of the rights of complainant. To show how it injured the complainant, its own course of business was explained and the object of the proceeding was seen to be to protect that course of business from what was claimed to be an unfair and an illegal invasion by respondent.

It appears from the showing that complainant has a line of road extending from Kansas City, Missouri, to points to the east thereof, including Chicago. There is also a line which it manages and operates coming into Kansas City from the west. Kansas City and Chicago are the great live-stock markets in the interior, and the road of complainant to the west of the first-named city brings to it a great number of cattle, some of which are marketed there, while others are taken thence by complainant's main line to Chicago. Complainant has competitors in this business both east and west of Kansas City, and among those with a line from Kansas City to Chicago is the respondent. The several competitors agree between themselves what the rates of freight shall be from points westerly of Kansas City to that point, and they also agree upon the rates through that city to Chicago, the through rate from points west of Kansas City to Chicago not being the same as the sum of the locals. It has for a number of years been customary for the several carriers to allow shippers of cattle from points west of Kansas City to bill through to Chicago at the through rate, but at their option to unload at Kansas City and try the market there before proceeding further. If the shipper found it to his advantage to sell at Kansas City, he did so, and then paid instead of the through rate at which the cattle were billed, the local rate to that point; if he did not sell, he reloaded them and forwarded them to Chicago, paying there the through rate precisely as he would have done had the cattle not been stopped in Kansas City at all. The testimony, we think, warrants us in saying that if some part of a total consignment were marketed at Kansas City, and the deficiency thus caused were supplied by purchase at that place, the same would be received and forwarded at the through rate from the point of origin, precisely as it would have been had no change in the identity of the consignment taken place. The course of business has also allowed a purchaser at Kansas City to reship from thence to Chicago on the original bill at the

through rate, precisely as though there had been no change of ownership.

The complainant very naturally desires to have the benefit of the transportation from Kansas City to Chicago of all such cattle brought by its own line to the former place as are reshipped thence to the more eastern market; the respondent, which has no line to the west of Kansas City, desires to participate in the carriage. To exclude such participation, the complainant declines to agree with respondent upon any division of the through rate, and insists that if the respondent receives the cattle at Kansas City and transports them thence to Chicago it can lawfully only do so at the regularly established local rate between those cities; the shipment, so far as respondent is concerned, being nothing but a local shipment. The respondent, on the other hand, insists that its shipment of the cattle from Kansas City to Chicago is no more a local shipment than it would be if made by complainant; the original shipment having terminated at Kansas City with only a possibility of renewal, and the renewal when made being no different in its incidents when made by the carrier which brought the cattle to Kansas City than when made by any other. It is therefore insisted by respondent that when complainant makes a reshipment from Kansas City to Chicago for a charge which, added to what it has already received, makes an aggregate equal to the agreed through charge from the point of origin of the freight to Chicago, the respondent with precisely the same legal justification may take the freight from Kansas City to Chicago for a like sum; the shipment from Kansas City being no more a part of a through transportation from the original point of shipment in the one case than it is in the other.

Such is the point of controversy involved in the case. It was suggested on the hearing that the Commission should confine its attention to the legality of the course of business as conducted by the respondent, and that it was immaterial to the controversy whether the practices of the complainant as shown were or were not in compliance with the Law. It will be seen, however, that the case necessarily presents the question whether the course of business of complainant, which the proceeding seeks to defend and protect, is any more in conformity with law than that of the respondent. If both are legal, the proceeding must fail, because then the respondent is guilty of no legal wrong; if both are illegal, the complaint must equally fail, since in that case there is nothing in which the Commission can protect the complainant, and the purpose in instituting the proceeding appears to be one that the Law cannot sanction.

We have no doubt of the right of carriers to agree upon through rates which shall be different from and lower than the sum of the locals. This principle has frequently been considered and applied in cases passed on by the Commission. *Lippman v. Ill. Cent. R. Co.* 2 Inters. Com. Rep. 414, 2 I. C. C. Rep. 584. The action of the carriers in this case in fixing upon through rates from points west of Kansas City to Chicago does not appear to be the subject of just criticism. But these through rates are rates supposed to be fixed for through carriage,

and they differ from the sum of the locals because they are supposed to involve less cost and less labor to the carriers than do the local shipments. There is supposed to be but one loading and one unloading. There is supposed to be less time occupied with men and equipment than would be necessary if the same freight were taken the same distance with one or more stoppages and unloadings on the way. It is for these reasons that the lesser aggregate charge for one shipment is made in practice and is justified in the Law.

It is impossible to say upon the evidence in this case that when the complainant receives live cattle at points west of Kansas City, at through rates to Chicago, but with an understanding that they are to be unloaded at Kansas City to try the market there, there is in point of fact a through shipment from the point of origin to Chicago. So far from that being the case, there is no understanding that there shall be any through shipment at all, and whether there shall be one or not is understood to depend entirely upon the state of market at Kansas City, and upon the option of the purchaser if the cattle are there sold. If the cattle are finally transported to Chicago, there is not only more than the one loading and unloading, but there is also necessarily some loss of time beyond what would be expected to take place in case of a through shipment. The identity of the cattle may to some extent be changed; the original shipper may cease to have anything to do with the transportation of the freight at that point; and it is pure fiction that treats the transportation as one and indivisible from the point of origin to the point which finally, at the option of the parties, proves to be that of ultimate destination.

Whether this course of business which admits of the stoppage by the way for purpose of testing a market which may not prove to be the ultimate market, is one which can be justified as against shippers from Kansas City whose freight originated at that point, we shall not discuss on this record. Nobody is here questioning the right thus to allow freight to be stopped *in transitu* and then taken up and carried through to a point of final destination on the through rate that would have been charged had no such stoppage taken place. Both these parties are acting upon an assumption that it may be rightful thus to allow the stoppage to try the intermediate market; and respondent does not dispute the legality of what the complainant is doing; it only insists that its own course of business is in all legal particulars the same with that of the complainant, and, assuming the legality of the complainant's course of business, its own course of business is equally justified. We think this position is unanswerable. The reshipment by the complainant under the circumstances attending its course of business from Kansas City to Chicago is no more a part of a through transportation than is the shipment of cattle brought into Kansas City from points to the west and taken thence by the respondent. The fiction that the case of reshipment is a part only of one transportation is just as applicable to the one case as to the other, and comes just as near representing a fact. The complainant says very justly that it has never agreed with

respondent upon any division of through rates from points on its line west of Kansas City to Chicago, and that respondent cannot for itself determine what the division shall be. But this contention does not fully cover the case. It would cover the case if the transportations which are brought in question were through transportations in fact; but when it appears that they are not through transportations, whether the carriage from Kansas City to Chicago is by one party or by the other, the ques-

tion of agreement upon the matter of division of through rates seems to be foreign to the case.

Without further allusion to important and interesting questions that are suggested by the record, but not directly presented, we are forced to the conclusion that complainant is not entitled to protection in the course of business shown by its complaint and by the evidence, as against the respondent; and that the *complaint must therefore be dismissed.*

UNITED STATES SUPREME COURT.

THE WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,

v.

THOMAS SEAY, Governor, *et al.*

(132 U. S. 472, 33 L. ed. 409.)

1. **Telegraph companies** which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268, Rev. Stat. U. S., cannot be taxed by a State for any messages, or receipts arising from messages, from points within the State to points without, or from points without the State to points within; but such taxes may be levied upon all messages carried and delivered exclusively within the State.
2. **Messages of the former class are elements of commerce between the States** and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing power.
3. **Where a state court decided** that a state law taxing telegraph companies authorized and imposed a tax upon receipts derived by them from messages from or to other States, and sustained a state tax thereon under such law, this court has jurisdiction to review such decision.

(December 16, 1889.)

IN ERROR to the Supreme Court of the State of Alabama to review a judgment affirming a judgment of a court of that State quashing a writ of certiorari to correct an assessment for taxes on the gross receipts of a Telegraph Company. *Reversed.*

The facts are stated in the opinion.

Reported below, 80 Ala. 273.

Messrs. Gaylord B. Clark and Thos. B. Jones for plaintiff in error.

Mr. John T. Morgan for defendants in error.

Mr. Justice Miller delivered the opinion of the court:

This case comes before us on a writ of error to the Supreme Court of the State of Alabama.

The question on which the jurisdiction of this court depends has been decided in this 2 INTER S.

court so frequently of late years, several of the decisions having been made since the judgment of the Supreme Court of Alabama was delivered, that but little remains to be said in the present case except to show that it comes within the principles of the cases referred to.

That principle is, in regard to telegraph companies which have accepted the provisions of the Act of Congress of July 24, 1866, sections 5263 to 5268 of the Revised Statutes of the United States, that they shall not be taxed by the authorities of a State for any messages, or receipts arising from messages, from points within the State to points without, or from points without the State to points within, but that such taxes may be levied upon all messages carried and delivered exclusively within the State. The foundation of this principle is that messages of the former class are elements of commerce between the States and not subject to legislative control of the States, while the latter class are elements of internal commerce solely within the limits and jurisdiction of the State, and therefore subject to its taxing power. The following cases in this court have fully developed and established this proposition: *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 [24 L. ed. 708]; *Western Union Tel. Co. v. Texas*, 105 U. S. 460 [26 L. ed. 1067]; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 [31 L. ed. 790]; *Ratterman v. Western Union Tel. Co.* 127 U. S. 411 [32 L. ed. 229]; *Letoup v. Port of Mobile*, 127 U. S. 640 [32 L. ed. 311]; *Fargo v. Michigan*, 121 U. S. 230 [30 L. ed. 888]; *Philadelphia and Southern Steamship Co. v. Pennsylvania*, 122 U. S. 326 [30 L. ed. 1200].

The plaintiff in error instituted its proceeding in the state court by a writ of certiorari, directed to E. A. O'Neal, Governor; C. C. Langdon, Secretary of State; M. C. Burke, Auditor, and Frederick H. Smith, Treasurer, composing the State Board of Assessment, for the purpose of correcting the error which they had made in an assessment for taxation of the gross receipts of the Company. This Board was invested by the Law of Alabama with authority to assess for taxation the items of property of railroad companies returned to the auditor of the State (section 13 of the Act approved February 17, 1885), and by section 15 of the same Act a similar authority is conferred upon it in reference to telegraph companies whose lines, or any part thereof, are within the State. By an Act to levy taxes for the use of the State and the counties thereof, approved December 12, 1884, it is declared by subdivision 6, section 1, that a tax shall be levied "on the gross

amount of the receipts by any and every telegraph, telephone, electric light and express company, derived from the business done by it in this State, at the rate of two dollars on the hundred dollars." The Telegraph Company, in making its report of gross receipts to this Board of Assessment, included only those received from business transacted wholly within the State of Alabama. The Board were not willing to accept this report, and required the Company to make report of its receipts from all messages, whether carried wholly within or partly without the State, and, against the remonstrances of the Company, decided that this sum should be the amount on which the tax of two per cent should be paid. It was to correct the supposed error of this assessment that the writ of certiorari was issued by the Circuit Court of Montgomery County to the Governor and others constituting that Board of Assessment. That court held the assessment valid, and made an order quashing the writ of certiorari and dismissing the proceeding. On appeal to the Supreme Court of the State this decision was affirmed, and the case is now before us, on a writ of error, to review that judgment of affirmance. In the opinion of the Supreme Court of Alabama, which is found in the record, the point mainly discussed is the construction of the Tax Law, in regard to the meaning of the words "gross receipts derived from business done in this State," and also whether, "if that means all the receipts of the Company for business having connection with lines within the State, it is consistent with the Constitution of Alabama." Of these questions this court has no jurisdiction; but, having decided that the Statute, by fair interpretation, included all receipts derived from business done in the State, and actually received there, though the message may have been delivered at, or may have been sent for delivery from, some office out of the jurisdiction of the State, the court proceeds: "Though thus construed, the Statute is not an unauthorized interference with interstate commerce. The question is fully and ably considered and discussed in the following cases: *Western Union Tel. Co. v. Richmond*, 26 Gratt. 1; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521, and *Port of Mobile v. Leloup*, 76 Ala. 401; and is expressly decided in respect to a tax on the gross receipts of railroad companies, they consisting in part of freights received for transportation of merchandise from the State to another State, or into the State from another, in *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284 [21 L. ed. 164], and in *Osborne v. Mobile*, 83 U. S. 16 Wall. 479 [21 L. ed. 470]."

It will be observed that the authorities relied on by the Supreme Court of Alabama to sustain its judgment in this case are mostly decisions of state courts. The case of the *Western Union Tel. Co. v. State*, 55 Tex. 314, and the case of *Port of Mobile v. Leloup*, 76 Ala. 401, have been reversed by the decisions of this court in the same cases on writ of error to the state courts. Of the cases already referred to as establishing the proposition which we have stated in the early part of this opinion, those of the *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1 [24 L. ed. 708]; *Western Union*

Tel. Co. v. Texas, 105 U. S. 460 [26 L. ed. 1067]; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530 [31 L. ed. 790]; *Ratterman v. Western Union Tel. Co.* 127 U. S. 411 [32 L. ed. 239], and *Leloup v. Port of Mobile*, 127 U. S. 640 [32 L. ed. 311], are all cases in regard to taxes upon telegraph companies by state authorities, and all of them hold that no tax can be imposed upon messages, or upon the receipts derived from messages, where the communication is carried either into the State from without, or from within the State to another State.

In the earliest of these cases, *Pensacola Tel. Co. v. Western Union Tel. Co.*, the Statute of Florida had attempted to confer upon a corporation of its own State, the Pensacola Telegraph Company, an exclusive right of doing the telegraph business within that State. This court held, affirming the judgment of the Circuit Court of the United States for that District, that this Statute was a regulation of commerce among the States forbidden by the Constitution of the United States to the State of Florida. In the next case, that of the *Telegraph Co. v. Texas*, in which that State had imposed a tax of one cent for every full-rate message sent, and one half cent for every message less than full rate, on the business of the Western Union Telegraph Company, many of the messages were by the officers of the government on public business, and a large portion of them were to places outside of the State. The company contested the constitutionality of this law, and the case came to this court, where it was said that a telegraph company occupies the same relation to commerce, as a carrier of messages, that a railroad does as a carrier of goods. Both companies are carriers, and their business is commerce itself. The court then went on to consider the authorities, and said further that it followed that the judgment under review, so far as it included the messages sent out of the State or for the government on public business, was erroneous. The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of the State, and does not affect other nations of States,—that is to say, the purely internal commerce of the State,—belongs exclusively to the State, was said to be as well settled as that the regulation of commerce which does affect other nations or States or Indian tribes belongs to Congress. The judgment of the Supreme Court of Texas was therefore reversed.

The case of *Western Union Tel. Co. v. Massachusetts* was a question growing out of the taxation of the telegraph company by the State of Massachusetts, and the same principle we have already considered was asserted in that case, after a general review of the authorities upon the subject.

In *Ratterman v. Western Union Tel. Co.* the same question arose on a writ of error to the Circuit Court of the United States for the Southern District of Ohio, where, after a full review of the whole subject, this court said that there was really no question, under the decisions of this court in regard to the proposition, that so far as a tax was levied upon receipts properly appurtenant to interstate commerce, it was void; and that so far as it was only upon commerce wholly within the State, it was valid. The commerce here mentioned was telegraph

business, and the receipts were receipts for telegraph messages. This case arose upon a certificate of division of the judges who presided at the trial, and in remanding the case the court said: "We answer the question in regard to which the judges of the circuit court divided in opinion, by saying that a single tax, assessed under the Revised Statutes of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross, and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce;" and, concurring with the circuit judge in his action enjoining the collection of the taxes on that portion of the receipts derived from interstate commerce, and permitting the treasurer to collect the other tax upon property of the company and upon receipts derived from commerce entirely within the limits of the State, the decree was affirmed.

In the subsequent case, *Leloup v. Port of Mobile*, found in the same volume, the question arose upon a conviction under the Statute of

Alabama on an indictment for failing to take out a license tax by the telegraph company, imposed by the City of Mobile on all telegraph companies. Edward Leloup, the agent of the company, was convicted under this proceeding, his conviction affirmed by the Supreme Court of Alabama, and its judgment brought to this court on writ of error. This court held that, his company having complied with the Act of Congress of July 24, 1866, the State could not require it to take out a license for the transaction of business in the city, and that a general license tax on the telegraph company affected its entire business, interstate as well as domestic and internal, and was unconstitutional.

We think these cases are so directly in point on the questions arising in the present case that they must control; and as the record of the case presents the means by which the receipts arising from commerce wholly within the State, and from that which, under these definitions, may be called interstate commerce, can be separated, *the judgment of the Supreme Court of Alabama is reversed, and the case remanded to it, with directions for further proceedings in conformity with this opinion.*

UNITED STATES CIRCUIT COURT, E. D. OF PENNSYLVANIA.

CITY OF PHILADELPHIA v. WESTERN UNION TEL. CO.

(40 Fed. Rep. 615.)

1. **The City of Philadelphia is not authorized to tax** a telegraph company occupying its streets, and could not, even if authorized, tax a company engaged in interstate commerce.
2. **An ordinance charging a corporation** occupying the streets of a municipality license fees amounting, in all, to \$16,000 per annum, where the cost of supervising and controlling the corporation for the protection of persons and property had for several years been only \$3,500 annually, levies a tax, and the ordinance is unreasonable and void.
3. **An ordinance charging license fees to an amount** much greater than the cost of controlling and supervising the licensee cannot be sustained on the ground that demands might be made against the municipality on account of the licensee.

(October 28, 1889.)

AT LAW. Motion by defendant for judgment notwithstanding the verdict on point reserved. *Granted.*

This was an action in assumpsit brought by the City of Philadelphia against the Western Union Telegraph Company in the Court of Common Pleas of Philadelphia, to recover license fees for poles and wire privilege, erected in Philadelphia by the defendant corporation. The case was removed by defendant to the United States Circuit Court for the Eastern District of Pennsylvania.

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Mr. Chas. F. Warwick, *City Sol.*, and **R. Alexander**, *Ass't. City Sol.*, for plaintiff.
Messrs. Read & Pettit for defendant.

Butler, J., delivered the opinion of the court:

On the trial defendant presented the following point: "Under the evidence in this case the license fee sought to be recovered by the plaintiff is much more than the cost of the regulation, and excessive—it is therefore unreasonable in law and void; and if you believe the evidence in the case, your verdict must be for the defendant." The point was reserved, and the court submitted the case to the jury under the following instructions: "The City of Philadelphia sues to recover license fees under the ordinance before you. Whether the ordinance is valid or not depends upon the question whether it is reasonable, as respects the amount required to be paid, by the defendant and other similar companies using lines of wire within the city. The city cannot tax these companies, and does not, as declared by counsel, seek to do so. Nor can it prohibit them from establishing and maintaining their lines; but it can subject them to proper regulations and supervision, with a view to the protection of persons and property. It is the duty of the city to prescribe such regulations and conditions, and to exercise such supervision. If it failed in this it would be responsible to citizens who might be injured either in person or property. It is readily seen that the construction and maintenance of these lines subjects the city to serious responsibility, and considerable expenditure, and for this the city may demand indemnity and reimbursement. Thus you observe the question is, as before stated, Is the ordinance reasonable? The city has power to enact such an ordinance if its exactions are not excessive. In passing upon the question of excessiveness,

the city should not be subjected to a contracted or narrow view, but be treated with fair and reasonable liberality. Turning now to the evidence you must determine whether the ordinance is reasonable."

The jury having found for the plaintiff, the point must now be disposed of. It embraces the entire case,—the validity of the ordinance, judged by the testimony. The facts were submitted to the jury, for reasons stated at the time which need not be repeated here; nor need we enlarge on the charge respecting the parties' rights. There is no controversy on the subject, nor is there room for controversy.

The plaintiff cannot tax the defendant,—not only because it is not authorized to do so, but because the State is without power to confer such authority. The imposition of a tax would be an interference with interstate commerce and thus be an infraction of the Federal Constitution.

The plaintiff may and is in duty bound to subject the defendant, and other similar companies, to such proper conditions, restrictions and supervision, respecting lines within its limits, as are necessary to the public safety, and consequently to such charges as will enable it to perform its duty, without loss to itself. If the ordinance does no more than this it is reasonable, and therefore valid; otherwise it is not. Does it do more? The question in view of the evidence (about which there is no disagreement) is too narrow to admit of discussion. A statement of the facts disposes of it. The ex-

perience of several years shows that \$3,000 or at the most \$3,500 per year is sufficient to cover every expenditure the city is required to make on this account. The ordinance imposes the payment (in round numbers) of \$16,000 annually. This is five times the amount required. It seems to follow, as a necessary consequence, that the ordinance is unreasonable. It compels a payment annually of about \$14,000 in excess of the amount necessary. This is a tax pure and simple. The city cannot collect and lay by a sum to insure itself against imaginary future demands, which may possibly arise. If it properly discharges its duty of control and supervision no such demands can arise. It is responsible alone for vigilance and care in these respects. It may, possibly, at some time, be subjected to expenditure in resisting unjust claims. This, judged by the past, however, is not probable. A very trifling annual surplus would provide for it. But as the contingency is remote such provision may well be left until it occurs.

The only embarrassment we have felt in reaching this conclusion arises from the fact that the state courts—the common pleas of this city and the supreme court—adopted a different one in previous suits under this ordinance. Our very great respect for these courts would impel us to give their judgments controlling weight, if we could find anything to support them in the testimony before us.

Judgment must be entered for the defendant notwithstanding the verdict.

INTERSTATE COMMERCE COMMISSION.

THE PITTSBURGH, CINCINNATI & ST. LOUIS R. CO.

v.

THE BALTIMORE & OHIO R. CO.

(No. 215.)

1. **Passenger excursion rates are required to be published** according to the provisions of section 6 of the Act to Regulate Commerce.
2. **Party-rate tickets are not commutation tickets**, and when party rates are lower than contemporaneous rates for single passengers they constitute discrimination, **and are illegal.**

(Complaint filed July 10, 1889.—Answer filed July 31, 1889.—Heard November 15, 1889.—Briefs filed January 11-13, 1890.—Decided February 21, 1890.)

PROCEEDING to compel the respondent Railroad Company to desist from selling party-rate tickets and to print and post its excursion rates. *Relief granted.*

See abstract of complaint, *ante*, p. 572. The facts are also stated in the opinion.

Mr. J. T. Brooks for complainant.

Messrs. John K. Cowen and Hugh L. Bond, Jr., for defendant.

Messrs. A. J. Dittenhoefer, Delos McCurdy and Augustus Vanderpoel for theatrical managers.

Veazey, Commissioner:

The substance of the petition is that the par-

ties hereto are common carriers, subject to the Act to Regulate Commerce, and are competitors in business; that the respondent has adopted and has in operation "party rates," so called, whereby parties of ten or more persons traveling together on one ticket are transported over the respondent's lines of road between stations located thereon at two cents per mile *per capita*, which is less than the regular rate for a single person, said rate being about three cents per mile; that said Company also sells round-trip excursion tickets, good between points on its lines, at less than the rate for ordinary tickets, without publicly posting in its ticket offices or elsewhere the rates at which said tickets are sold; and charging that this practice of the respondent is in violation of the Act to Regulate Commerce, and for this reason is not participated in by the complainant, and thereby traffic is diverted from petitioner's lines to those of the respondent, to the damage and loss of the petitioner; and the petitioner prays that the respondent may be ordered to withdraw from its lines of road, upon which business competitive with that of the petitioner is transacted, the so-called "party rates," and to discontinue giving such rates in the future, and also requiring respondent to discontinue the practice of selling excursion tickets at less than the regular rates, unless the rates on such tickets are posted in its offices as required by the Act to Regulate Commerce.

The respondent answered, admitting the facts substantially as charged, but denying that they were in violation of the Act to Regulate Commerce or any other law, and claiming that the

excursion tickets are such as are mentioned in the 22d section of that Act, and that the Act does not require or contemplate the posting of rates at which such excursion tickets are sold, and that it would be practically useless if not impossible to post them.

It was urged on behalf of the petitioner, the same as alleged in the complaint, that the so-called party rates are not warranted by law, and are demoralizing in effect, and necessarily work a discrimination against the single passenger who purchases his ticket at the regular office, and in favor of the customer of the ticket broker. It was also insisted that under the Act to Regulate Commerce it is required that excursion rates shall be posted in the same manner as in the case of the ordinary rate.

Counsel appeared both in behalf of the respondent Railroad Company and of the managers of theatrical companies, who are claimed to be especially interested in maintaining the so-called "party rates."

Counsel for petitioner offered no evidence. Some evidence was taken in behalf of the respondent tending to show that the practice here complained of as to party-rate tickets was in effect for several years prior to the enactment of the Act to Regulate Commerce, and that such practice obtained in the different countries of Europe, and that theatrical companies are especially favored in that regard there; that unless the Law allows the issuance of such tickets theatrical companies cannot afford to travel, and the present practice of first-class companies going from the great cities through the country to the smaller places would have to cease, and thereby the country at large, outside of the great centers, would be deprived of large, first-class, theatrical entertainment.

No question was made on the trial but that the parties to this case were common carriers subject to the Act to Regulate Commerce, or that the respondent issued the so-called "party-rate" tickets to all persons alike who desired to buy a ticket for ten or more persons, but the respondent Company did not sell such a ticket to anyone for a less number than ten; and the fact is so found. Neither was it disputed that the respondent had issued excursion tickets without posting notices of the excursion rate in its several stations as required by law in case of the regular rate.

It is found that the practice of selling party rates existed at the time that the Act to Regulate Commerce was enacted and had so existed for several years previously; that under authority of law the practice obtains in Europe to a greater or less extent of transporting theatrical companies at reduced rates below the regular rates of carriage; that although these so-called party-rate tickets are offered to all persons alike they are not used to great extent by others than traveling theatrical companies. The saving to the theatrical companies under the party-rate system is very great, owing to the great number and large size of such traveling companies. It was claimed that that saving was so great that there could only be a profit in the business of such companies by having the privilege; and this Commission is not prepared to say, from the evidence in the case, that it is not so. Neither is it prepared to say to what extent it would interfere with or

stop the business of traveling theatrical companies to require the payment of full regular rates for persons and scenery.

Counsel for the respondent Railroad Company claimed that under the party-rate ticket method there was no discrimination, neither between different theatrical managers nor between theatrical business and other kinds of business, because the offer of such tickets was open to everybody alike. Therefore he insisted there was no violation of the provisions of the second and third sections of the Act to Regulate Commerce, which are based on the idea and principle of equality of rate and service to all persons alike from common carriers who are public servants. By the party-rate system, the carrier says to all persons in substance: If you want one ticket for the transportation of ten or more persons on the same train to the same destination you can have it at a specified reduced rate below the regular rate. Is this an unjust discrimination or the giving of undue or unreasonable preference or advantage to the purchaser of such a ticket (within the meaning of the provisions of the second and third sections of the Act) as against the persons, from one to nine inclusive, who have to pay the higher regular rate for precisely the same transportation and service? The answer may be aided somewhat by another question: Why may a party of ten or more persons have individually a lower rate than a party of nine or less, from a common carrier which is bound to treat all patrons equally who have the same amount and quality of service? The design of the Act to Regulate Commerce was to put each individual, in the matter of transportation, on exact equality, with only such exceptions as the Act itself specified. It was not a new idea in law, for it had always been recognized as a sound legal proposition, though violated in practice, that a common carrier must treat all persons alike under similar circumstances and conditions. It is difficult to see how this individual equality is preserved when in a carload, say of nineteen persons, all starting from the same point and having the same destination, ten of them pay two cents per mile each, and the other nine three cents.

If tickets can be sold at reduced rates for parties of ten, there is no limit either in number or in rate for which they may be sold; the Law may thus be rendered a meaningless enactment and its purposes wholly defeated at the discretion of carriers. It would seem that, standing upon the general provisions and theory of the Act, this form of ticket cannot be sustained.

But the Act provides, section 22, "that nothing in this Act shall prevent . . . the issuance of mileage, excursion or commutation passenger tickets;" and it is here claimed that the party rate is but a form of commutation. If that is so, then it must be sustained, notwithstanding it is in itself a violation of and opens the door to abuses of the fundamental idea of the enactment.

The question, therefore, is, How is the word "commutation," as used in said Act, to be construed?

The witnesses in this case threw but little light on the subject as to the definition of the term "commutation," or whether a party-rate ticket

properly came under that class. The official correspondence and records in the hands of the Commission do, however, easily settle the question that a one-way party ticket was not at the time the Act was passed, and has not since been, regarded or treated in official railroad circles as embraced under the head of commutation. We have found nothing to the contrary prior to the Act, and such is the great preponderance of the evidence, although not universal, since the Act took effect. A one-way party ticket entitles the number of persons specified thereon to transportation of the quality indicated by the ticket, without stop-over, from and to the stations named on the ticket, within the limit specified. It is used for irregular travel between points varying with the applications of parties traveling one way. A commutation ticket entitles the holder (one person) to one first-class passage, without stop-over, for each number indicated on, or each coupon attached to, the ticket, between the stations named, in either direction, and is available to anyone under the conditions and within the limit specified in the contract. It is a kind of ticket largely used by suburban residents traveling between their homes and the larger cities, such as business men, school children, employés, etc. It has various forms, but is uniform in substance. It is a ticket generally on sale regularly by railroads, while party rates are commonly made to suit the particular conditions governing each party. We think the best expert railroad authority is to the above effect, and also that party-rate tickets are an entirely distinct class from commutation tickets, and are for a different class of travel.

It is not claimed that this ticket comes under either of the other classes excepted in the Act, viz: mileage and excursion.

The argument that the party rate ought to be sustained, as otherwise traveling theatrical companies will have to retire from the business, which the evidence tended strongly to show might be the case, and all places except comparatively few large cities would be deprived of this kind of first-class entertainment, is one for the consideration of Congress under a proposition to amend the Act. But as the ticket cannot be sustained on the ground of equality of service and rate and is not embraced within the excepted classes, this Commission has no power to furnish relief to the theatrical companies.

It is urged that party rates were in force at the time the Act to Regulate Commerce was passed. We have no doubt of this from the evidence and official records in this office; but it affords no argument for the contention of the respondent railroad or the theatrical managers, but the reverse, because as Congress did make exceptions to the operation of the Act, the not including this form of ticket in the exceptions indicates a purpose to exclude it, under the common-law rule that the express mention of one thing implies the exclusion of other things not mentioned.

One of the reasons that may have influenced Congress in not providing for such tickets is the facility with which they might be used for speculative purposes. If generally issued by railroads they would be a most convenient and

inviting method for evading the Law in the hands of ticket brokers. The Commission has heretofore had occasion to consider tickets of this character and then condemned their use. See *Re Passenger Tariffs*, 2 Inters. Com. Rep. 445, 2 I. C. C. Rep. 649. The Commission there said: "The practice is vicious in conception and demoralizing in its effects; it necessarily works a discrimination against the single passenger who purchases his ticket at the regular office and in favor of the customer of the broker." It is plain that if the party-rate ticket should be added to the exceptions to the operation of the Act specified in section 22, for the benefit of theatrical companies, it ought to be under regulations that would prevent it from becoming a source of evasion of the Law by ticket speculators.

Another point urged in the defense is that when a discrimination is not between persons who are competitors in the same line of business, it is not in violation of the Act, and that this applies to passengers as well as to freight transportation. The Commission considered and answered this claim in the holding in *Smith v. Northern Pacific R. Co.*, 1 Inters. Com. Rep. 611, 1 I. C. C. Rep. 308, to the effect that the rule under which passenger transportation should be conducted requires absolute equality of payment from all persons enjoying the same accommodations.

The other complaint in the petition is that the respondent road does not print and post its excursion rates, as required for regular rates. The charge is admitted, but it is claimed to be unnecessary under the provisions of section 22.

Section 6 of the Act to Regulate Commerce, after providing for the printing and posting of schedules of rates, fares and charges, etc., says:

"And when any such common carrier shall have established and published its rates, fares and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares and charges as may at the time be in force."

We think it is too plain to require discussion that, under this provision, excursion rates as well as others must be printed and posted as in case of other rates. The only ground upon which the respondent can stand is that the provision of section 22, to the effect that nothing in the Act shall prevent the issuance of excursion tickets, takes such tickets from under the operation of the provision last above quoted. But the view of this Commission has always been that in the issuance of mileage, excursion and commutation passenger tickets, the other provisions of the Act do apply so far as preserving equality as to the method of issuing them; as illustrated in *Larrison v. Chicago & Grand Trunk R. Co.*, 1 Inters. Com. Rep. 369, 1 I. C. C. Rep. 147, where it was held that when a railroad company sells mileage tickets, it must sell them impartially to all the public who apply for them; and that their sale to a particular class of persons at lower rates than are charged to others is

unjust discrimination. Inasmuch as excursion rates must be general and open to all alike, there can be no embarrassment in requiring them to be posted like other rates.

The respondent Railroad Company must therefore be notified to immediately cease and desist from selling said party-rate tickets, and ordered to print and post excursion rates according to the provision of section 6 of the Act to Regulate Commerce.

P. H. LOUD, Jr.,

v.

THE SOUTH CAROLINA R. CO. *et al.*

(No. 252.)

A BSTRACT of complaint, filed Feb. 13, 1890, in the above-named action.

Complainant is a commission merchant, and a dealer in and shipper of fruits and watermelons, from Williston, in the County of Barnwell, in the State of South Carolina, to the Cities of Washington, D. C., Baltimore, Md., Philadelphia, Pa., and New York, N. Y., and other points in said States and other States along the line of defendants' railways.

The value of melons in market depends upon their rapid transportation and immediate delivery at points of destination.

The defendants exacted from complainant the sum of \$87.12 to the City of Washington, D. C., the sum of \$87.12 to Baltimore, Md., the sum of \$96.72 to Philadelphia, Pa., the sum of \$103.92 to New York, N. Y., as freight charges for carload from the Towns of Williston and Blackville, S. C., and others along the South Carolina Railway.

Defendants, without consulting with complainant and without any agreement with him, arbitrarily fixed 24,000 pounds as a carload weight, and charged excess freights on all carloads which they claimed exceeded 24,000 pounds in weight, the excess rates being per 100 pounds for all over 24,000 pounds.

Fixing a carload at 24,000 pounds was arbitrary, unjust and oppressive; 32,000 pounds per carload would be just, reasonable and fair; the rates charged are unreasonable and excessive; the sum of \$75 per carload of 32,000 pounds would be an adequate and reasonable price for such freight.

The defendants discriminate against him by charging him a higher rate of freight than they do other shippers, and, in disregard of his rights and in violation of law, changed their rates of freight without giving the notice required by law. Complainant further shows that the defendant Companies, in violation of their agreement, did not, in many instances, make rapid transit and immediate delivery, in consequence of which said melons were over-ripe and in bad condition on their arrival, to the great injury of complainant. By reason of all such wrongs, breaches of contract and violations of law by the defendants, the complainant has been damaged in the sum of five thousand dollars.

Wherefore, etc.

2 INTER S.

THOMAS H. B. BAKER

v.

THE LOUISVILLE, NEW ALBANY AND CHICAGO R. CO.

(No. 253.)

A BSTRACT of complaint, filed Feb. 14, 1890.

Complainant is a physician residing at Pekin, on line of defendant's road.

Defendant is subject to the Act to Regulate Commerce, as a common carrier between Louisville, Ky., through Indiana, to Chicago, Ill.

There is not now, and never has been, any railroad commission or other authoritative body with a right to redress the grievances herein mentioned, created or in existence under the statute laws of said State of Indiana.

Defendant operates and daily runs two passenger trains each way over its said railroad from Louisville to Chicago through said Pekin without stopping at Pekin for passengers, although it keeps a regular station ticket agent at Pekin selling tickets for defendant from Pekin to other points along said railroad, but during the same period persons so buying such tickets could not and did not obtain passage on any of defendant's passenger trains at Pekin.

Complainant, after specifying the purchase at Pekin and attempted use by himself and another of regular tickets to Louisville and refusal of defendant to stop passenger trains to let them on, continues:

Pekin is and has been a highly remunerative shipping and passenger point of the defendant's railroad for thirty years last past before these grievances, and said Pekin contains stores, mills, tile factory, district agricultural fair, and many other industries and enterprises; and for one of defendant's passenger trains passing daily each way to stop at Pekin would entail upon the defendant no additional expense; and there is no other convenient station within five miles thereof; and complainant, in common with hundreds of others, is discriminated against as above set forth.

Wherefore petitioner prays, etc.

HERVEY BATES and H. Bates, Jr.,

v.

THE PENNSYLVANIA R. CO. *et al.*

(No. 231.)

PETITION of the Baltimore & Ohio R. Co., filed Feb. 20, 1890.

TO THE HONORABLE THE INTERSTATE COMMERCE COMMISSION:

Your petitioner respectfully shows that an order* was passed in this cause on the seventh day of February, instant, ordering and adjudging "that the Pennsylvania Railroad Company and the Pennsylvania Company, defendants herein, and the Baltimore and Ohio Railroad Company, be, and they hereby are, severally directed to revise the tariffs of rates in force over their respective lines from Indianapolis in the

*See *ante*, p. 715.

State of Indiana to eastern seaboard points, so that by or before the twentieth day of February, 1890, the rate on corn and its direct and immediate products, namely, ground corn, cracked corn, corn meal, grits, hominy and feed, shall be the same, and from and after said twentieth day of February each of the above named Railroad Companies is hereby required to wholly cease and desist from discriminating in rates between corn and the said products of corn transported by them or either of them from Indianapolis aforesaid to eastern seaboard points."

2. Your petitioner further shows that it owns no line running out of the City of Indianapolis, and makes no rates therefrom to the seaboard, but that traffic from Indianapolis to the seaboard is received by it at Cincinnati from the Cincinnati, Hamilton & Dayton and Cleveland, Columbus, Cincinnati & St. Louis Railroad Companies, and at Columbus from the Columbus, Springfield & Cincinnati and Columbus & Cincinnati Midland Railroad Companies, and at Shelby Junction from the Cleveland, Columbus, Cincinnati & St. Louis Railroad Company, and that the rates on such traffic are, in accordance with the universal custom, named by the carrier in whose territory the traffic originates.

3. Your petitioner further shows that it was not a party defendant in the above entitled proceeding and had no opportunity of producing testimony or examining witnesses at the trial thereof. That after the trial your petitioner received a communication from the Commission to the effect that it having appeared on the trial that your petitioner might be directly or indirectly interested in the determination of the cause the Commission had ordered that your petitioner be notified of the pendency of the cause and be given an opportunity to be heard therein on printed argument, provided it signified its desire to be heard before a certain date; that thereupon your petitioner signified its desire to be heard and submit printed argument, and upon being notified that it might do so its counsel filed such an argument with the Commission. That your petitioner understood at the time that the question upon which it was to be heard was the general proposition which your petitioner understood was maintained by the complainants in the cause, and which was stated in the second recital of the order of the Commission passed therein the twenty-fourth day of October, 1889, to wit: that the commercial relation between corn and corn products was such that any discrimination in rates between them must necessarily be an unjust discrimination. That your petitioner did not understand that it was to be treated as a party defendant in the cause, and as such bound by the particular facts admitted at the trial or deduced from the testimony taken thereat.

4. Your petitioner further shows that the opinion and decision of your Honorable Commission on which the said order of February 7th instant was based does not sustain the general proposition hereinbefore stated, but rests entirely upon the particular facts found from the testimony produced at the trial of this case and applying only to the City of Indianapolis and the plaintiffs in this cause. With reference to the matters of fact so found by the Com-

mission your petitioner has had no opportunity of producing testimony or rebutting the testimony of the complainants herein. And your petitioner protests that it should not be held bound by such findings of fact without such an opportunity.

5. Your petitioner further shows that it believes it will be able, if opportunity be afforded it, to show that certain essential findings in the said opinion and decision of the Commission, however justified by the testimony now in the cause, do not find the facts as they actually exist.

To specify more particularly some of the facts which your petitioner believes it will be able to establish by proof, it mentions the following:

1st. That there are reasons, founded on the cost of service, for difference in rates between corn and corn products, and that it is not for the interest of the carriers to carry the direct corn products at the same rate that they carry the raw corn.

2d. That it is not true that the complainants' business is unjustly affected by the difference in rate from Indianapolis to the seaboard, between corn and corn products, or that such difference in rates gives any advantage whatever to those engaged in the milling business on the seaboard.

3d. That the interests of the carrier and of the producers of corn both require and justify a lower rate on corn than on corn products, as well from inland points as from points on or near the Great Lakes.

Wherefore your petitioner prays that so much of the order of February 7th instant as relates to the petitioner be rescinded, and that your petitioner be given an opportunity to produce testimony and be heard in argument before any order be passed against it in the premises.

The Baltimore & Ohio Railroad Company,
by Chas. E. Way,
General Freight Agent.

John K. Cowen,
Hugh L. Bond, Jr., Counsel.
(Duly Verified.)

On the following day the Pennsylvania Railroad Company and the Pennsylvania Company filed the following:

TO THE HONORABLE INTERSTATE COMMERCE COMMISSION:

The petition of the above-named defendants respectively shows:

1st.—That on the 14th inst. they were served with copy of the order and opinion in this case, made under date of the 7th inst., directing them, on or before this date, to revise their tariff of rates from Indianapolis to the Atlantic seaboard, so that corn and its direct and immediate products shall be the same, and to cease and desist from discriminating in rates between corn and the products of corn.

2d.—That, on the 19th inst., they made by telegraphic communication, through their counsel, an application for a rehearing, following the same on the 20th inst. with another telegram, copies of both of which telegrams are hereto attached, marked respectively "Exhibit A" and "Exhibit B," and made part hereof, as though herein fully written.

3d.—That Hon. Wheelock G. Veazey, in the

opinion delivered as the opinion of the Commission, has mistakenly assumed against the facts as they are believed to exist, and can be fully exhibited to the Commission, that the corn reaching Indianapolis markets is not affected directly by water competition, the truth being that it is affected directly by water competition both upon the lakes eastwardly as well as upon the river water-way southwardly. To such an extent is this true that if the corn of Indianapolis and its tributary agricultural region is compelled to pay a larger price in order to reach an eastern or southern market than the corn grown northward and westward thereof procures from the water and railways adjacent to the water routes, it will be substantially, if not entirely, excluded from the consuming market; that said last-named corn-producing region has adequate area and product to entirely supply the east and south with the amount necessary for ordinary consumption to the entire exclusion of the region tributary to Indianapolis.

4th.—That the difference in rates between corn and corn products is justified from the standpoint of the carrier by, *inter alia*, the fact that the raw corn passes directly from the elevator or warehouse of the owner to the car loaded by his appliances, and is delivered to the elevator or warehouse at the seaboard and handled by the receiver without expense to the carrier, whereas the product of corn is taken from, and necessarily taken to, the extensive terminals of the carrier company, and unloaded and handled by the carrier's employes and at its expense; wherefore the carrier is justified in making a smaller charge for raw corn than for the direct products thereof.

5th.—That to put raw corn from the Indianapolis region at a higher rate than raw corn from west and north thereof would be to work a destructive injury to the farming interests adjacent to Indianapolis, and result substantially in shutting those producers out of an eastern market; and that by putting the direct product of corn from Indianapolis at as low a rate as corn itself, the carrier would receive less than a justifiable charge, without any substantial advantage to the producer.

Wherefore, the petitioners by reason of the foregoing, all of which they expect to be able to successfully establish and maintain before your Honorable Commission, pray that they may be accorded a rehearing, and that the order of the 7th inst. may be suspended and revoked.

James A. Logan,

(Duly Verified.) Counsel for Petitioners.

Whereupon, at a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of February, A. D. 1890,

Present:

Hon. Augustus Schoonmaker,

Hon. Walter L. Bragg,

Hon. Wheelock G. Veazey,

Commissioners,

The following order was made:

The report and opinion of the Commission in this case having been filed on the 7th day of February, 1890, and an order thereon having been issued on the same day commanding the defendants and the Baltimore & Ohio Railroad

Company to cease and desist from discriminating in rates between corn and corn products on or before the 20th day of February, 1890, and directing that the cause be retained by the Commission for the purpose of citing in as parties the other railroad companies owning lines leading from Indianapolis to eastern seaboard points, to wit: the Lake Erie & Western Railroad Company, the Ohio, Indiana & Western Railway Company, the Cincinnati, Hamilton & Indianapolis Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Louisville, New Albany & Chicago Railway Company, unless they comply with the provisions of said order within the time therein specified; and the Pennsylvania Railroad Company and the Pennsylvania Company, defendants herein, and the Baltimore & Ohio Railroad Company, having filed applications for a rehearing of this case and for a suspension of said order pending such rehearing,

It is ordered, That said applications be granted, and that this case be, and it hereby is, assigned for rehearing at the office of the Commission in Washington, D. C., on the 6th day of March, 1890, at 10 o'clock A. M.

It is further ordered, That each of said other Railroad Companies owning or operating lines leading from Indianapolis to eastern seaboard points, or that unite in joint rates between those points with connecting roads, that is to say, the Lake Erie & Western Railroad Company, the Ohio, Indiana & Western Railway Company, the Cincinnati, Hamilton & Indianapolis Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, and the Louisville, New Albany & Chicago Railway Company, be each and all of them notified of the pendency of this proceeding and required severally to appear on said rehearing and show cause why the order of the Commission entered in this case on the 7th day of February, 1890, or such other order as may be made herein, should not be made to apply to the transportation of corn and corn products over their respective lines from Indianapolis to eastern seaboard points.

And it is further ordered, That a copy of the record in this proceeding be forthwith made and sent to each of said new parties, and that a copy of this order be served upon each of the other parties to this proceeding.

THE NEW YORK BOARD OF TRADE
AND TRANSPORTATION.

THE PENNSYLVANIA R. CO., The Pittsburgh, Ft. W. & C. R. Co., and The Pittsburgh, C. & St. L. R. Co.

(No. 248.)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of February, A. D. 1890,

Present:

Hon. William R. Morrison,

Hon. Walter L. Bragg,

Hon. Wheelock G. Veazey,

Commissioners,

The following order was made:

It appearing to the Commission on reading the petition and answer on file in this proceeding, that carriers, other than those named as defendants in said petition, are necessary and proper parties defendant herein, and it further appearing to the Commission that subdivision (c.) of the third paragraph in said answer contains an averment or allegation in regard to the rates charged by said other carriers for inland transportation of import traffic—

It is ordered, That the following named carriers, to wit:

The New York Central and Hudson River Railroad Company,
The Michigan Central Railroad Company,
The Lake Shore and Michigan Southern Railway Company,
The Chicago and Grand Trunk Railway Company,
The Great Western Railway Company of Canada,
The New York, Lake Erie and Western Railroad Company,
The Chicago and Atlantic Railway Company,
The New York, Pennsylvania and Ohio Railroad Company,
The New York, Chicago and St. Louis Railroad Company,

The West Shore Railroad Company,
The Delaware, Lackawanna and Western Railroad Company,
The Grand Trunk Railway Company of Canada,
The Wabash Railroad Company,
The Baltimore and Ohio Railroad Company,
The Philadelphia and Reading Railroad Company,
The Central Railroad Company of New Jersey,
The Boston and Maine Railroad Company,
The Louisville, New Orleans and Texas Railway Company,
The St. Louis, Iron Mountain and Southern Railway Company,

be and each of them is hereby made parties defendant to this proceeding.

It is further ordered, That copies of the petition and answer on file in this proceeding and of this order, be sent to each of said new defendants, with notice to satisfy the complaint herein, or answer the charges embraced in said petition and subdivision (c.) of the third paragraph of said answer within twenty days from the date thereof.

And it is further ordered, That a copy of this order be sent to each of the original parties to this proceeding.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK, *ex rel.* THOMAS C. PLATT,
as President, etc., *Appt.*,

v.

EDWARD WEMPLE, Comptroller, etc.,
Resp't.

(....N. Y.)

1. **A Company formed and doing business within this State**, which was organized by a number of individuals signing articles of agreement by which the concern was described as a "**joint-stock company**," and which provided for continuance a certain number of years, for a capital stock divided into

shares, represented by certificates or scrip and assignable in the usual manner; which provided further that the business should be managed by a board of directors, that suits should be brought in the name of the president, and all deeds should run to and be made by him, and that the death of members less than a majority interest of the whole should not dissolve the Company, —is either a "corporation, joint-stock company or association," within the provisions of chap. 542, Laws 1880, which provides for the taxation of such concerns, and is therefore liable to taxation under that Act, although the articles of

NOTE.—Tax on franchise or business of express companies.

A state tax on gross receipts of a corporation has been held not a tax on commerce, but a tax on the franchise, and in the nature of a tax on general income. *Western U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 289 (21 L. ed. 164, 165); *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361; *Osborne v. Mobile*, 83 U. S. 16 Wall. 481 (21 L. ed. 472); 1 *Desty*, Taxn. 225, 227.

It is not a violation of the constitutional provision confiding to Congress the power to regulate commerce. *State Tax on Railway Gross Receipts*, *supra*; *Am. U. Exp. Co. v. St. Joseph*, 66 Mo. 675; *Columbia Conduit Co. v. Com.* 90 Pa. 307; *Southern Exp. Co. v. Hood*, 15 Rich. 66; *Western U. Tel. Co. v. Mayer*, *supra*. See *Dubuque v. Chicago*, D. & M. R. Co. 47 Iowa, 196.

Where the tax imposed is only a tax on the privilege of doing business within the State, it is not in violation of the Constitution; so the tax on a franchise is lawful. *Baltimore & O. R. Co. v. Maryland*, 2 INTER S.

88 U. S. 21 Wall. 456 (22 L. ed. 678); *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 284, 294 (21 L. ed. 164, 168); *State Freight Tax Case*, 82 U. S. 15 Wall. 277 (21 L. ed. 162); *Society for Savings v. Coite*, 73 U. S. 6 Wall. 606 (18 L. ed. 902); *Osborn v. U. S. Bank*, 22 U. S. 9 Wheat. 859 (6 L. ed. 233); *Brown v. Maryland*, 25 U. S. 12 Wheat. 444 (6 L. ed. 687); *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 497 (22 L. ed. 596).

The annual tax imposed upon certain classes of corporations is not laid upon the money and receipts of such corporations, but upon their franchises, the amount of the net earnings or income being resorted to simply as a just measure of the tax that should be paid for the enjoyment of the franchise. *Phila. Contrib. for Ins. v. Com.* 98 Pa. 48.

Where there is no intention to obstruct or prohibit interstate business it is not unconstitutional. *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532.

A state may authorize a municipal corporation to impose a license or privilege tax on an express company (*Ibid.*), although it is engaged in interstate commerce. *Western U. Tel. Co. v. State*, 55 Tex. 314.

agreement contain no reference to any Statute under which the Company was organized, and the Statute providing for such organizations was not in fact passed until after the agreement was prepared.

2. The word "incorporated," as used in Laws 1880, § 3, amended by Laws 1881, chap. 380, providing that every company incorporated under any law of this State shall be subject to a certain tax, is not to be confined to an association brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations the enabling provisions of the Statute.
3. A tax upon the corporate franchise or business of express companies organized or doing business within the State, to be computed upon their capital stock or its valuation, is neither in form nor in substance obnoxious to the Federal Constitution, as interfering with commerce.

(November 26, 1889.)

APPEAL by relator from an order of the General Term of the Supreme Court, Third Department, confirming upon certiorari the proceedings of the comptroller imposing a tax upon the franchise and business of a certain alleged corporation under the provisions of Laws 1880, chap. 542. *Affirmed.*

The opinion sufficiently states the case.

Mr. W. W. MacFarland, for appellant: The third section of the Act of 1881 embraces only incorporated companies.

People v. Gold & Stock Teleg. Co. 98 N. Y. 67.

The term "joint-stock companies" is, and from the beginning has been, a generic name for all business corporations (Ang. & A. Corp. § 113), and they are recognized under that name by many statutes of this State,—among others, Laws 1849, chap. 308; Laws 1867, chap. 91; Laws 1868, chap. 290; Laws 1855, chap. 155; Laws 1881, chap. 599.

On the other hand numerous statutes, commencing with the Act of 1849, chap. 258, recognized these unincorporated associations, commonly also called "joint-stock companies," according to their true legal character.

See *Bray v. Farwell*, 81 N. Y. 608.

The relator is not an incorporated Company, and therefore is not liable to the tax upon capital stock.

Marbled Iron Works v. Smith, 4 Duer, 374; *Bell v. Streeter*, 1 N. Y. Transcript, N. S. 6; *Witherhead v. Allen*, 3 Keyes, 564; *Schuyler-ville Nat. Bank v. Vanderwerker*, 74 N. Y. 234, *Bray v. Farwell*, 81 N. Y. 608.

Such associations are mere copartnerships and not corporations.

Commercial Teleg. Co. v. Smith, 47 Hun, 494; *Whitman v. Hubbell*, 30 Fed. Rep. 81; *McKeon v. Kearney*, 57 How. Pr. 349; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Marbled Iron Works v. Smith*, *supra*; *Bodwell v. Eastman*, 106 Mass. 525; *Lot v. Dinsmore*, 3 Mass. 45; *Frost v. Walker*, 60 Me. 468; *Bacon v. Dinsmore*, 42 How. Pr. 377; *Taft v. Ward*, 2 INTER S.

106 Mass. 518; *Chapman v. Barney*, 129 U. S. 677 (32 L. ed. 800); 2 Bell, Com. of Scotland, 519; 3 Kent, Com. 24; Parsons, Partn. chap. 18, bk. 5, chap. 1, § 1079; Lindley, Partn. 5; 1 Parsons, Cont. 7th ed. 162.

The tax imposed by the third section of the Act is unconstitutional. No organization or individual enterprise for the purpose of carrying on interstate commerce can be prohibited from conducting that business in any State.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1 (24 L. ed. 708).

No tax can be levied upon interstate commerce by any State in any manner or form, nor can any fees be exacted for the exercise of that right, which is not a state, but a national, privilege.

Cook v. Pennsylvania, 97 U. S. 566 (24 L. ed. 1015); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067); *State Freight Tax Cases*, 82 U. S. 15 Wall. 232 (21 L. ed. 146); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29 L. ed. 785); *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 498 (30 L. ed. 698); *Fargo v. Michigan*, 121 U. S. 230 (30 L. ed. 888); *Phila. & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200); *Leloup v. Port of Mobile*, 127 U. S. 640 (32 L. ed. 311); *People v. Gold & Stock Teleg. Co.* 98 N. Y. 67.

Mr. Clarence A. Seward filed a brief on behalf of the Adams Express Company:

The tax imposed under section 3 of chap. 361 of 1881 is a tax upon corporate franchises and business; it only embraces corporations.

People v. Home Ins. Co. 92 N. Y. 328; *People v. New London Equitable Trust Co.* 96 N. Y. 393; *People v. Gold & Stock Teleg. Co.* 98 N. Y. 67; *Matter of Miller*, 110 N. Y. 222.

The relator is not a corporation, nor exercising a corporate franchise or business. Copartners for the transportation of property cannot constitute themselves a corporation.

Willcock, Corp. 21; 1 Bl. Com. 472; 2 Kent, Com. 276; *People v. Utica Ins. Co.* 15 Johns. 382; *Beatty v. Marine Ins. Co.* 2 Johns. 109.

There can be no corporation except by authority for incorporation in some Act of the Legislature.

Walsh v. Brooklyn Bridge, 93 N. Y. 438.

A partnership or association is not a corporation because organized by ownership in shares or joint stock.

3 Stephens, Com. 181; 3 Kent, Com. 25; *Burrill, Law Dict.* title *Joint Stock Assn.*; *Commercial Telegram Co. v. Smith*, 47 Hun, 506.

The conferring upon voluntary associations of one or more of the powers which at common law are included in a grant of incorporation does not incorporate them nor constitute them in any proper meaning of the term corporations.

Warner v. Beers, 23 Wend. 103.

Even if an association of seven or more, suing and holding property in the name of an officer and having transferable shares, is thereby deemed to possess any corporate powers, it is not a corporation, under the Acts of 1849, 1851, 1853.

Bacon v. Dinsmore, 42 How. Pr. 368; *New York v. Smith*, 4 Duer, 874; *Niagara County Suprs. v. People*, 7 Hill, 507; *Witherhead v. Allen*, 3 Keyes, 562; *Sander v. Edling*, 13 Daly,

1; *McKeon v. Kearney*, 57 How. Pr. 349; *Betts v. Betts*, 57 How. Pr. 355.

Under Code Civ. Proc., § 1919, as well as under the previous Statute, a voluntary association, such as the relator, though suing or sued in the name of an officer as permitted by the Statute, is not a corporation.

Commercial Co. v. Smith, 47 Hun. 506; *Chapman v. Barney*, 129 U. S. 677 (32 L. ed. 800); *Whitman v. Hubbell* (N. Y.) 30 Fed. Rep. 81; *Taft v. Ward*, 106 Mass. 518; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Imperial Ref. Co. v. Wyman*, 6 R. R. & Corp. L. J. 94.

Where persons having common or similar interests in the subject matter of controversy are so numerous that all cannot conveniently be joined, one or more may sue or be sued as representing himself and all the others.

Mann v. Butler, 2 Barb. Ch. 362; *Smith v. Stormstedt*, 57 U. S. 16 How. 288 (14 L. ed. 942); *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Niren v. Spickerman*, 12 Johns. 401; *Chamberlain of London's Case*, 3 Coke, 62 b.

Associations may be entitled to take advantage of the Statute without any particular organization; it is not necessary that they have written articles.

Schuylerville Nat. Bank v. Vanderwerker, 74 N. Y. 234.

An interpretation of the Taxing Laws of New York, which excludes a portion of the citizens who are engaged in business as copartners, and includes only a minor fraction of copartners engaged in a particular business, and that simply by reason of the fact of the strength of their domestic organization, is unconstitutional and void.

Gordon v. Cornes, 47 N. Y. 612.

The unconstitutionality of the Statute, if construed as applicable to associations of seven or more, whether it be applied only to those who have actually sued or been sued, and held or conveyed property in the officer's name, thus exempting others equally within the Acts of 1849, etc.; or whether it be extended to all associations of seven or more, thus taxing all groups of seven engaged in business, and exempting all groups of six or less,—is equally clear. Either construction violates that fundamental rule which secures equality before the law.

Corfild v. Coryell, 4 Wash. C. C. 380; *Slaughter House Cases*, 83 U. S. 16 Wall. 118 (21 L. ed. 422); *San Mateo Co. v. Southern Pac. R. Co.* 8 Am. & Eng. R. R. Cas. 11; *People v. New York Consrs.* 76 N. Y. 71; *Columbus Exch. Bank v. Hines*, 3 Ohio St. 10; *People v. New London Equitable Trust Co.* 96 N. Y. 395.

Messrs. **Charles F. Tabor**, *Atty-Gen.*, and **William A. Poste**, *Dep. Atty-Gen.*, for respondent:

Chapter 542 of the Laws of 1880 was one of a series of statutes all aimed at the same end—the obtaining revenue from a new source—the taxation of such business enterprises as by reason of aggregate character enjoy the privileges of bodies corporate and the advantages of perpetual succession; a taxation not of their property but of their privileges and business, based upon the dividend-earning power of their capital stock.

2 INTER S.

People v. Spring Valley Hydraulic Gold Co. 92 N. Y. 386; *People v. Home Ins. Co.* 92 N. Y. 328.

The United States Express Company is subject to the taxation prescribed by section 3 of the Act of 1880. It is a joint-stock Company and is organized under the Laws of the State of New York, and derives its principal powers and privileges from such laws. At common law a joint-stock association could not, without becoming actually incorporated, obtain perpetual succession, nor the right to issue transferable stock.

3 Anderson, *History of Commerce*, 81; 6 Encyclop. Brit. article *Company*; Taylor, *Joint-Stock Companies' Statutes*, Appendix; *Queen v. Whitmarsh*, 28 L. J. 185.

The arrogation and exercise of all powers that had a tendency to produce a perpetual succession were forbidden to joint-stock associations at common law.

Duvergier v. Fellows, 5 Bing. 248; *Blundell v. Winsor*, 8 Sim. 601.

Such Company has by its own acts and uniform policy placed itself upon and profited by the very Statutes which it now seeks to ignore, and has attained its present power and wealth by taking advantage of such Statutes, and should not now be heard to say that such Statutes did not give it its present powers and advantages. Were it not for the permission given to joint-stock companies to acquire and hold real estate for the purpose of their business the title to such lands as the association might acquire would be subject to all the burdens and liabilities attaching to partnership lands, such as the enforcement of the liens of judgment and widow's dower.

Atkins v. Saxton, 77 N. Y. 195; *Hawley v. James*, 5 Paige, 451; *Bigelow, Estoppel*, 582; *Van Hook v. Whitlock*, 26 Wend. 43; *People v. Murray*, 5 Hill, 468; *Smith v. Sheeley*, 79 U. S. 12 Wall. 358 (20 L. ed. 430).

Within the scope of the legislation of 1880, 1881—the taxation of corporate and aggregate privileges and franchises—the United States Express Company is to be considered as a corporation; and those privileges being the results of the legislation of the State, the Company is to be considered as a corporation organized and incorporated under the laws of the State. No precise form of words, nor even an express grant of corporate powers, is necessary to form a corporation.

Grant, Corp. 5; *Thomas v. Dakin*, 22 Wend. 94.

If there be granted by the State to individuals such property rights or franchises, or imposed upon them such burdens, as can only be properly held, enjoyed, continued or borne, according to the terms of the grant, by a corporation, the intention to create such corporate entity is presumed.

Conservators v. Ash, 10 Barn. & C. 349; *Denton v. Jackson*, 2 Johns. Ch. 320; *Liverpool Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566 (10 L. ed. 1029); *Sanford v. N. Y. Suprs.* 15 How. Pr. 172; *Waterbury v. Merchants U. Exp. Co.* 50 Barb. 157; *Westcott v. Fargo*, 61 N. Y. 542; *Fargo v. McVickar*, 55 Barb. 440; *Fargo v. Louisville, N. A. & C. R. Co.* (Ind.) 6 Fed. Rep. 787.

The Legislature may raise revenue by special

taxes upon all kinds of business, trades and enterprises.

Cooley, Taxn. 7; *People v. Brooklyn*, 4 N. Y. 419; *Stuart v. Palmer*, 74 N. Y. 183; *People v. New London Equitable Trust Co.* 96 N. Y. 387; *Portland Bank v. Apthorp*, 12 Mass. 252; *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306.

The legislation does not offend the Federal Constitution. It is a tax on a franchise, and not a tax on property.

People v. Home Ins. Co. 92 N. Y. 344; *People v. New London Equitable Trust Co.* 96 N. Y. 387.

The decisions of the United States Supreme Court sustain the power of a State to impose a tax upon a corporate franchise.

Hamilton Mfg. Co. v. Mass. 73 U. S. 6 Wall. 638 (18 L. ed. 906); *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206 (21 L. ed. 888).

State legislation is not forbidden in matters either local in their nature or only indirectly affecting commerce, or resulting in practical assistance thereof. Congress, by its non-action in such matters, virtually declares that for the time being, and until it sees fit to act, they may be controlled by the state authority.

Mobile Co. v. Kimball, 102 U. S. 691 (26 L. ed. 238); *Munn v. Illinois*, 94 U. S. 113 (24 L. ed. 77); *Packett Co. v. Catlettsburg*, 105 U. S. 559 (26 L. ed. 1169).

It is perfectly competent for a State to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the State for boats which they use in conveying passengers and goods across a navigable river to and from a landing in another State; and such a tax is not a regulation of or interference with interstate commerce within the meaning of the Constitution.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365 (27 L. ed. 419); *Wheeling, P. & C. Transp. Co. v. Wheeling*, 99 U. S. 273 (25 L. ed. 412). See *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411 (32 L. ed. 229); *Western U. Teleg. Co. v. Mass.* 125 U. S. 530 (31 L. ed. 790); *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206 (21 L. ed. 888).

Danforth, J., delivered the opinion of the court:

This case arises upon an application made by the relator as president of the United States Express Company for a certiorari requiring the comptroller of the State to return to the supreme court his proceedings relating to the imposition of a tax on the franchise or business of that Company, to the end that such proceedings might be set aside, and that in the mean time the collection of the tax be stayed. So far as is material to the question raised upon this appeal, the return of the comptroller showed that prior to the 9th of April, 1888, that officer called upon the Express Company to report as to the amount of its capital stock employed within this State, for the purpose of enabling him to adjust the taxes and penalty due from it to the State under the provisions of the Act, chap. 542 of the Laws of 1880, entitled: "An Act to Provide for Raising Taxes for the Use of the State upon Certain Corporations, Joint-Stock Companies and Associations," as amended by subsequent Acts (chap. 361, Laws 1881; chap.

501, Laws 1885); that the Company refused to comply with his demand, and he, from such data as he could procure, did assess and fix the taxes and penalties recited in the relator's application. It was thereupon stipulated by the relator and the comptroller that the only question to be argued by either party should be whether the relator was liable for the tax provided for by the third section of the Act of 1880, *supra*, and the Acts amendatory thereof, and upon hearing of the matter before the General Term of the Supreme Court in the Third Department the application of the relator to vacate the assessment was denied and the proceedings of the comptroller were ratified and confirmed.

From the order then made this appeal is taken by the relator. The discussion is necessarily limited to the point presented by the stipulation already referred to.

The Express Company was composed of individuals who signed an agreement purporting to have been made April 22, 1854, but which by its terms was to take effect on the 1st of May, 1854, and continue in force for ten years thereafter. On November 24, 1859, the articles were amended by the associates so as to continue in force for twenty years from the 1st of May, 1864, and on January 23, 1884, the directors, under power conferred upon them by the associates, passed a resolution continuing the existence of the Company for twenty years from May 1, 1884. The association was formed for the purpose of carrying on a forwarding agency, banking, exchange and insurance business between such cities and towns of the United States and those of other countries as the directors or their successors might specify.

It is described in the articles as a "joint-stock company," its capital declared to be \$500,000, divided into shares of \$100 each, subject to increase or decrease as the board of directors might think proper, but represented by certificates or scrip signed by the president and secretary of the Company, and countersigned by the treasurer. These shares are made assignable without restriction from one person to another in the usual form in person or by attorney and may be forfeited by order of the directors for causes set forth in the agreement. The property and business of the Company is to be managed by a board of five directors, who from their own number might elect a president, vice-president and secretary, and, except by their permission, "no shareholder in" the Company can use or sign its associate name; in short into their hands the management of the whole business of the Company is intrusted. The directors are also empowered to declare dividends from the net earnings of the Company as they may from time to time deem expedient.

Deeds and other instruments of conveyance or as security are to run to the president, and all suits at law or in equity in favor of the Company are to be brought in his name. It is also provided that the death of no member or any number of members less than a majority of the interest of the whole shall operate as a dissolution of the Company, but its business shall continue as if no death had occurred.

It seems obvious from these articles that the

arrangement consummated by them has little in common with a private partnership, for they provide for a permanent investment of capital, the right of succession, the transfer of property by an assignment of the certificate of ownership and the prosecution of suits in the name of one person. The Company has therefore the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships. It is precisely such an association as, when formed without authority from Parliament, was declared in England to be illegal and void, and to be "deemed a public nuisance" (6 George I., chap. 18, § 18), the Statute in this respect following, it was said, the common law, and enforcing its rules by the imposition of penalties. *Buck v. Buck*, 1 Camp. 547; *Re v. Stratton*, Id. 549, note; *Joseph v. Pebrer*, 3 Barn. & C. 639.

It was held in *Duvergier v. Fellows*, 5 Bing. 248, that there can be no transferable shares of any stock except the stock of corporations or of joint-stock companies created by Acts of Parliament, affirmed in 10 Barn. & C. 826, and 1 Clark & F. 39; and to the same effect is the decision in *Blundell v. Winsor*, 8 Sim. 601.

It is not necessary, however, to assert in what cases such a combination of individuals would now be deemed illegal at common law; for the Statutes of the State render the arrangement possible, and in our opinion the association in question is within their purview.

By the Act of 1849, chap. 258, § 1, a joint-stock company or association was authorized "to sue and be sued, in the name of the president and treasurer," with like effect as if the names of the associates were stated in the proceedings. It was extended in 1851. Laws 1851, chap. 455; Laws 1853, chap. 153.

On March 31, 1854, a bill was introduced into the Legislature (see Senate Journal of that date), and passed April 15, 1854 (Laws 1854, chap. 245), entitled "An Act to Amend, and in Addition to the Several Acts Relative to Joint-Stock Associations," the first section of which declared that (§ 1), "whenever, in pursuance of its articles of association, the property of any joint-stock association is represented by shares of stock, it may be lawful for said associations to provide, by their articles of association, that the death of any stockholder or the assignment of his stock shall not work a dissolution of the association, but it shall continue as before, nor shall such company be dissolved except by judgment of a court for fraud in its management, or other good cause to such court shown, or in pursuance of its articles of association;" and (§ 2), that "said association may also, by said articles of association, provide that the shareholders may devolve upon any three or more of the partners the sole management of their business."

A further Act was passed in 1867, chap. 289, authorizing "joint-stock companies and associations to purchase, hold and convey real estate," and declaring that all conveyances thereof should be made to the president of the Company, who might hold and convey the same free from any claim thereon against any

of the shareholders, or any person claiming under them.

In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view also of the Statutes which legalize its assumed capacities, and make valid and effective its asserted right of succession, its distinctive name, and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association. It is true these articles contain no reference to any statute of the State as one under or by which the Company was organized; yet by the very constitution of the body itself, and the privileges and powers which it can only exercise by virtue of those Statutes, it must be taken to belong to one of those classes of artificial beings described in the Act of 1880, *supra*, as a "corporation, joint-stock company or association."

The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law which sanctions the union. It is doing business within this State, and because it was also formed under the laws of the State it is within the Act. Nor does it seem to us that this construction is at all at variance with the literal and precise language of the Act. It declares (§ 5 of the Act of 1880, as amended in 1881, chap. 361): "Every corporation, joint-stock company or association whatever, now and hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or organized by or under the laws of any other State or country, and doing business in this State (with certain exceptions not now material), shall be subject to and pay a tax as a tax upon its corporate franchise or business into the treasury of this State annually, to be computed," according to certain specified circumstances, upon the capital stock or its valuation made in accordance with the provisions of the first section of the Act.

The first section thus referred to makes it "the duty of the president or treasurer of every association, corporation or joint-stock company, liable to be taxed on its corporate franchise or business as provided in § 3, to make a report to the comptroller" of its capital and dividends, and, if no dividends, then of circumstances which prevent an appraisal. The phraseology of both sections,—the first, "every association, corporation or joint-stock company," and the third, the same words differently arranged,—embraces the United States Express Company, and its relation to the class is not changed by the subsequent limitation implied by the words "incorporated under any law of this State." The word "incorporated," as here used, is not to be taken in a technical or restricted meaning and confined to an association brought into being according to the formality of a statute, but as including any combination of individuals

upon terms which embody or adopt as rules or regulations of business the enabling provisions of the Statutes.

In the case before us the agreement which brought many persons into one artificial body was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the Legislature they must be deemed, for the purposes of the Act in question, to be incorporated, that is, formed or united, under the law of the State, whether the artificial body be termed a corporation, a joint-stock company, or association.

Nor is the principal question altogether new. In *Waterbury v. Merchants Union Express Co.*, 50 Barb. 158, the nature and legal character of the defendant, a joint-stock association created in like manner with the one before us, was held to have all the attributes of a corporation, and all its incidents except a common seal. The Statutes from 1849 to 1867, *supra*, were examined and held to confer the qualities which distinguished a corporation from a partnership, and to establish the relations of a member of the association as those of a stockholder in a corporation, and not those of an individual in a partnership, and that in controversies affecting them the analogies afforded by laws and jurisprudence in the case of corporations should be followed, and not those derived from a simple partnership.

In *Westcott v. Fargo* (president of the same company), 6 Lans. 319, a like discussion was had upon circumstances calling for a decision as to the nature and character of the association. A shareholder sued the company for the loss of freight intrusted to it. It was set up as a defense that the plaintiff as such shareholder was one of the owners of interest in the express company; but the court held otherwise, that it was no valid objection that the plaintiff was a member of the company, saying, "the action is against the corporation;" and so the plaintiff prevailed. Upon appeal the case came in this court, *Westcott v. Fargo*, 61 N. Y. 542, and again the issue was distinctly presented. The appellant contended that the plaintiffs could not maintain an action upon a contract between themselves and the association of which they were members; that their remedy was in equity for an accounting, as in partnership cases; while for the respondent it was argued that "joint-stock companies, organized under the statutes of the State, are corporations, not partnerships."

This court also examined the Statutes relating to joint-stock companies, *supra*, and came

to the conclusion that they conferred powers and privileges of corporations not possessed by individuals or partnerships.

We do not overlook the contention of the learned counsel for the appellant that the articles of agreement and association of the Express Company already contained the provision embraced in the Act of 1854, *supra*, and were therefore part of the fundamental law of the Company. No doubt parties are, in general, deemed to contract with reference to the state of the law as it existed at the time of making the contract; but certainly there is nothing to prevent them from doing so with reference to a state of the law which did not then exist, and more especially is this so if it appears that by the terms of the agreement that changed condition of the law might reasonably be expected.

The Act of 1854 was proposed to the Legislature as early as March. It was passed and became a law on the 15th of April, and although by force of the Statute (1 Rev. Stat. title 4, part 1, chap. 7, 157, § 12), it did not take effect until twenty days thereafter, it was apparently in contemplation of the parties when on the 22d of April, and therefore after its passage, they prepared an agreement embodying the terms and language of the Statute; but however that may be, the period of its new or extended existence began in 1854, when the law was in full force. The agreement which effected it might well be deemed equivalent to a new and original organization. I do not, however, regard this fact as essential. It is not an answer to the operation of the Statute that the agreement constituting the joint-stock association was prepared antecedent to the time when it took effect. It is enough that the powers which it provided for, and assumed to exercise, were thereby ratified and made valid. Thenceforth it acted under and by virtue of the Statute.

Second. We are also of opinion that the tax sought to be enforced is neither in form nor substance obnoxious to any provision of the Federal Constitution. It interferes in no respect with commerce with foreign nations, or among the several States. It is confined to capital employed in this State by an entity existing under its laws, and the manner in which its value shall be assessed and the rate of taxation are matters of legislative discretion. In no aspect does it profess "to regulate commerce," nor in any proper sense has the legislation in question that effect.

We therefore agree with the Supreme Court, and think its order should be affirmed.

All concur, **Andrews, J.**, in the result.

INTERSTATE COMMERCE COMMISSION.

THE KANSAS CITY, WYANDOTTE & NORTHWESTERN R. CO. and The Kansas City & Beatrice R. Co.

v.

THE BURLINGTON & MISSOURI RIVER R. CO. in Nebraska, and The Chicago, Burlington & Quincy R. Co.

(No. 254.)

COMPLAINT filed February 25, 1890.

The Kansas City, Wyandotte and Northwestern Railroad Company respectfully shows that

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it is a railroad corporation existing under the laws of the State of Kansas and owns a line of railroad extending from Kansas City and Leavenworth in a northwesterly direction to the Nebraska state line at Summerfield; that the Kansas City and Beatrice Railroad Company owns a line of railroad from the terminus of the former to Beatrice in the State of Nebraska; that the first-named Company owns and operates the said last-named Company and both are used under a common control, management and agreement.

That The Burlington and Missouri River Railroad in Nebraska, a corporation of the said State, owns and operates a line of railroad from Beatrice to Denver, Colorado, and to numerous points in the State of Nebraska, and especially those hereinafter mentioned, and that the said Burlington and Missouri River Railroad Company in Nebraska is owned and operated by The Chicago, Burlington and Quincy Railroad Company, owning and operating a line of railroad from Chicago to the Mississippi River, where it connects with the said Burlington and Missouri River Railroad in Nebraska, and that it is subject to the provisions of an Act to Regulate Commerce, approved on February 4, 1887, and the amendments thereto.

The complainant states that on or about the 13th of February, 1890, it received at Leavenworth from the Riverside Coal Co. two cars of coal, one of them destined for Wymore, Nebraska, and the other for Hubbell in the same State, both of which places are on the line of the Burlington and Missouri River Railroad; that on the 15th of February, 1890, it offered and tendered the said two cars of coal to the said respondent Company at Beatrice on the connecting tracks between the complainant and defendant Companies to be transported by the latter at its full local tariff rate from Beatrice to destination. That the said coal was loaded in cars of the complainant Company and that the said respondent Company refused to receive the same for transportation; that again on the 17th of February, 1890, it tendered to the said respondent Company at Beatrice on the said connecting track two other carloads of coal loaded in the cars of the complainant Company, one destined for DeWitt and the other for Strang, both in the State of Nebraska and on the line of the respondent Company and both originating at Leavenworth in the State of Kansas, and proposed and offered the same at the full local tariff rates of the said respondent Company from Beatrice to the points of destination. The complainant says that the respondent Company unlawfully combined to prevent the carriage of the said coal from its point of origin to destination as a continuous shipment for the purpose of embarrassing the complainant Company and discriminating against it, and also for the purpose of discriminating against the coal mines at Leavenworth in the State of Kansas, contrary to the provisions of the said Act of Congress.

Complainants say that the said refusal was based upon the pretext of the respondent that they would not receive said coal in the cars of the complainant Company, though afterwards the complainant Company offered to remit the mileage on the said cars and requested the same to be forwarded to destination at full local tariff rates, and the respondent Company still willfully refused to transport the same, contrary to the provisions of the said Act of Congress, though afterwards the complainant Company asked for cars of the respondent Company in which to load coal originating at Leavenworth, Kansas, and destined for points on the line of the respondent Company in Nebraska, which was also refused, contrary to the provisions of the said Act of Congress.

Wherefore, the complainant prays that an order be issued requiring and compelling the

said respondent Companies to receive and transport coal from Leavenworth or other points in the State of Kansas and delivered to them at Beatrice in the State of Nebraska destined for points upon their lines in said last-named State at full local tariff rates, and that they be compelled to receive such coal in the cars of the complainant Company upon the usual and customary terms and conditions existing between railroad companies, and for such other and proper relief as may seem meet and proper.

The, Kansas City, Wyandotte and Northwestern Railroad Company,

By Newman Erb, Vice-President.

GEORGE A. MURRAY

v.

EAST TENNESSEE, VA. AND GA. R. CO.

(No. 250.)

A BSTRACT of complaint filed Dec. 26, 1889, by George A. Murray, a citizen of Rogersville, Hawkins County, Tennessee, engaged in buying and shipping lumber.

All his shipments have been made over the line of Company named, mostly to eastern cities, with a limited quantity to stations on the line of said Company. Until recently the Tennessee and Ohio Railway, a line 15 miles in length connecting Rogersville with the main line, was a separate road and independent of the East Tennessee, Virginia and Georgia Company's line, but now it is a part of the property of said Company and operated under the same management, and forms one continuous line. All reports and funds from Rogersville go into the Company's principal office at Knoxville, Tennessee. Complainant files herewith, and makes part of this complaint, a published tariff of rates and charges on lumber in carload lots from the various stations on the Company's line to the eastern cities named as points of destination. By said exhibit the rates to all these points named are uniform from all the stations named except those on said Tennessee and Ohio Division. All shipments of lumber from Rogersville, Tennessee, to any of the eastern cities named, pay 2½ cents per 100 pounds in excess of the rates charged from Chattanooga and Dalton, the longest distance named, and the same excess over shipments from Rogersville Junction as well as from all intermediate stations between Chattanooga and Dalton and Bristol, Tennessee; and on all shipments of lumber from Rogersville over the same line in the same direction to Greenville or Bristol, Tennessee, or other intermediate stations, the Rogersville shipper pays 5 cents per 100 pounds in excess of the rates charged from Chattanooga and Dalton, and 4½ cents per 100 pounds on through freight in carload lots of lumber in excess of the rate charged from Atlanta, Georgia, to the eastern cities named; and if shipments are made from Rogersville west, to Knoxville or Atlanta, the excess charged over that of other stations southwest from Bristol, Tennessee, is 5 cents per 100 pounds. This is giving an undue and unreasonable preference and advantage to lumber

dealers shipping from other points on the line of the Company complained of.

Shipments of lumber from all the points named to eastern cities are for longer distances than shipments from Rogersville and other stations named in the Tennessee and Ohio Division, and with the same service.

Complainant is advised that this action of the Company complained against is in violation of the 3d section of the Act to Regulate Commerce, and constitutes an unjust and unreasonable discrimination in violation of the 1st section of the said Act.

If in the opinion of the Commission it should be necessary to make connecting lines parties, the right is reserved to ask leave to amend this complaint, under Rule X., at any time such opinion may be announced.

Complainant prays an investigation, etc.

F. B. THURBER, M. N. Day, E. A. Doty,
H. K. Miller, W. B. Timms, B. F. Shores,
Committee of the New York Board of
Trade and Transportation,

v.

THE NEW YORK CENTRAL AND HUD-
SON RIVER R. CO., The New York,
Lake Erie and Western R. Co., The Dela-
ware, Lackawanna and Western R. Co.,
The Pennsylvania R. Co., and The Balti-
more and Ohio R. Co.

THOMAS L. GREENE, as Manager of the
Merchants' Freight Bureau and as represent-
ing two hundred and eighty-one retail mer-
chants in six different States,

v.

SAME.

FRANCIS H. LEGGETT & CO.

v.

SAME.

(Nos. 65, 66, 67.)

1. **Classification of freight** for transportation purposes is in terms recognized by the Act to Regulate Commerce and is therefore lawful. It is also a valuable convenience both to shippers and carriers.

2. **A classification of freight designating different classes for carload quantities and for less than carload quantities for transportation at a lower rate in carloads than in less than carloads is not in contravention of the Act to Regulate Commerce.** The circumstances and conditions of the transportation in respect to the work done by the carrier and the revenue earned are dissimilar, and may justify a reasonable difference in rate. The public interests are subserved by carload classifications of property that, on account of the volume transported to reach markets or supply the demands of trade throughout the country, legitimately or usually moves in such quantities.

3. **Carriers are not at liberty to classify property** as a basis of transportation rates and impose charges for its carriage **with exclusive regard to their own interests**, but they must respect the interests of those who may have occasion to employ their services, and conform their charges to the rules of relative equality and justice which the Act prescribes.

4. **Cost of service is an important element in fixing transportation charges** and entitled to fair consideration, **but is not alone controlling** nor so applied in practice by carriers, and the value of the service to the property carried is an essential factor to be recognized in connection with other considerations. **The public interests are not to be subordinated** to those of carriers, and require proper regard for the value of the service in the apportionment of all charges upon traffic.

5. **A difference in rates upon carloads and less than carloads of the same merchandise between the same points of carriage so wide as to be destructive to competition** between large and small dealers, especially upon articles of general and necessary use, and which, under existing conditions of trade, furnish a large volume of business to carriers, is unjust and violates the provisions and principles of the Act.

6. **A difference in rate for a solid carload of one kind of freight from one consignor to one consignee, and a carload quantity from the same point of shipment to the same destination consisting of like freight or freight of like character from more than one consignor to one consignee or from one consignor to more than one consignee, is not justified by the difference in cost of handling.**

7. **Under the Official Classification, the articles known in trade as grocery articles are so classified** as to discriminate unjustly in rates between carloads and less than carloads upon many articles, and a revision of the classification and rates to correct unjust differences and give these respective modes of shipment more relatively reasonable rates is necessary, and is so ordered.

(Hearings at Washington for taking testimony, January 24 to January 28, 1888, inclusive.—Briefs filed in behalf of the different parties, at various times down to February 4, 1889.—Decision filed March 14, 1890.)

PROCEEDINGS to secure relatively reasonable classification and rates for carloads and less than carloads. *Relief granted.*

See complaints, 1 Inters. Com. Rep. 355, 396, 397; answer in No. 65, Id. 684. The facts are also stated in the opinion.

Messrs. Simon Sterne, Charles F. Beach, Jr., and Thomas L. Greene for the complainants.

Mr. Frank Loomis for N. Y. C. & H. R. R. Co.

Mr. James A. Buchanan for N. Y., L. E. & W. R. Co.

Mr. M. Taylor Pyne for D., L. & W. R. Co.

Mr. James A. Logan for Pa. R. Co.

Messrs. John K. Cowen and Hugh L. Bond, Jr., for B. & O. R. Co.

Mr. J. H. McGowan for Mississippi and Missouri Rivers Jobbers' Association; also for Hoe & Fork Manufacturing Association of the United States, west of the Allegheny Mountains.

Mr. S. E. Payne for Hoe & Fork Makers' Union.

Mr. J. W. Walker for St. Joseph, Mo., Board of Trade.

Mr. D. B. Henderson for Iowa State Jobbers & Manufacturers' Association, and citizens of Iowa, and signers of petitions of 1,300 retail grocery houses of Iowa.

Mr. Peter A. Dey for the executive of the State of Iowa.

Mr. Newton Dexter for Retail Merchants' Association of New York.

Mr. William K. Gillispie for Association of Wholesale Grocers of Pittsburgh, Pa.

Mr. J. C. O'Donnell for Retail Grocers' Association of Pittsburgh, Pa.

Mr. Robert A. Stevenson for Pennsylvania Retail Grocers' Association.

Mr. John Henry Keene, Jr., for signers of four petitions of Baltimore, Md., merchants.

Schoonmaker, Commissioner:

The complaints in these cases all relate to the same subject-matter, the classification of certain freight in carloads, and in less than carloads, but present it in somewhat different aspects.

In the case of Thurber and others the complaint is as follows:

"The undersigned, representing the New York Board of Trade and Transportation, comprising in its membership upwards of one thousand firms and individuals, respectfully submit the following complaint against the New York Central and Hudson River R. R.; New York, Lake Erie and Western R. R.; Delaware, Lackawanna and Western R. R.; Pennsylvania R. R., and Baltimore and Ohio R. R., for unjustly discriminating against small shippers of some varieties of goods, by placing less than carload quantities in a higher class than carloads, by which small shippers are forced to pay from 16 per cent to 60 per cent more for their transportation than large shippers who ship the same goods in carloads. We claim that this action violates provisions in sections one and three of the Interstate Commerce Law, and virtually continues under the guise of classification the unjust discriminations against both localities and individuals, formerly practiced by means of rebates and drawbacks, which the Interstate Commerce Law designs to prevent. This question, as affecting the eastern trunk lines, embodies important points not heretofore presented to your honorable body, by the complaint of the merchants of St. Louis against the Missouri Pacific Road. The west-bound classification of the eastern trunk lines, in force prior to the enactment of the Interstate Commerce Law, made but few and unimportant carload differentials (about one hundred and seven), but the

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new classification adds about one thousand articles to this number, some of which are very important, and the differences in rates made between small and large quantities are excessive. This was the more unnecessary and unreasonable on the part of the eastern trunk lines, because more than half of their west-bound cars go empty, and, the volume of miscellaneous freight transported by them being large, it enables them to a very great extent, if they so desire, to fill their cars with full loads of assorted freight. The principle is the same as in the coal cases which have been brought to your attention, and which, if carried to its logical end, would concentrate the business of the roads in the hands of but one shipper or a few shippers in every place. If this principle is to be tolerated, it should be made as uniform as possible. At present it is not applied to some of the most important branches of trade, the others thus being discriminated against, as well as individuals. The classification of freight touches the principles upon which rates of transportation are based at almost every point, and is worthy of your fullest and most careful consideration. As at present practiced, although there are two parties in interest, shippers and carriers, the latter dictate absolutely to the former in secret session, no publicity being allowed to their deliberations, and no opportunity being allowed the other party in interest to be heard. We believe a full investigation of this question will show that the present classification of the trunk lines is unjust, against public policy, and against even the interests of the railroads themselves, which, although generally taking the position that their business is an intricate one, beyond the comprehension of the ordinary business man or citizen, and that their methods should not be questioned or interfered with by law-makers, have frequently admitted that regulations imposed upon them by law in the interest of the public were not only right but unexpectedly beneficial.

"We respectfully petition for a hearing upon this complaint against the before-mentioned lines at such time as will be convenient to your honorable board, and such relief as may appear after investigation to be reasonable and just."

In the case of Greene, Manager, etc., the complaint is as follows:

"The undersigned, on behalf of 281 merchants in the States of Michigan, Illinois, Indiana, Ohio, Pennsylvania and Delaware, begs leave respectfully to present to your favorable consideration the accompanying petitions. On behalf of petitioners I make complaint to your honorable body that the present classification (copy herewith) in use on west-bound traffic by the railroads known as the Trunk Lines, viz., the New York Central and Hudson River, The Delaware, Lackawanna & Western, The Pennsylvania, the Baltimore & Ohio and the New York, Lake Erie & Western, as regards the unjust differences now made in classification and freight charges between carloads and less than carloads on the same articles between the same points, is in violation of the sections of the Interstate Commerce Law forbidding undue preferences to individuals or localities. On

behalf of petitioners I pray your honorable body to order a restoration to the west-bound tariffs of the principle of uniform rates without regard to quantity of freight, which has been in force from the seaboard for twenty years previous to April, 1887. If a hearing is desired upon the matter, I respectfully ask on behalf of petitioners that we be made parties thereto in connection with the N. Y. Board of Trade and Transportation and any other boards or individuals interested."

In the case of *Leggett* and others the complaint is as follows:

"*First.* That the railroad companies commonly known as the Trunk Lines, which have their eastern termini at the City of New York, namely, the Baltimore & Ohio, the Pennsylvania, the Delaware, Lackawanna & Western, the New York, Lake Erie & Western and the New York Central & Hudson River Railroads, and their connections, have violated the provisions of the Interstate Commerce Act, as follows:

"*Second.* That the said Railroad Companies have published, established and issued a classification of property in common use amongst them. Said classification is annexed hereto, and forms a part of this complaint.

"Said classification declares their intention and purpose to transport property in full carloads with a minimum weight of 20,000 pounds upon the first three classes, and a minimum of 24,000 pounds for the last three classes. That property in a less quantity than said minimum weights is to be charged for in a class higher and at a higher rate of charges than property in carloads of their respective minimum weights.

"Your petitioners complain that the said Railroad Companies, by reason of affixing charges by the said classification, discriminate in favor of shippers who forward a minimum carload against a smaller shipper; that by so doing they give an undue preference, and that, therefore, the said Railroad Companies are acting in violation of section two of the Interstate Commerce Act, which is, 'that if any common carrier . . . shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any services rendered or to be rendered for the transportation of property than it charges any other person or persons for doing for him or them a like and contemporaneous service . . . under substantially similar circumstances and conditions,' etc.; and in violation of section three, namely, 'that it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'

"Your petitioners therefore pray that your honorable body issue a decree requiring said common carriers to cease and desist from such

violation of said Act, and for such other and further relief as in your judgment may be just and proper."

The respondents in the three cases answered jointly, and their answers, which are substantially alike in each case, are as follows:

"1. The respondents are not advised that the petitioners represent the New York Board of Trade and Transportation, or that said Board comprises in its membership upwards of one thousand firms and individuals, and therefore ask that the petitioners be held to due proof thereof.

"2. The respondents deny the other allegations of the petition and each and every of them, except as hereinafter stated. They say and allege that in March, 1887, the 'Joint Committee,' so called, being a committee composed of representatives of the 'Trunk Line Association,' so called; the 'Central Traffic Association,' so called, and certain other railroad companies, after careful consideration, adopted, to take effect April 1st, 1887, 'The New Official Classification,' superseding 'The Official Classification of East-Bound Freight,' 'The Official Classification of West-Bound Freight,' 'The Middle and Western States Classification of Freight,' and 'The Joint Merchandise Freight Classification' in force prior to April 1st, 1887, in different parts of the country and upon various traffic, which classification was accepted by the respondent Companies and other railroad companies and was used by all the railroad companies in the territory east of the Mississippi River and north of the Ohio River, embracing one half of the railroad mileage and eighty per cent of the railroad tonnage of the United States; that subsequently the said 'Joint Committee,' after careful consideration, the hearing of representatives of various commercial interests affected, and the consideration of their suggestions and all the facts known with respect to the operation of the said Official Classification adopted to take effect April 1st, 1887, adopted the 'Official Classification No. 2,' to take effect July 15th, 1887, which Official Classification No 2 was accepted by the respondent Companies and the other railroad companies operating in the territory aforesaid, and is now in use; and the respondent Companies allege that said 'Official Classification No. 2' is just and reasonable, and, upon information and belief, satisfactory to the great majority of the commercial interests in the territory aforesaid.

"3. The respondents further allege and aver that 'the distinction in rates as between carloads and smaller quantities is readily understood and appreciated.'

"That the difference in charge made as set out in said classification between carloads and smaller quantities is based upon fair and equitable considerations, alike just to the shipper and carrier, the result of careful and intelligent thought and consideration by the officers of the respective Companies respondents and of said Joint Committee, and is just and reasonable; that among the reasons which necessitated the distinction in rates as between carloads and smaller quantities is the fact that the average cost to the carrier of handling small shipments is proportionally much greater than that of carload lots, experience having shown

that an average loading of mixed carloads at New York does not exceed five tons per car having a capacity of not less than twelve and often fifteen or more tons; that to retain small packages until a quantity equivalent to a carload for any given destination would be received, would involve an unreasonable delay in shipment objectionable to the shipper, who would look to the company for damages, and impossible to the carrier, because of want of storage facilities in the meantime; so that the railroads, in transporting mixed carloads, must haul seventeen tons for every five tons of paying freight (the empty car itself weighing twelve tons), while in carload freight the paying freight exceeds the dead weight. To this is to be added the loss of time and expense incident to stoppages of whole trains while small packages are being unloaded at many places, whereas cars containing full loads can be readily dropped from the train at their destination.

"4. The respondents further aver that at no season of the year, on any of the lines of the respondent Companies, do more than twenty per cent of their cars go west empty, while on the lines of some of the respondents the loaded cars west bound are equal to the number east-bound, and at certain seasons of the year the west-bound traffic preponderates. An empty car leaving New York is often more valuable to the Companies than one partially loaded to a western point, because of the opportunity to obtain a full load at an intermediate point.

"5. The respondents further say that if any incidental detriment may happen to a few individual shippers in the east as the result of this proper and necessary practice upon the part of the respondents (which these respondents deny), it is much more than overcome by the advantages accruing to jobbers in the cities and large towns in the interior of the country, who buy in the east in large quantities and transport to their respective cities for the purpose of distributing in small quantities within a territory naturally tributary to their interior cities.

6. "Your respondents further answer that they have caused to be constituted a special committee of railroad officers, whose duty it is to consider all communications from shippers suggesting changes in classification and to accord them ample hearings and to submit its recommendations thereafter as to such matters to the railroads interested, as to which fact the public has been duly informed; that at the last meeting of said committee over thirteen hundred communications of this character received consideration, and that many reductions in classifications were made in accordance therewith.

"Wherefore these respondents pray that the said petition may be dismissed."

After the service of the answers the following amendment to the complaints was filed:

"The several petitioners in the above-entitled proceedings, pursuant to Rule 10 of the Rules of Practice, leave having been first duly obtained, by this amendment, to be incorporated in, and to be regarded as a part of, their original petitions, respectfully and severally allege that the respondent Railway Companies, by making and enforcing the carload rates of which complaint is made in their original petitions, and which operate to grant a lower rate for

shipments of or in excess of twenty thousand or twenty-four thousand pounds' weight, than is exacted for shipments of lesser quantities, make an unlawful discrimination of great magnitude in favor of larger centres of population, trade and business, in Pennsylvania, Ohio, Illinois, Missouri, Indiana and Minnesota, which take of the staples set forth in the petition herein by the carload from single consignors to single consignees as against towns and cities nearer to New York from which the shipments are made, and which contain few or no individual consignees to whom carload shipments are made, which lesser shipments are made at such higher price to the shorter distance under substantially similar circumstances and conditions than those shipped for the longer distance, thus violating so much of the fourth section of the Act to Regulate Commerce as provides 'that it shall be unlawful for any common carrier, subject to the provisions of this Act, to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance.'

The complaints as filed apparently assailed the lawfulness and justice of any difference in rates founded upon a classification for carloads and less than carloads. Upon the hearing, however, this broad ground was not taken, and it was conceded that as to certain staples that move from the east to the west, or from the west to the east, or from the south to the north, like coke, coal, lumber, grain of every kind, tobacco or cotton, it is proper that discrimination should be made between carloads and less than carloads, because these stuffs move in carloads, and the natural, normal shipment is the carload, and they have from the first been shipped in the larger rather than the smaller quantity.

The controversy was therefore limited in its immediate objects to certain specified articles of merchandise described by the complainants as staple groceries, and which are as follows: cider in glass; cider in wood; iron nuts, bolts and nails; sugar; paint in barrels; liquors at valuation; prunes in boxes, kegs or bags; prunes in barrels or casks; crockery; fish, salted or pickled; canned goods; cement in barrels or casks; soda and saleratus; pickles in barrels or casks; rice; salt in barrels or sacks; molasses, and wine.

In respect to these articles the contention of the complainants is that their normal mode of shipment is not in carloads, but in smaller quantities called commercial packages, and that either no discrimination should be made in rates between carloads and less than carloads, or that if any difference is permissible on account of greater cost of handling and of transportation in the case of the smaller quantities, it should be so small as not to consume the commercial profit on the goods. It is also contended that no difference should be made between a carload from one consignor to one consignee, and a carload from several consignors to several consignees from the same point of origin to the same point of destination.

The testimony taken is very voluminous, and

covers generally the whole field of transportation in the territory of the Official Classification in carload and less than carload quantities. Only such portions of this testimony need be referred to as seem necessary to the disposition

Cleveland, Fort Wayne, Indianapolis, Chicago, St. Louis and several other western cities.

The classification and rates for the articles in question before April, 1887, and since that date, are shown by the following table:

Table of Comparisons of Freight Rates on West-Bound Traffic Before and After April 1st, 1887. On Basis New York to Chicago.

| Articles. | Before April, 1887. | | After April, 1887. | | | | Amount of increase in rates for small lots since April, in cents, per hundred lbs. | Amount of present increase for small lots over carloads, in cents, per hundred lbs. | Percentage of advance in rates for small lots over carloads at present. |
|-------------------------------|------------------------------|-----------------------|-------------------------|-----------------------|---------------------------|-------|--|---|---|
| | Class regardless of quantity | Rate per hundred lbs. | Class when in carloads. | Rate per hundred lbs. | Class when in small lots. | Rate. | | | |
| Cider in glass | 2 | 60 | 5 | 30 | 2 | 65 | 5 | 35 | 116 $\frac{2}{3}$ |
| Cider in wood | 4 | 35 | 5 | 30 | 3 | 50 | 15 | 20 | 66 $\frac{2}{3}$ |
| Iron nuts, bolts and nails | 4 | 35 | 5 | 30 | 4 | 35 | — | 5 | 16 $\frac{2}{3}$ |
| Sugar | 5 | 25 | 6 | 25 | 4 | 35 | 10 | 10 | 40 |
| Paint in barrels | 4 | 35 | 5 | 30 | 4 | 35 | — | 5 | 18 $\frac{2}{3}$ |
| Liquors at valuation | 4 | 35 | 4 | 35 | 3 | 50 | 15 | 15 | 43 |
| Prunes in boxes, kegs or bags | 2 | 60 | 5 | 30 | 3 | 65 | 5 | 35 | 116 $\frac{2}{3}$ |
| Prunes in barrels or casks | 4 | 35 | 5 | 30 | 3 | 50 | 15 | 20 | 66 $\frac{2}{3}$ |
| Crockery | 4 | 35 | 5 | 30 | 4 | 35 | — | 5 | 16 $\frac{2}{3}$ |
| Fish, salted or pickled | 5 | 25 | 6 | 25 | 5 | 30 | 5 | 5 | 20 |
| Canned goods | 4 | 35 | 5 | 30 | 4 | 35 | — | 5 | 16 $\frac{2}{3}$ |
| Cement, barrels or casks | 5 | 25 | 6 | 25 | 4 | 35 | 10 | 10 | 40 |
| Soda and saleratus | 4 | 35 | 4 | 35 | 3 | 50 | 15 | 15 | 43 |
| Pickles in barrels or casks | 4 | 35 | 5 | 30 | 3 | 50 | 15 | 20 | 66 $\frac{2}{3}$ |
| Rice | 2 | 60 | 5 | 30 | 1 | 75 | 15 | 25 | 50 |
| Salt in barrels | 5 | 25 | 6 | 25 | 5 | 30 | 5 | 5 | 20 |
| Salt in sacks | 5 | 25 | 6 | 25 | 4 | 35 | 10 | 10 | 40 |
| Molasses | 5 | 25 | 6 | 25 | 4 | 35 | 10 | 5 | 16 $\frac{2}{3}$ |
| Wine | 4 | 35 | 5 | 30 | 4 | 35 | — | 10 | 40 |

of these cases. The general facts deemed material and important are as follows:

Carload classification for west-bound business from the seaboard was about a dozen years ago limited to a few articles, but has been extended to other articles from time to time, until the number so classified is large. In 1877 about twenty-four articles had a carload classification; in 1880 about fifty articles; in 1884 about one hundred and forty articles; in 1887, immediately prior to the taking effect of the Act to Regulate Commerce, about one hundred and sixty articles. The new classification, under the Act to Regulate Commerce, embraced about nine hundred articles that might be carried in carload quantities at lower rates than less quantities. The carload classification in existence prior to the Official Classification, which took effect April 1st, 1887, did not include the articles in contention in these cases and hereinbefore specified. There was nominally no distinction, therefore, in rates on these articles for carload and less than carload quantities, although the evidence shows, and the fact is notorious, that rebates, special rates and disregard of tariff schedules were so common that the published tariffs were scarcely prima facie evidence of the actual rates charged.

A much larger proportion of the articles in question is understood to be shipped under the present classification in less than carloads than in carloads. One jobber states the carload shipments to be one eighth. Sometimes full carloads are carried made up of consignments from one or more consignors to one or more consignees at the same destination, and these are usually taken at carload rates. Such shipments are made to Pittsburgh, Columbus,

Testimony was given to show the cost of many of the articles in question to the seaboard jobber, and the profit arising from the business. This testimony tended to show that the average cost of handling the business, including rents and all direct and incidental expenses, is five per cent on the price paid by the jobber for his goods, and that the commercial profit on many articles is very small, and on some no profit but sometimes a loss. For example, according to some witnesses, the values, gross profits and net profits per hundred pounds on certain articles are stated as follows:

| Articles. | Value. | Gross profit. | Net profit. | Difference in rate, C. L. & L. C. L. |
|--------------------------|---------|------------------|-------------|--------------------------------------|
| Coffee | \$20 00 | \$1 00 | \$) 00 | \$0 10 |
| Sugar | 6 50 | 13 | 00 | 10 |
| Prunes in casks | 4 00 | 20 | — | 20 |
| Prunes in boxes | 11 00 | 1 10 | 55 | 35 |
| Standard canned tomatoes | 3 00 | 15 | — | 05 |
| Molasses | 3 75 | 37 $\frac{1}{2}$ | 19 | 05 |
| Salted fish | 7 00 | 70 | 35 | 05 |

These are admitted to be approximations and averages, and, as the testimony of the witnesses varied considerably, and market prices fluctuate, exact statistics cannot be deduced from the evidence.

Facts presented on behalf of the respondents are found as follows:

Prior to April, 1887, when the Act to Regulate Commerce took effect, the principal classifications in use in the territory now covered by the Official Classification were as follows:

1. The distinctive local classifications of the

several railroad companies, differing in many respects from each other.

2. The through west-bound classification, generally known as the Trunk Line West-bound Classification, for through traffic originating at seaboard cities and destined to western termini, Buffalo, Erie, Pittsburgh, Parkersburg, etc., and to a number of competitive points, trade centers or railroad junctions west of those terminals.

3. The East-bound Classification, which alone applied to east-bound traffic originating in the territory east of Chicago and the Mississippi River, west of the western termini of the Trunk Lines, and north of the Ohio River, destined to the western termini of the Trunk Lines and to points east of those termini.

4. Traffic between competitive interior points in the States of New York, Pennsylvania, New Jersey, Delaware, Maryland, Virginia and West Virginia, interchanged between the several Trunk Lines and connecting roads, was governed by the Joint Merchandise Freight Classification, which also applied to the local traffic of certain roads.

5. The Middle and Western States Classification applied to traffic between competitive interior points west of the western termini of the Trunk Lines, east of the Mississippi and north of the Ohio River.

6. Traffic between certain points in the Western States east of the Mississippi River and certain southern competitive points was governed by a separate classification.

These several classifications were superseded on the 1st day of April, 1887, by what has since been known as the Official Classification. This classification was made to meet the requirements of the Act to Regulate Commerce with regard to rates. It covers all the territory lying east of the Mississippi River and north of the Ohio River, extending to the Atlantic Ocean. It is the same for both east-bound and west-bound traffic, and from one station to another. The territory includes about ten thousand stations, and about forty-seven thousand miles of railroad, and applies on 181 railroads.

The present classification applies from New York City alone to an average of 3,015 points on the five principal lines of road leading from that city, being in detail as follows: New York Central & Hudson River Railroad, 3,157; New York, Lake Erie & Western Railroad, 3,200; Pennsylvania Railroad, 3,100; Delaware, Lackawanna & Western Railroad, 2,874; Baltimore & Ohio Railroad, 2,742. Through rates are published to these points by the chief roads named. Under the old classifications in force to April 1st, 1887, the average number of points to which through rates were published by the same roads was 713.

The number of articles classified in carloads and less than carloads in the several classifications in use prior to April 1st, 1887, was:

| Classification. | Number of articles classified. | Carload classes. | Percentage of C. L. to total. |
|---------------------------------|--------------------------------|------------------|-------------------------------|
| East-bound trunk line | 1,763 | 713 | 44 |
| West-bound trunk line | 1,021 | 137 | 14 |
| Middle and Western States | 1,689 | 905 | 54 |

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In the Official Classification No. 2, of July 15th, 1887, there are 2,178 classified articles, 996 of which have carload rates, being 46 per cent.

Changes or modifications have been made in the Official Classification, as follows: The first took effect April 1st, 1887; the second July 15th, 1887; the third February 1st, 1888; the fourth August 15th, 1888; the fifth February 18th, 1889; and the sixth August 15th, 1889. Other changes, relating to a few articles, have also been made by supplement from time to time. In the Official Classification No. 6, August 15th, 1889, and now in effect, there are 4,018 classifications.

It contains 3,536 less than carload and 2,044 carload classifications, many articles being in both. Of carload classifications only, there are 482; of less than carloads only, 1,974; and of less than carloads with lower rate when in carloads, 1,562.

The classes and the rates (New York to Chicago) of several of the articles in question at the present time are as follows:

| Articles. | C. L. | | L. C. L. | |
|----------------------------------|--------|-------|----------|-------|
| | Class. | Rate. | Class. | Rate. |
| Sugar | 6 | .25 | 4 | .35 |
| Molasses | 5 | .30 | 4 | .35 |
| Canned goods | 5 | .30 | 4 | .35 |
| Prunes, in boxes and casks | 4 | .35 | 3 | .50 |
| Salt fish | 6 | .25 | 5 | .30 |
| Rice | 6 | .25 | 5 | .30 |
| Salt | 6 | .25 | 4 | .35 |
| Coffee | 6 | .25 | 4 | .35 |

The rates upon the same articles (New York to Chicago) immediately prior to April 1st, 1887, were as follows:

Sugar and molasses, without distinction as to quantity, 18 cents per hundred pounds; canned goods, in any quantity, 35 cents; prunes in boxes, any quantity, 60 cents; prunes in casks, any quantity, 35 cents; salt, any quantity, 25 cents; rice, any quantity, 35 cents; coffee, carloads, 25 cents, less than carloads, 35 cents. Upon sugar the carload rate has been advanced 7 cents, the less than carload rate, 17 cents. On molasses the carload rate advance is 12 cents, and on the less than carload rate the advance is 17 cents. On canned goods there is 5 cents reduction in the carload rate, and the less than carload rate remains the same. On prunes in boxes the carload rate is 35 cents, being 25 cents lower, and the less than carload rate is 50 cents, being 10 cents lower. On prunes in casks the carload rate is unchanged, and the less than carload rate is advanced 15 cents. On salt fish the carload rate is unchanged, and the less than carload rate advanced 5 cents. On salt the only change is an advance of 5 cents on the less than carload rate. On rice the only change is a reduction of 10 cents on carloads. On coffee there is no change.

In the Official Classification there are only six classes, and the difference in rates between the first and second classes is ten cents per hundred pounds, between the second and third and fourth fifteen cents per hundred pounds, and between the last three five cents each per hundred pounds.

In the two other classifications at present in force, the Western, and that of the Southern

Railway and Steamship Association, there are, respectively, ten classes, with less difference in rates between them. Both carload quantities and less quantities have frequently a special class in this classification. The rates per hundred pounds on the articles in question, in this classification, from Chicago to Kansas City, 488 miles, or about half the distance from New York to Chicago, are as follows:

| Articles. | Carloads. | Less than carloads. |
|------------------------|-----------|---------------------|
| Sugar | .25 | .28½ |
| Molasses | .25 | .28½ |
| Canned goods | .25 | .28½ |
| Prunes, in boxes | .30 | .40 |
| Prunes, in casks | .30 | .30 |
| Salt fish | .25 | .28½ |
| Salt | .15 | .30 |
| Rice | .25 | .28½ |
| Coffee | .25 | .28½ |

These rates are proportionately higher than under the Official Classification, but the differences between carloads and less quantities, with the exception of salt, are less.

A large amount of testimony was given to show the relative average cost of handling and loading freight in carloads and less than carloads, of its transportation and unloading, of the average loads in cars carried respectively, of the relative earnings from carloads and less than carloads, and of the movement of empty cars. The testimony is too voluminous to set forth more than some of the results shown.

The cost of loading 1,769 cars, of which six per cent was carload freight, at Duane Street, New York, was shown to be 62.1 cents per ton. At Dock No. 6, Jersey City, the cost of loading miscellaneous freight was 58.3 cents per ton. At Dock No. 5, Jersey City, the cost of loading carload freight, exclusive of lighterage and only for receiving, sorting, loading in cars and billing the freight, was 16.3 cents per ton. On this basis the cost of loading miscellaneous freight is from 43 to 46 cents per ton, or from 2.1 cents to 2.3 cents per hundred pounds, greater than loading carload freight.

The relative cost of unloading and delivering carload and less than carload freight at Chicago was shown to be 23 cents a ton for less than carloads and 9 cents per ton for carloads, or seven-tenths cents per hundred pounds.

With reference to transportation alone, exclusive of loading and unloading, the following results appeared respecting west-bound shipments over six of the Trunk Lines for a period of fifteen days each in six different months from June to August, 1887, inclusive, in carloads and less than carloads: Less than carloads—whole number of cars, 5,307; number of consignments, 72,678; total weight, 52,513,313 pounds; average weight per car, 9,895 pounds; average weight of consignment, 723 pounds. Solid carloads—whole number of cars, 1,776; total consignments, 1,963; total weight, 52,577,398 pounds; average weight per car, 29,604 pounds; average weight of consignment, 26,784 pounds.

Six hundred and forty-one cars carried less than one ton each, with 1,538 total consignments and an average weight per car of 756 pounds, and an average weight per consignment of 315 pounds.

The average work for a single day during this period was 274 cars of miscellaneous freight, 2 INTER S.

containing 1,524 tons in consignments averaging 648 pounds to 4,713 consignees at 1,452 places; and 111 cars of carload freight, containing 1,638 tons, each car to one consignee and a single destination, and averaging 29,514 pounds per car.

During certain days in October, 1887, in which 11 cars were sent west from New York over some of the Trunk Lines, with miscellaneous freight to certain large cities, averaging 30,419 pounds to a car, there were sent on the same days over the same lines 768 cars with miscellaneous freight consisting of 15,217 consignments, and averaging 11,615 pounds to a car; 69 cars with one consignment only, 10,596 pounds to a car, and 98 cars with 235 consignments, averaging 779 pounds to a car.

The general average of carload shipments from the tables in evidence was nearly 15 tons for carloads and about 5.8 tons for less than carloads or miscellaneous freight.

The evidence gives an illustration of two trains hauling the same number of gross tons, including weight of cars and load, the cars weighing 11 tons each. One train of 25 cars, loaded with 14½ tons each, carries 362½ tons of paying freight. The other train of 38.6 cars, loaded with 5½ tons each, carries 212.3 tons of paying freight. The cost of hauling the freight in the first case would be 0.276 cents per ton per mile, and in the latter 0.471 cents per ton per mile.

The relative earnings from miscellaneous and carload freight, based on average loadings, and the miscellaneous freight made up of different classes, as usually shipped west from New York, of 5½ tons to a car, and a carload of 19 tons of freight of fifth class, was shown, on a division of the Pennsylvania Railroad, to be \$22.03 from the miscellaneous, and \$49.40 from the carload. On the Lake Shore, from Buffalo to Toledo, from average loadings of 4.79 tons miscellaneous, and 13½ tons sixth-class carload freight, the earnings from miscellaneous were \$17.07 and from carload \$27 per car. From Cleveland to Chicago, on the same road, the earnings based on average loadings of miscellaneous freight of different classes, and sixth-class carload freight, were shown at tariff rates to be \$10.40 from miscellaneous and \$30.85 from carload.

The local rates, or rates for short distances, under the Official Classification, are low, and differ less between the classes than for long hauls like that from New York to Chicago. For example, the rates on the Pennsylvania Railroad, on the six different classes, for a distance of thirty miles are, respectively, in cents: 12, 10, 9, 7, 6, 5½; for fifty miles, 18, 14, 12, 8, 7, 6; for ninety miles, 24, 19, 16, 12½, 10½, 9. On the Lake Shore Railroad, for thirty miles: 8½, 8, 8, 7, 6, 4½; for fifty miles, 12, 11, 10, 8½, 7, 6; for one hundred miles, 21, 19, 15, 12, 10, 8.

With regard to empty cars, there is no doubt that a considerably greater proportion of empty (box) freight cars goes west than east over the Trunk Lines, and that a much greater number of only partially loaded cars goes west than east; although the evidence shows that at times large numbers of empty cars have been brought from different points on the Trunk Lines to New York to carry west-bound traffic. The

east-bound tonnage is much larger in volume than the west-bound, though the latter is mostly of higher classifications. In 1887 the east-bound Trunk Line tonnage was, in round numbers, 11,000,000 tons, and the west-bound 2,000,000 tons. For a period of four months in 1887 the number of box cars forwarded west from Buffalo on the Lake Shore Road, loaded and empty, was in the proportion of one empty to about 46 loaded.

The argument in behalf of the complainants is, in substance, as follows: That the difference between carload and less than carload quantities is *prima facie* unjust discrimination against the latter, to be justified by the respondents both as to rates and classification. That a lower rate for a carload than for less than a carload upon the same article, transported over the same line, in the same direction, and for the same distance, violates the provision of the first section of the Act that all transportation charges shall be reasonable and just. That the differences in rates also violate the third section forbidding unreasonable preference and advantage. That they are also in violation of the fourth section of the Act. That the discrimination complained of cannot be justified upon the ground that the higher charge is upon way or local traffic; or that local business is more expensive to the carrier; or that the lower charge inures to the benefit of certain classes or communities; or that the present rates and classification merely continue the former order of business in reference to through and local traffic; or that the shipper who gets the lower rates loads and unloads the freight; or that the matter is adjusted upon what is known as the principle of wholesale and retail. That if any discrimination is permissible in rates between carloads and less than carloads on the freight in question, there is no justification for the wide discrimination in the present tariffs and classifications as between one consignor to one consignee and many consignors to many consignees, or, particularly, one consignor to many consignees. That the contention of the respondents for large differences in freight rates for quantity, deduced from alleged difference in cost of service, is one not regarded in the actual practice of the railroads, and therefore should not be accepted in argument when the tariffs are challenged. That the extreme limit of difference in freight rates for differing quantities is the net commercial profit. That a reduction of discriminating differences for quantities to the basis of net commercial profit would work no injustice to the jobbing interests of the interior cities.

The complainants therefore ask the Commission to order that carload rates upon all articles of commerce complained of in these proceedings be discontinued by the respondents, or made so close to each other that they do not prevent shipments of the commercial package. That all rates upon any quantity of any of these articles be by the hundred weight. That the respondents cease and desist from any species of discrimination whatsoever for quantities shipped of any of these articles so long as the same is contained in the commercial package; and from any discrimination whatever by carload rates which depends upon the number of consignors or consignees. And that such rates

and such classification in respect thereto be adopted as will in no degree oppress or discriminate against the smaller jobber in the smaller localities.

The complainants' argument in effect is that a lower rate for carloads than for less than carloads upon traffic for which, in existing conditions of commerce, a large demand exists in less than carload quantities, is unreasonable and unjust, because it subjects small dealers dispersed throughout the country who may wish to purchase from seaboard or distant jobbers to a disadvantage in choice of markets, and compels them to purchase from near jobbers, and that to enable seaboard jobbers to continue their business and compete with interior jobbers what is called the commercial package and not a carload should be the unit of classification and rate.

On the part of the respondents it is claimed that cost of service is an important and acknowledged element in rate-making, and the argument to sustain the present classification is based almost entirely upon the difference in cost of service shown by the evidence between carloads usually hauled long distances to one consignee, and smaller quantities from different consignors to different consignees to be delivered at many stations.

Mr. Dey, one of the Railroad Commissioners of the State of Iowa, who appeared generally in behalf of the States west of the Mississippi River, made an elaborate argument against the contention of the complainants. Among other considerations he presented the following:

"The carload rate in States west of the Mississippi has, ever since the advent of the railway, been the unit of measurement in all classes of goods and all manufactured articles, as well as in the products of the soil; in fact, in everything that is or can be dealt in largely enough to require the full capacity of a car. The Law was not intended to interfere with the classifications of freight, or the reasonable difference between carload and less than carload rates; provided the same classification applies alike to all shippers, and that all shippers are on equal terms entitled to carload rates in everything they desire to ship. The Western Classification, that took effect December 19, 1887, and was adopted by sixty-four different railway companies, representing 77,000 miles of railroad, contains 660 articles in the carload classification in which the rates per hundred pounds are less than in small lots. This classification is but a continuation of that in use when railways were new, representing the growth of business, and varied from time to time as experience dictated, but the carload has always been recognized as entitled to a lower rate than the less than carload.

"The reasons for the carload rate are: First, the cost of service is less; second, the risk to the carrier is less; third, the time the cars are in use is less; fourth, the unloading is usually done by the consignee.

"The reduction in the differences between carloads and less than carloads on the part of the lines west of Chicago, was not made on any principle announced by the railroad managers of these lines, but was in the nature of a com-

promise between the Chicago jobbers and the interior jobbers west of the Mississippi River, and all subsequent changes made in the Western Classification have been in the direction of restoring it to its old status. Neither Chicago nor New York is the initial or starting point of all freight shipments. The carload rate is essentially a manufacturers' rate, and originated from the necessities of manufacturers. The articles showing the smallest percentage of difference between carload and less than carload rates compose ninety to ninety-five per cent of the whole tonnage, while all the other articles combined compose the other five to ten per cent.

"Under the old system of making rates, the rates from manufacturing points to a few of the large distributing centres of the country were ridiculously low as compared with the rates to the smaller distributive centres, and the real ground of the complaining parties is that they are no longer able, as jobbers, to distribute traffic over territory which they were able to do under the old system of rates.

"Such articles as plows, wagons, general agricultural implements, starch, paper, axle grease, vinegar, soap, western packed canned goods, tubs, pails and washboards, corn, syrups and pickles, are manufactured not only at Chicago and New York, but at a number of points in the west widely scattered, and what right has the jobber of the former cities to complain if, by reason of the nearness of the manufacturers, the jobbers of the latter cities are enabled to obtain these manufactured goods at as cheap or cheaper freight than they? The articles of wooden ware, under which is comprised tubs, pails and washboards, plows and wagons, on which the largest percentage of difference between carload and less than carload rates exist, are first class in less than carloads, and fourth class and class A in carloads. These articles can only be loaded into cars in anything like car-weights by experts in loading and packing, at considerable pains and in extra-size cars. Fifteen to twenty thousand pounds may thus be loaded in a car. Of the same class of goods in the ordinary course of delivery, in broken and assorted lots at the freight station, not more than one third of the above amount of weight can be loaded in a car by the ordinary warehouseman.

"In respect to the following items from the seaboard: Sugar, sugar syrups, raisins, rice, coffee, Baltimore packed canned goods, and salt fish, all of which, except raisins, show the smallest percentage of difference between carload and less than carload rates, the ground is taken that the difference in rates between carloads and less than carloads is not unjust or excessive. As an illustration, ten cars of miscellaneous freight billed from Chicago to Ottumwa, in September, 1885, contained on an average 7,920 pounds per car. Ten straight carloads of groceries taken from the same month contained on an average 24,237 pounds per car.

"There is nothing in the claim that the small shipper or retailer is oppressed in the discrimination of rates. If the retailer is charged the full difference between less than carload and carload rates by the local jobber, then the New York jobber is not shut out of competition. If

the difference in freight is allowed to the small buyer or retailer he cannot complain that he is oppressed.

"The fact that the less than carload lots take nearly four times as many cars to carry the tonnage is not answered by the claim that cars go empty for the return produce and the railway may as cheaply haul the partially loaded car as the empty car. For the year ending June 30th, 1886, the tonnage crossing the Mississippi River into Iowa by rail was, east-bound, 4,216,878 tons; west-bound, 3,263,223 tons. The freight crossing the Missouri River by rail from and to the State of Iowa was, east-bound, 1,215,433 tons; west-bound, 1,426,292 tons. For the year ending June 30th, 1887, the tonnage crossing the Mississippi River into Iowa was, east-bound, 4,411,544 tons; west-bound, 3,601,566 tons. Missouri River, east-bound, tons, 1,286,831; west bound, tons, 2,015,147.

"The method of arranging freight tariffs is to follow the law that governs the cost of service, to decrease the rate per mile with distance. This decrease in long distances is very great. For example, Des Moines, a large jobbing centre, is 350 miles from Chicago. On a consignment from Des Moines to a point 40 miles west of Des Moines, in less than carload lots of fourth-class goods, the rate is about the same as from Chicago for the same distance west of that city—about 12 cents per hundred pounds, while the difference from Chicago to Des Moines and from Chicago to the point 40 miles west of Des Moines, on the same shipment, is but two cents per hundred pounds. The whole merit of this controversy lies in the effort of the eastern jobbers to require their Des Moines competitors to pay the 10 cents per hundred more than they, to place the same goods in the hands of their customers 40 miles west of Des Moines."

The questions involved in these cases, like most transportation questions, are complicated by conflicting interests on the part of persons engaged in trade and commerce, and of localities in different portions of the country. They cannot be disposed of with sole reference to the interests of any one class of persons or one part of the country, but must be determined with due consideration of all interests, but more especially those of the general public, embracing, in their greatly preponderating number, the producers and consumers of the traffic, but without injustice to the transportation agencies. A general rule that shall be equitable to all is exceedingly desirable, but, in the conflict of interests, is difficult, if not impossible, to apply; and, in the frequently changing conditions of commerce, no rule of classification or rates can have an assurance of permanence or absolute equity. Classification is not yet an applied science founded on correct principles and governed by just and consistent rules. It is still in process of growth and development, and the best traffic experts, uninfluenced by exceptional conditions of roads or of special interests, are required to elaborate a system that shall be simple and just, and fairly adapted to the wants of the country. The numerous classifications prior to the Act to Regulate Commerce were mostly irregular expedients, framed with little regard to principles of equity, and, lack-

ing greatly as they did in uniformity, were confusing to the public. Some, for long-distance transportation, had been constructed with more care and upon more reasonable principles regarding character of traffic and value of service.

The provisions of the Act to Regulate Commerce, operating directly upon the greater part of the commerce of the country, and, by necessary consequence, indirectly upon the whole internal commerce, rendered the multitudinous antecedent classifications impracticable, and made a new and improved general classification, or at least classifications suited to territorial areas substantially similar in conditions and traversed by the same traffic, necessary in order to establish rates over connecting roads in conformity to the requirements of the Law. The Official Classification for the business of a very large territory and for a great number of roads thus came into existence. But, being hastily prepared, and in many respects a compromise of diverse and rival interests, especially on the part of roads, it inevitably had imperfections and inconsistencies. Some of these have been corrected by subsequent issues, and, except for the rigid methods of classification committees and the lack of lawful authority, more numerous and more rapid improvements would doubtless have been made. But, as all action in classification, in the first instance, is voluntary on the part of carriers, both in recommending changes and their adoption by different roads, the difficulties in making material alterations are serious. Common consent is the only mode until complaint is made concerning rates.

The present contention has arisen out of this condition. The railroad managers made a classification of the varied and numerous articles of commerce, including those in controversy, which was a compromise between the roads in the eastern and western portions of the territory intended to be governed by the classification. The reasons that originally controlled, whether rightly or wrongly, are still supposed by some of the constituent roads to be influential. And more thorough investigation of the subject has led all the roads, or at least the principal lines and the governing committees, to make a stand against the changes demanded. And in this they are earnestly supported, as shown by the argument of Mr. Dey, by the important interests west of the Mississippi River. The general question remains, therefore, in most respects in a similar condition to that in which it was first presented to the framers of the Official Classification.

In another case before the Commission the principles or considerations that mainly govern committees charged with the preparation of a classification were stated in evidence by a prominent official to be as follows:

"The competitive element, or the rates made necessary by competition; volume of the business, or tonnage; the direction in which the freight moves, whether that in which most of the freight is transported, or the reverse direction, in which the empty cars move; the value of the article to some extent, its bulk, its weight, and the risks attending transportation; the facilities required for particular or unusual

transportation; the conditions attending transportation, embracing many things, such as the necessity for furnishing special equipment, as in the case of cars for dressed beef or cars specially adapted for freight of a perishable nature, large cars for freight of extraordinary bulk, etc., also the analogy which the article classed bears to other articles in the classification; the conditions under which different railroad companies can afford to transport traffic have a large influence; the volume of a particular traffic upon a line of road, and the nature of the competition that it has to meet."

It will be observed that these considerations have reference almost exclusively to the relation of carriers to the traffic, and that no prominence is given to any duty carriers owe to the public, or to any limitations upon the interests of carriers. The public character of carriers, and the public interests affected beneficially or injuriously by the conditions of the service rendered, require a just degree of consideration for those interests, and in general it is believed they are not disregarded, though in some and perhaps many instances injustice may be done by too much concern for the carrier and too little for the public. As was said in the second annual report (*ante*, p. 253), the Commission has laid down the principle "that carriers in making rates cannot arrange them from an exclusive regard to their own interest, but that they must respect the interests of those who may have occasion to employ their services, and subordinate their own interests to the rules of relative equality and justice which the Act prescribes."

How to reconcile rival or competing interests and comply with the Law by reasonable rates and impartial service, with just compensation for the work of the carrier, is a problem of no less difficulty than it has been heretofore. Every special interest is willing to have itself favored at the expense of others, but the purpose of the Law is that burdens and benefits shall be equitably distributed, and average reasonable results can be reached in no other way, and are all that can justly be demanded.

The complainants insist that by the present classification unjust burdens are imposed upon miscellaneous shipments in small quantities as compared with carload shipments, and they ask a return to the former method of no distinction in rates between carloads and less than carloads and still in use by the roads in the Southern Railway and Steamship Association. They urge that a discrimination in charges between carloads and less than carloads is unjust and in violation of the first four sections of the Act to Regulate Commerce. This contention leaves out of view the dissimilar circumstances and conditions of the two methods of shipment and the material element of greater cost to the carrier in the one case than the other. The supposed illegality of a discrimination in charges for carloads and less quantities with varying destinations cannot be maintained under any of the provisions of the Act. The Law itself must have a reasonable interpretation, and its provisions are ample to warrant differences in rates founded upon the character of the traffic and the dissimilar conditions of shipment and carriage. The first section requires

all rates to be reasonable, and this necessarily means under the circumstances of the traffic and transportation. The second, third and fourth sections no more require an equal rate for different kinds of traffic and different modes of transportation than they require the same charge between stations, however near or however remote. The elements of distance, of difference in character of traffic, and of dissimilar transportation conditions, as grounds for distinction in rates, are as clearly recognized as the right of a carrier to compensation for its services. Some discrimination for adequate cause is therefore lawful. The discrimination must not be unjust nor the advantage undue, and the respective rates must not be relatively unreasonable. It is the extent of the discrimination that may be unreasonable and unjust, and not always the mere fact of a difference.

The compulsory restoration of equal rates for carloads and less than carloads in respect of goods properly so classified because naturally and legitimately carried in both modes to meet the demands of commerce, is altogether impracticable, and would seriously demoralize classification and business. It would be a retrograde movement, detrimental in many respects to the public interests. A lower less than carload rate might follow in some instances, but the carload rate would necessarily advance in most cases to make an average remunerative rate, and the interior jobber would lose his vocation unless the cost to the consumer were generally increased. It is a sound rule for carriers to adapt their classifications to the laws of trade. If an article moves in sufficient volume, and the demands of commerce will be better served, it is reasonable to give it a carload classification and rate. The carload is probably the only practicable unit of quantity. And the fact of an antecedent condition when no such distinction existed, and perhaps was not required, furnishes no argument for a return to a mode no longer suited to the requirements of business.

The important question in these cases is therefore whether the classifications of the articles under consideration mark too wide a difference in rates with reference to quantity carried. The complainants concede that difference in cost of service is a proper element to be taken into account, but deny that this difference is equal to the disparity in rates. The complainants insist that the difference in rates for carloads and less quantities should be measured by the commercial profit on the goods of the jobber who ships in small quantities or commercial packages to retailers throughout the country. And it was urged that a retailer who buys directly from a seaboard jobber or manufacturer, instead of an interior jobber, saves an intermediate profit which may inure to the benefit of the consumer.

The theory of an adjustment of rates to preserve a commercial profit to manufacturers and jobbers in all cases, if accepted as a necessary rule under the Law, and generally applied, would be far reaching in its consequences, and clothe common carriers with a new function, to equalize at their own expense the net results of business operations, without regard to location or the conditions of handling and carriage.

In many instances the work of the carrier would have to be done at less than cost, and in some for nothing. Such a rule is not admissible, therefore, as one of general application, and is not essential to the case of the complainants.

And the question at issue is not restricted to jobbers and manufacturers in any one locality or district of country. These are dispersed widely, and traffic is drawn from various quarters and all sources of supply. As classifications and rates must be general an injurious effect in some cases and to some interests is unavoidable, but so long as in the main they are satisfactory the rule applies that the good of the greater number is paramount.

The differences in classification of carloads of one kind of freight to one destination, and less quantities of different kinds to various destinations, are based on the well-known fact of a difference in the cost of service by the carrier. This fact, and the extent of the difference, were probably never so fully demonstrated by tests on different roads, and at different points, as in these cases. Exact average differences, or the difference upon any particular kind of traffic, have not been shown, and perhaps are not possible, but approximately the difference in cost of transportation as shown by testimony ranges from 47 per cent to 100 per cent exclusive of handling, loading and delivering, less than carload freights and transfers *en route*, and the average difference in earnings per car from an average load of carload freight and an average load of less than carload freight is not far from 100 per cent. These averages are varied in both directions by differing conditions and volume of business at different points, but the facts show in a general way substantial grounds for a difference in classification.

In the German Classification, of which evidence was given, freight is classified in two principal classes, carloads and less than carloads. Different rates are charged on goods of different values shipped in carloads of 20,000 pounds, of which there are three general classes, and a lower charge is made on goods of the third class carried over sixty miles. There are also special carload rates for goods not belonging in the first, second and third carload classes for quantities of 10,000 pounds, and a rate three mills lower per ton per mile for quantities of 20,000 pounds. Articles embraced in the first three carload classes, when carried in quantities of 10,000 pounds, are charged a higher rate per ton per mile, the differences being 2 mills for the first class, 6 mills for the second class, and 1 cent for the third. In the less than carload class all goods are comprised without distinction as to value (except that bulky articles have an extra charge), and for this class the highest rate per ton per mile is charged, being 4.5 cents. The difference between the highest rate of carload freight and the rate on all articles of less than carload freight is 2 cents per ton per mile, or 80 per cent, and the lowest carload class is one fifth of the rate for less than carloads.

The rates under the German Classification are very much higher than under the Official Classification in question. For example, on an assumed basis of 1,000 miles, the highest German rate (less than carloads) is 4.5 cents per

special rates makes less discrepancy even than class differences between carloads and less than carloads.

The reasonableness of the rates in question, independently of their relations to each other, is not complained of, but they are challenged on the ground of relative unreasonableness as applied to quantity. The other classifications, say the complainants, make either no discrimination between carloads and minor quantities, or so much less discrimination that the smaller shipper is not unduly prejudiced. At the rates charged, they aver, the service in respect of less than carloads is disproportionately remunerative to the carrier, but substantially valueless to the shipper, because the competition of the carload shipments of the same kind of traffic leaves no margin of commercial profit on the goods, and therefore the transportation is not worth the charges imposed for the service. They also say that large differences in rates for quantity is a rule not uniformly adhered to in the actual practice of carriers, and therefore should not be recognized as a general rule, nor applied to the articles in question, which are mostly household goods of universal use and everywhere handled in the retail trade. Reference is made to a large number of articles, forming a considerable part of the traffic carried by railroads, for which no separate carload rates are made, such as dry goods, cotton piece goods, boots and shoes, tobacco, clothing, candy, caps and hats, blankets, hardware, wool, eggs, tea, etc.

The testimony tends strongly to support these contentions of the complainants, and they have not been met by any evidence other than the average difference in cost of service for carload and less than carload traffic and average revenue therefrom. These averages are deduced from the carriage of every variety of goods, and embrace the freight that has no carload classification. A general average is not an absolute criterion for a particular class of traffic that supplies a large tonnage, carried under favorable transportation conditions.

Moreover, evidence intended to show relative cost of service and relative earnings from traffic differently handled, is not always as fully trustworthy as might be desired. Analysis of such evidence often discloses factors that are given undue weight, or discovers that other material factors may be omitted. So much depends upon the use of strictly legitimate items, and the manner in which figures are handled in reaching results, that caution is generally necessary in accepting arithmetical conclusions. All such evidence is to be considered, therefore, with some degree of reservation as to its weight.

The claim made by complainants that shipments of the grocery articles in question are chiefly made in less than carloads, has not been controverted. The evidence shows that one of the complainant firms shipped annually over the respondent lines about 20,000 tons of freight, of which only about 120 tons, or three fifths of one per cent, was in carloads, and that another firm shipped over the same lines about 25,000 tons, of which about one eighth of one per cent, or 31 tons, was in carload quantities to one consignee.

One of the witnesses for the respondents, and 2 INTER S.

of the highest authority on transportation subjects, conceded that there are features of hardship in the present classification, as, for example, where one consignor forwards to one consignee 20,000 pounds of miscellaneous freight in one shipment, and is charged the less than carload rate, although the shipment amounts to a full carload. This manifest anomaly was imputed to the fact that in the present classification the line had been drawn at carload shipments of 20,000 pounds or 24,000 pounds of one class of goods from one consignor to one consignee. And the witness gave it as his judgment that, when a car is loaded to its full capacity with miscellaneous freight, it would seem fair to make a reduction in rates, and that this rule should apply to any number of shippers who might make up a full carload. The feature of the German Classification allowing a reduced rate for shipments of miscellaneous freight in quantities of 10,000 pounds, but not as low as for full carloads of 20,000 pounds, he thought, if adopted, would remedy to some extent the complaints against the present classification, which limits the minimum carload weight to 20,000 or 24,000 pounds. These cautious utterances are significant upon the questions at issue. Other able and experienced traffic managers not called as witnesses deprecate the differences in rates based on quantity, and favor a uniform rate regardless of quantity. The differences in the other classifications referred to are also suggestive. There is a division of opinion, therefore, among experts in transportation, with reference to the justice and propriety of the present classification.

The *Providence Coal Case*, 1 Inters. Com. Rep. 363, 1 I. C. C. Rep. 107, involved a principle similar to the one in this case, and considerations were urged by the defendant not essentially different from the contention of these respondents. That case was not an issue between carloads and less quantities, but between total annual consignments to one dealer, at any one station on the line of road, of thirty thousand tons or upwards, and consignments of less amounts, a lower rate of ten per cent, equal to ten cents per ton in that case, being allowed to the consignee of the specified quantity. It was said by the Commission:

"A discrimination such as the offer and its acceptance by one or more dealers would create, must have necessary tendency to destroy the business of small dealers. Under the evidence in the case it appears almost certain that this destruction must result, the margin for profit on wholesale dealings in coal being very small. The discrimination is therefore necessarily unjust, within the meaning of the Law. It cannot be supported by the circumstance that the offer is open to all; for though made to all, it is not possible that all should accept. Moreover, in testing such a discrimination we must consider the principle by which it must be supported; and the principle which would support a 30,000-ton limitation would support one of 50,000 or 100,000 equally well; the quantity named would be arbitrary in any case. It might easily be made so high as practically to be open to the largest dealer only. A railroad company if allowed to do so might in this way hand over the whole trade on its road in some necessary article of commerce to a single dealer.

for it might at will make the discount equal to or greater than the ordinary profit in the trade; and competition by those who could not get the discount would obviously be then out of the question. So extreme a case would not however be needful to show the inadmissibility of such a discount as is here offered; the injustice would be equally manifest if several dealers instead of one were able to accept the offer. A railroad company has no right, by any discrimination not grounded in reason, to put any single dealer—whether a large dealer or a small dealer—to any such destructive disadvantage.'

Upon all the evidence, and upon principles that should govern rate-making, a prima facie case has been made against the present classification, which has not been justified by the respondents. Rates should be adjusted to correspond, within reasonable limits, to the existing business of the country, in which the public generally is interested. It is not the province of carriers to regulate business or to build up or destroy markets, but it is their duty to serve business interests equitably and impartially. The evidence shows that the public is far more largely interested in miscellaneous shipments than in solid carload shipments of one kind of traffic. While this condition exists the carriers have a duty to perform to make their service equitable and as reasonable as just compensation for their work will permit. All rates must be reasonable and just. Differences ranging from 40 per cent to upwards of 100 per cent upon the same goods to the same destination, in substantially like quantities as well as in less, in the same kind of cars, and perhaps hauled in the same train, are manifestly neither reasonable nor just, and work undue prejudice and disadvantage to shippers and consignees of miscellaneous freight, both in full carloads and in smaller quantities. The circumstance of many consignors to many consignees of a full carload to the same destination is too unimportant in the item of cost of handling to demand a difference in the rate. Fractional differences exist in all business, as they do under all laws imposing burdens, and in business are supposed to be equalized by average charges. For illustration, in the passenger service quantity is not considered, and passengers weighing three times as much, and with the full limit of baggage, are charged the same rate for the same journey as the lighter passengers without baggage; and a few passengers in a car pay no higher rate than the passengers in a full car, though the earnings of the two cars and the cost of service per passenger differ widely.

In the case of smaller shipments to many consignees at many destinations there is such material difference in the cost of service, in the earnings of cars, and in car detention, as to justify a higher charge. A reasonable amount of difference is difficult to adjust, but it should not be prohibitory upon the business, nor unjustly disproportionate.

The difficulties that have led to these complaints doubtless arise in most part from the small number of classes in the Official Classification, and the effort to compress a vast number of articles of commerce in so few classes. If special rates were made, as in the Western Classification, and a lower intermediate carload

classification established, as in Germany, at a corresponding rate, many of the hardships of the present classification might perhaps be satisfactorily remedied. A classification is not a fixed condition to which other interests must necessarily yield. It is the creation of carriers for their own and the public convenience, and may be changed by its creators. If not compatible with the public interests it should be modified to subserve those interests. Changes ought to be made, but changes under an order of the Commission may not be final. In the nature of things they must in a measure be experimental. And corrections, however made, may require further revision. In the contemplation of the Statute, classifications are to be made and rates established by the carriers subject to review by the Commission and such orders in the premises as justice may require under the provisions of the Act.

In these cases the Commission finds that no adequate reason has been shown for a difference in rates for a carload quantity of like traffic to the same destination, whether from one consignor to one consignee or from several consignors to several consignees, and the discrepancy between the rates for carloads and less than carloads upon the grocery articles in question is unreasonable when both go to one destination, and seems in a lesser degree to be unreasonable when less than carloads go to different destinations. Under these findings the respondents are required to revise their classification and rates and reduce the unreasonable differences to a basis more in conformity to the Statute.

The Commission orders that the respondents proceed forthwith to make the corrections indicated, and that they complete and put the same in effect within thirty days from the service of this order with a copy of the report and opinion.

THE NEW YORK BOARD OF TRADE AND TRANSPORTATION

v.

THE PENNSYLVANIA R. CO. *et al.*

(No. 248.)

THE JOINT AND SEVERAL ANSWER of The Pennsylvania Railroad Company, The Pittsburgh, Ft. Wayne & Chicago Railway Company and The Pittsburgh, Cincinnati & St. Louis Railway Company, to the complaint filed in the above-stated case; filed January 9, 1890; complaint *ante*, p. 660.

The defendants cannot be advised as to the character of the complainant, nor as to the authority of the parties claiming to proceed in its behalf, and, asking that the complainant be held to proof thereof, for answer to so much of the complaint as they are advised it is necessary for them to make answer unto, say:

First. The defendants admit that they are common carriers, substantially as stated in the first section of the first paragraph of the complaint, except that the railway of The Pittsburgh, Ft. Wayne and Chicago Railway Company is operated by The Pennsylvania Company. These defendants, however, deny that they are guilty of unjust discrimination, or

that they have violated section 4 of the Act to Regulate Commerce as amended, according to its true spirit and purpose, as they are advised; and they also deny that either of them is interested in the management and operation of steamship lines running from New York and Philadelphia to foreign ports. The Pennsylvania Railroad Company is, however, the owner of capital stock and bonded indebtedness of the International Navigation Company to the extent of less than one sixth of the entire aggregate of such capital stock and indebtedness. The said International Navigation Company is interested in several lines of steamships between Philadelphia and New York to foreign ports; but The Pennsylvania Railroad Company takes no part in, nor does it assume any control or supervision of, nor does it claim or exercise any exceptional facilities with reference to, said steamships by reason of said stock and bond ownership. The said stock was received in exchange for the transfer to said International Navigation Company of four steamships owned by the American Steamship Company, the entire stock of which was held by The Pennsylvania Railroad Company, which steamships, being operated at a loss, were sold to the said International Navigation Company.

Second. The defendants admit that, under arrangement expiring on the first day of October, 1889, which had continued for a considerable period, the defendant Companies formed with certain ocean steamship lines through routes, and, by means thereof, were engaged in connection with said steamship lines as common carriers in the transportation of property under a common arrangement for a continuous carriage between points in Europe and the City of Chicago and other western points in the United States, by way of New York and Philadelphia; and the defendants say that by the universal practice of carriers constituting a through route under a common control, management, or arrangement for continuous carriage, the initial carrier fixed the rate, and the subsequent carriers, under the practice, did not file tariffs of rates for through shipments. The defendants also admit that they did receive, as their portion of the through rate, a less amount than their full inland rate, but say that if the statement contained on page 3 of the complaint is correct, in the special instances there set forth, so far as the through rate is concerned (which is not admitted), yet the divisions therein shown credit the defendants with a less sum than was actually received. But the defendants aver that said rates, so far as they are correctly stated, represent exceptional instances of extreme low rates, the current and prevalent rates approximating more closely the sum of the inland and ocean rates.

Third. The defendants are advised that the acceptance of a proportion for the inland carriage less than the local inland rate was necessary and may be justified as follows:

(a) That a less sum may be received for a continuous passage over several lines than the sum of the local rates of all the parties to the carriage, is well founded in principle, and has equal application, whether all the lines forming such through route be within the limits of the United States, or whether a portion of the route,

or some carriers parties thereto, be beyond those limits.

(b) The route constituted by the arrangement between the defendants and the steamship lines referred to above, between Liverpool and Chicago, consists of approximately thirty-four hundred miles of ocean from Liverpool to Philadelphia and New York; and approximately eight hundred and fifty miles of rail entirely within the United States. In competition with the routes constituted as above, there existed and exists a route *via* Montreal. The distance from Liverpool to Chicago, by way of Montreal, is substantially the same, the ocean mileage from Liverpool to Montreal being about thirty-four hundred miles, and the inland distance from Montreal to Chicago being about eight hundred miles. By this latter route, however, five hundred of the said eight hundred miles is upon Canadian railroads, not subject to the jurisdiction of this Honorable Commission, and only three hundred miles upon lines of railroads within the limits of the United States, namely, from Detroit to Chicago. The line *via* Montreal also has a complete and independent water route from Montreal to Chicago—that is to say, by way of the Merchants' Line of propellers, operating a weekly line of boats during the season between Montreal and Chicago, through the St. Lawrence River, the Welland Canal and the Great Lakes, which said Merchants' Line of propellers is seeking and has sufficient capacity to carry an important part of the import traffic destined to Chicago and points west that would be delivered to it by the ships landing at Montreal. The agents in Europe of the said route to Chicago *via* Montreal, competing with the agents of the defendants' through line to the same point, tendered to the shippers the option of movement from Montreal, either by the railroad *via* Detroit or by the water route *via* the Merchants' Line of propellers, and constantly bid for said traffic at a through rate lower than that fixed contemporaneously by the defendants' through line, as aforesaid; and that the reductions in the through rate, which resulted in bringing the inland rate accepted by the defendants' through line below a sum which would allow the defendants their full inland rate for the carriage of such traffic, have been rendered necessary in order to obtain traffic *via* New York and Philadelphia as against the competition of the said Montreal line.

(c) As a circumstance cited, not as justifying the defendants' action as standing alone, but as showing that the water and Canadian competition referred to affected other carriers as it did the defendants, the defendants aver that the competing lines of railroad from the seaboard to interior points have constantly, through the agents of their connecting water lines to Europe, bid as low and lower rates on the same character of traffic as were accepted by defendants; and, on information and belief, the defendants charge that the said competing lines accepted, and accept, a less amount as their proportion for the inland carriage of their import traffic than they charge and receive on their inland traffic between the same points.

Fourth. These defendants aver that the said through route, and the division of the rate thereon, were, for the reasons hereinbefore

stated, justified under the Law; and in this behalf they invite the judgment of the Honorable Commission. Inasmuch, however, as any order which might be made restrictive in the future of the practices by the defendants as herein admitted, would work great and unjust prejudice to these defendants, unless all the competitive lines from the seaboard inland were also in like manner restrained and restricted, the defendants suggest to the Honorable Commission that, under their ample powers in this behalf warranted, they cause the said carriers by competitive routes to be made parties to this inquiry.

Wherefore the defendants pray that the complaint in this case be dismissed.

Following this answer came the order of February 8th, *ante*, p. 734.

Answers have since been filed as follows:

By The New York Central and Hudson River Railroad Company, Feb. 24, 1890.

By The Lake Shore and Michigan Southern Railway Company, Feb. 27, 1890.

By The New York, Lake Erie and Western Railroad Company, individually and also as lessee of The New York, Pa. and Ohio Railroad Company, March 1, 1890.

By The West Shore Railroad Company, The Boston and Maine Railroad Company and The New York, Chicago and St. Louis Railroad Company, March 3, 1890.

By The Central Railroad Company of New Jersey, The St. Louis, Iron Mountain and Southern Railway Company and The Louisville, New Orleans and Texas Railway Company, March 10, 1890.

The following—first and last of above list—illustrate the whole:

ANSWER OF THE N. Y. C. AND H. R. R. Co.

The Interstate Commerce Commission having, on the 8th day of February, 1890, made an order in the above-entitled proceeding, that The New York Central and Hudson River Railroad Company, and certain other Railroad Companies named in said order, be made parties defendant, and notified to satisfy the complaint, or answer the charges embraced in the petition, and subdivision (c) of the third paragraph of the answer, The New York Central and Hudson River Railroad Company, now answering, says:

That it denies that at the date of the filing of said petition it was violating, or at any time since has violated, the provisions in the Act to Regulate Commerce, in the respects charged in the said petition, and in subdivision (c) of the third paragraph of the answer thereto.

And this defendant further says and alleges that since the making of the order by the Interstate Commerce Commission of March 23, 1889, respecting, among other things, the rates on imported traffic, this defendant has, in every respect, complied with said order.

ANSWER OF THE LOUISVILLE, N. O. & T. R. Co.

The Louisville, New Orleans & Texas Railway Company, for answer, according to the rule of the Commission herein made the 8th day of February, A. D. 1890, to the matters of the petition and subdivision (c) of the third

paragraph of the answer of the original defendants, respectfully states:

(1) That it is a railway corporation owning and operating a line of railway between the Cities of New Orleans, Louisiana, and Memphis, Tennessee, and thereon is a carrier of freight and passengers.

(2) That respondent has neither knowledge or information as to what rate or rates the original defendants The Pennsylvania R. Co., The P. Ft. W. & C. R. Co. and the P. C. & St. L. R. Co. bid or accepted as their proportion of through rates on import traffic, or as to how low such are or have been, save only as shown by the pleadings herein. It denies that its inland proportion of through import rates has at any time varied so far from its local rates on inland traffic between the same points as instanced in the petition.

(3) That respondent admits that in order to get a share of such import traffic it accepts such business as the ocean carriers bring it, taking same at the rates contracted for by the ship agents on the other side; such through rate usually being divided equally between the ship and the rail line.

This course is forced upon respondent by competitors, carriers by water, the steamboats on the Mississippi River and its confluent, The Anchor Line of steamboats, bonded carriers the same as respondent, ply said river between New Orleans and St. Louis and on many lines of such import traffic bid rates 50 per cent lower than respondent, and so take such business direct from the ship to Memphis and the points intermediate New Orleans, Cincinnati and St. Louis. That such competition by water carriers not subject to the Act to Regulate Commerce is of controlling force and important in volume and amount is shown by the statements from the exchanges of those cities herewith or to be hereafter filed.

Beside, the Illinois Central R. Co. is a competitor with respondent for such business for all leading points from New Orleans, and pursues the same policy as herein admitted as followed by this respondent.

(4) That this method of rate-making on import traffic is necessary in order to secure the business, both because of the competition with carriers by water as above shown, and to enable consumers of such imported articles at inland points to obtain same without payment of tolls and tribute to middlemen, jobbers at seaports, etc., putting the articles from foreign fields into the hands of the interior consumer at such rates as will enable same to be moved and used in competition with others.

(5) That indeed neither the letter nor the spirit of the Act to Regulate Commerce interdicts the acceptance by respondent of a lower rate as its proportion of a through import (or for that matter a through export) rate than it charges for like service for inland or local haul, the aggregate import rate being as large or larger than the local or inland rate. And the Commission has held said Act to Regulate Commerce to apply to foreign as well as domestic common carriers for a continuous carriage from the United States to adjacent foreign countries, and to rates on commerce or traffic over rail lines between interior points of the United States through sea ports thereof to or

from foreign countries, requiring rail carriers thereof to publish their proportions of such rates. Respondent states that such through import rates in which it has participated have at all times been as great or greater than its local or inland rates over same inland line to same destination, though it has not at all times exacted on imported articles as its proportion of a through import rate a sum corresponding

to its local rate on inland traffic passing over its line to like destination; and this it is advised may rightfully be done without violation of the Statute,—such import rates not being required to be made upon a mileage basis any more than inland rates.

Wherefore respondent prays that the rule against it herein be dismissed.

INDIANA SUPREME COURT.

STATE OF INDIANA, *ex rel.* Cornelius CORWIN, *Appt.*,

v.

INDIANA & OHIO OIL, GAS & MINING CO.

(....Ind....)

1. Natural gas, when brought to the surface and placed in pipes for transportation, is an article of commerce.

2. A State Legislature has no power to prohibit the conducting of natural gas from points within to points without the State.

(November 6, 1889.)

A PPEAL by relator from a judgment of the Circuit Court for Jay County in favor of defendant in an action to have its franchises forfeited for violating the law in piping natural gas out of the State. *Affirmed.*

NOTE.—Power of Congress to regulate commerce.

By the Constitution of the United States it is provided that Congress shall have power to regulate commerce with foreign nations and among the several States. U. S. Const. art. 1, § 8, subd. 3; *Ward v. Maryland*, 79 U. S. 12 Wall. 418 (20 L. ed. 449); *Welton v. Missouri*, 91 U. S. 275 (23 L. ed. 347); *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 543); *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 473 (24 L. ed. 531); *State v. Carrigan*, 39 N. J. L. 37; *State Freight Tax Case*, 82 U. S. 15 Wall. 232, 275 (21 L. ed. 146, 161); *Passenger Cases*, 48 U. S. 7 How. 283 (12 L. ed. 702); *Pennsylvania v. Wheeling & B. Bridge Co.* 59 U. S. 18 How. 421 (15 L. ed. 435); *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 (6 L. ed. 678); *Almy v. California*, 65 U. S. 24 How. 169 (16 L. ed. 644).

That portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. *Welton v. Missouri*, *supra*.

For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. *Mobile Co. v. Kimball*, 102 U. S. 691 (26 L. ed. 238); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 574 (30 L. ed. 250).

Interstate commerce must be open and free to all persons unless restricted by congressional legislation. *Webber v. Virginia*, 103 U. S. 344 (26 L. ed. 565); *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 543); *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59 (27 L. ed. 383); *Smith v. Alabama*, 124 U. S. 469 (31 L. ed. 509).

The power of Congress to regulate interstate commerce is exclusive when its subjects are national in character, or admit of only one uniform system or plan of regulation. *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 489 (30 L. ed. 694); *Philadelphia & S. Mail Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200); *Kaiser v. Illinois Cent. R. Co.* 18 Fed. Rep. 151.

Its power is not restricted by state authority. *Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania*, 125 U. S. 181 (31 L. ed. 650).

Its power to regulate adapts itself to the new developments of time and circumstances. *Pensacola* 2 INTER S.

Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1 (24 L. ed. 708); 1 *Desty*, Taxn. 214.

And it comprehends all those general laws of internal regulation and protection of all property in the State, its power in these respects being supreme. *Ex parte Shradler*, 33 Cal. 279; *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. 506; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 (24 L. ed. 989); *Munn v. Illinois*, 94 U. S. 147 (24 L. ed. 91); *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *Davis v. Central R. & Bkg. Co.* 17 Ga. 323; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Daniels v. Hilgard*, 77 Ill. 640; *Boyd v. Alabama*, 94 U. S. 645 (24 L. ed. 302); *Slaughter-House Cases*, 83 U. S. 16 Wall. 62 (21 L. ed. 404); *Bartemeyer v. Iowa*, 85 U. S. 18 Wall. 138 (21 L. ed. 932); 2 *Desty*, Taxn. 1377.

Power of Congress exclusive.

The fact that Congress has never regulated commerce does not give to the States the power to do so. *Com. v. Philadelphia & R. R. Co.* 1 *Pearson* (Pa.) 379; *Desty*, Fed. Const. 292.

The non-exercise of the power in respect to the regulation of commerce between the States is equivalent to a declaration that such commerce shall be free from any restrictions or impositions. *Welton v. Missouri*, 91 U. S. 275 (23 L. ed. 347); *Brown v. Houston*, 114 U. S. 622 (29 L. ed. 257); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29 L. ed. 785); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244); *Walling v. Michigan*, 116 U. S. 446 (29 L. ed. 691); *Corson v. Maryland*, 120 U. S. 502 (30 L. ed. 699); *Hall v. DeCuir*, 95 U. S. 485 (24 L. ed. 547); *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465 (24 L. ed. 527); *Smith v. Alabama*, 124 U. S. 469 (31 L. ed. 509).

Any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 222 (6 L. ed. 23, 76); *Passenger Cases*, 48 U. S. 7 How. 283, 462 (12 L. ed. 702, 777); *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 469 (24 L. ed. 527, 529); *Welton v. Missouri*, 91 U. S. 275, 282 (23 L. ed. 347, 350); *Mobile Co. v. Kimball*, 102 U. S. 691 (26 L. ed. 238); *Brown v. Houston*, 114 U. S. 622, 631 (29 L. ed. 257, 260); *Walling v. Michigan*, 116 U. S. 446, 455 (29 L. ed. 691, 694); *Pickard v. Pullman Southern Car Co. supra*; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244); *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 493 (30 L. ed. 696); *Com. v. Philadelphia & R. R. Co. supra*; *Desty*, Fed. Const. 295.

Any legislation of a State, although in pursuance

The case sufficiently appears in the opinion.
Messrs. C. Corwin, John M. Smith and L. T. Michener, Atty-Gen., for appellant:

Whenever the State observes that an act about to be done, or which, if done, would materially affect, injure or deprive the citizens or inhabitants of the State of the full enjoyment of their property, it has the right through its Legislature and law-making power, as a police regulation, to prohibit the act about to be done, and, if done, to prescribe the penalties for so doing, in the way of fines if natural persons, and forfeitures if corporations.

Fry v. State, 63 Ind. 552; *Patterson v. Kentucky*, 97 U. S. 501 (24 L. ed. 1115).

Natural gas being a matter of internal commerce, not subject to general use between States, the law in question only seeks to regulate and control the piping of a domestic article out of the State; and under the decision of *Patterson v. Kentucky*, *supra*, the State of In-

diana has the inherent right to prohibit the act of piping gas out of the State.

See 9 Chicago L. J. Nos. 11 and 12, December, 1888; *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 346).

It was the act of one of the citizens of the State which was prohibited—not the sale of the article out of the State.

See *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Kidd v. Pearson*, *supra*.

Messrs. John B. Cohrs and R. C. Bell, for appellee:

Natural gas is a subject over which Congress has, by express provision of the Constitution, exclusive control, and concerning which the States have no power to legislate. In the absence of any such regulation by Congress such transportation must be without restriction.

Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 336 (30 L. ed. 1201). See also *Robbins v. Shelby Co. Taring Dist.* 120 U. S.

of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. *Smith v. Alabama*, 124 U. S. 465 (31 L. ed. 508).

Where a state statute invades the domain of legislation belonging exclusively to Congress it is void. *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 543). See *Sinnot v. Davenport*, 63 U. S. 22 How. 227 (16 L. ed. 243); *Blanchard v. The Martha Washington*, 1 Cliff. 473; *Re Ah Fong*, 3 Sawy. 145.

So state statutes imposing obstacles or burdens on interstate commerce are in conflict with the Constitution of the United States, and are void. *Hall v. De Cuir*, 95 U. S. 488 (24 L. ed. 548); *Welton v. Missouri*, 91 U. S. 282 (23 L. ed. 350); *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 338.

Commerce includes transportation and intercourse

The term "commerce" includes everything relating to the subject of intercommunication. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Lin Sing v. Washburn*, 20 Cal. 534.

Commercial intercourse, as interstate communication by telegraph, is a part of commerce. *Western U. Teleg. Co. v. Texas*, 105 U. S. 466 (26 L. ed. 1068).

Commerce refers to transportation and traffic, intercourse and navigation. *Lord v. Goodall Steamship Co.* 102 U. S. 541 (26 L. ed. 224); *Desty, Fed. Const.* 291.

Transportation is an essential element of commerce, including transportation of freight and passengers between the States, or with foreign countries. *Kaiser v. Illinois Cent. R. Co.* 18 Fed. Rep. 151; *Indiana v. Pullman Palace Car Co.* 11 Biss. 561; *Lord v. Goodall Steamship Co. supra*; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59 (27 L. ed. 353); 20 Blatchf. 296; *Head Money Cases*, 18 Fed. Rep. 135; *Pacific Coast Steamship Co. v. California R. Comrs.* 18 Fed. Rep. 10; *Sweatt v. Boston, H. & E. R. Co.* 3 Cliff. 339; *Clarke v. Philadelphia, W. & B. R. Co.* 4 Houst. 158.

The transportation of property is a constituent part of commerce, and a tax on property in transit from State to State is a regulation of commerce and cannot constitutionally be imposed under state authority. *State v. Carrigan*, 39 N. J. L. 37; *Erie R. Co. v. State*, 31 N. J. L. 531.

Any regulation of transportation, whether on the high seas, lakes, rivers or railroads, or other artificial channel of interstate commerce, operates as a regulation of commerce within the meaning of the Constitution. *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 338.

2 INTER S.

A corporation engaged in the removal of petroleum is a transportation company. *Columbia Conduit Co. v. Com.* 90 Pa. 307.

A statute of a State, intended to regulate or to tax, or to impose any other restriction upon the transmission of persons, or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and such statutes are void even as to that part of such transmission which may be within the State. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244).

Police power of State, regulation of occupation.

The police power of the State is the power to govern men and things within the limits of its dominion. *License Cases*, 46 U. S. 5 How. 525 (12 L. ed. 256).

So occupations requiring special regulations are subject to the police power. *Cincinnati v. Bryson*, 15 Ohio, 625; *Nightingale's Case*, 11 Pick. 168; *White v. Kent*, 11 Ohio St. 550; *Adams v. Somerville*, 2 Head, 363; *State v. Crawford*, Id. 460; *Buffalo v. Webber*, 10 Wend. 99; *Brooklyn v. Breslin*, 57 N. Y. 591; 2 *Desty*, Taxn. 1378.

Police laws, though they may disturb the enjoyment of individual rights, are not, therefore, unconstitutional. *Hill v. Thompson*, 16 Jones & S. 481.

The appropriate regulation of the use of property is not a "taking" it, within the meaning of the Constitution. *Richmond, F. & P. R. Co. v. Richmond*, 96 U. S. 521 (24 L. ed. 734).

The Legislature may prohibit a dangerous business, as the sale of opium, or may regulate the sale of any commodity, the use of which would be detrimental to the morals of the people. *Kirby v. Pennsylvania R. Co.* 76 Pa. 506; *People v. Hawley*, 3 Mich. 330; *State v. Ah Chew*, 16 Nev. 50; *State v. Gurney*, 37 Me. 156.

It has a right to adopt a general regulation in reference to its affairs which shall include imported goods equally with those of domestic origin; but it cannot obstruct interstate commerce. *Smith v. People*, 1 Park. Cr. Rep. 583; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 473 (24 L. ed. 531), disapproving *Yeazel v. Alexander*, 58 Ill. 254.

All regulations of trade with a view to the public interests may more or less impair the value of property, but they do not come within the constitutional inhibition unless they virtually take away and destroy those rights in which property consists, and the destruction must be, for all substantial purposes, total. *Munn v. People*, 69 Ill. 80.

493 (30 L. ed. 696); *Mobile Co. v. Kimball*, 102 U. S. 697 (26 L. ed. 239).

The only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons, and the protection of property.

Robbins v. Shelby Co. Taxing Dist. supra.

The police power is generally said to extend to making regulations promotive of domestic order, morals, health and safety.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 471 (24 L. ed. 530); *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149; *Salzenstein v. Mavis*, 91 Ill. 391.

Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation. Even this is forbidden. Much less is entire prohibition of transportation allowed.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470 (24 L. ed. 529); *Case of the State Freight Tax*, 82 U. S. 15 Wall. 232 (21 L. ed. 146); *Ward v. Maryland*, 79 U. S. 12 Wall. 418 (20 L. ed. 449); *Welton v. Missouri*, 91 U. S. 275 (23 L. ed. 347); *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 543); *Chy Lung v. Freeman*, 92 U. S. 275 (23 L. ed. 550); *State v. Saunders*, 19 Kan. 127; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 382.

Natural gas is property. Artificial illuminating gas is personal property and the subject of larceny.

Com. v. Shaw, 4 Allen, 308.

Natural gas is freight, and a company mining and piping it is in the same position as a company manufacturing and tubing illuminating gas.

Carothers v. Philadelphia Co. 11 Cent. Rep. 48, 118 Pa. 468.

Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has begun.

The Daniel Ball, 77 U. S. 10 Wall. 557 (19 L. ed. 999); *Kidd v. Pearson*, 128 U. S. 1-25 (32 L. ed. 346-352).

The transportation of property from one State to another is a branch of interstate commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 469 (24 L. ed. 529).

As the police power of the State in its range comes very near the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any intrusion.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 474 (24 L. ed. 531).

Elliott, Ch. J., delivered the opinion of the court:

At the last session of the General Assembly several Acts were passed upon the subject of mining, using and disposing of natural gas. The validity of one of these Acts, that of March 9, 1889, is assailed upon the ground that it contravenes the provisions of the Federal Constitution. The first section of the Act, which is here the direct subject of controversy, read thus:

"Section 1. Be it enacted by the General

Assembly of the State of Indiana, that it shall be unlawful for any person or persons, company, corporation or voluntary association, to pipe or conduct natural gas from any point within this State to any point or place without this State. Any person or persons, company, corporation or voluntary organization, now or hereafter incorporated under any law of this or any other State, for the purpose of drilling and mining for petroleum or natural gas, or otherwise acquiring gas or petroleum wells, and the products thereof, and to furnish the same to its patrons, or to convert such product into gas for illuminating purposes or fuel, which shall have entered upon and acquired by deed of conveyance, or appropriated or condemned, any real estate under any law of this State, for the purpose of laying its pipe lines, or for any other purpose, which shall permit any gas to be conveyed or carried through its pipes to any place without this State, or for the purpose of being used without this State, shall forfeit all right, title and interest in and to all real estate so appropriated, conveyed or condemned, and the pipes laid thereunder, and the same shall revert to and become the property of the persons or corporations, their heirs, successors or assigns, who owned the same at the time of such appropriation, conveyance or condemnation: provided, that the provisions of this Act shall not be so construed as to prevent towns or cities divided by any of the boundary lines of this State, and having a majority of the population of such cities or towns residing within this State, from being supplied with natural gas." Elliott's Supp. § 1875.

On the 21st day of February, 1889, an Act was passed declaring that the word "mining" should be deemed to include the sinking of gas wells, and that the incorporation of companies and that the subscriptions of stock under former laws are legalized. On the same day an Act was passed authorizing gas companies to extend their pipes beyond the corporate limits of towns and cities. On the 20th day of the same month the General Assembly passed an Act authorizing natural gas companies to appropriate and condemn property. Id. §§ 1016, 1809.

All of these Acts were put in immediate effect by the proper emergency clause.

The appellee's counsel contend that the Act of March 9, 1889, is invalid because it is interstate commerce legislation, and such legislation must be exclusively federal. In order to give any force to this contention, it is necessary to determine at the outset whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country. *Citizens Gas & Min. Co. v. Elwood*, 114 Ind. 332, 14 West. Rep. 92; *Carothers v. Philadelphia Co.* 118 Pa. 488, 11 Cent. Rep. 48; *Columbia Conduit Co. v. Com.* 90 Pa. 308; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 382; *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999]; *Kidd v. Pearson*, 128 U. S. 1 [32 L. ed. 346].

The gas in the earth may not be a commer-

cial commodity; but when brought to the surface, and placed in pipes for transportation, it must assume that character as completely as coal in the cars, or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference in principle between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce; but when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation, an article of property may not be regarded as a commercial commodity until it has started on its way from one State to another; but property that may become an article of commerce cannot be kept in the State where it was produced, by a state law forbidding its transportation. *Coe v. Errol*, 116 U. S. 517 [29 L. ed. 715].

If this were not so, then not only might coal or petroleum be kept within the State in which it was produced, but so might corn and wheat, cotton and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result; and it was to prevent the possibility of such a result that the provision vesting exclusive power in the federal government was written in the National Constitution. *State v. Woodruff S. & P. Coach Co.* 114 Ind. 155, 13 West. Rep. 311.

The question as to the extent of the power of the State to control the business of mining is not necessarily involved in this controversy. Granting, but not asserting, that procuring natural gas from the earth is mining, still, the question of the power of the State over that business is not so involved as to require our judgment upon it. The provisions of the Statute are so firmly interlocked that separation is impossible. Where the provisions of a statute are so clearly blended that a separation cannot be effected without substituting another law for that intended to be enacted, none can be made by the courts. *Griffin v. State*, 119 Ind. 520.

To authorize the courts to reject part and sustain part of a statute, "the two parts must be capable of separation, so that each can be read by itself. Limitation by construction is not separation." *Baldwin v. Franks*, 120 U. S. 673 [30 L. ed. 766]; *Virginia Coupon Cases*, 114 U. S. 269 [29 L. ed. 185]; *Trade-Mark Cases*, 100 U. S. 82 [25 L. ed. 550]; *United States v. Reese*, 92 U. S. 214 [23 L. ed. 563].

In this instance, there is no attempt to regulate the business of mining, except in so far as that business may be connected with transporting natural gas out of the State. The principal object, and, indeed, it is not too much to say, the sole object, of the Statute is to prevent persons from conveying gas into another State; and the provisions of the Act as to the sinking of wells is so bound up with the provisions designed to effect the principal object that separation cannot be made without completely destroying the Statute, and substituting another for it, by judicial construction.

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The power to regulate commerce between the States is exclusively in the Federal Congress. Inaction by Congress will not authorize the States to legislate in matters of interstate commerce. Whatever doubt the earlier decisions may have created, and certainly there was for a time much confusion and conflict, it is completely removed by the recent decisions; and the law now is that all legislation in regulation of commerce between the States must be enacted by the National Legislature. Transportation of commercial commodities from State to State is interstate commerce, and the State Legislatures can neither burden nor restrict it. *Henderson v. New York City*, 92 U. S. 259 [23 L. ed. 543]; *Chy Lung v. Freeman*, 92 U. S. 275 [23 L. ed. 550]; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 470 [24 L. ed. 529]; *Robbins v. Shelby Co. Taving Dist.* 120 U. S. 489 [30 L. ed. 694]; *Bozman v. Chicago & N. W. R. Co.* 125 U. S. 465 [31 L. ed. 700]; *Western U. Tele. Co. v. Atty-Gen. of Massachusetts*, 125 U. S. 530 [31 L. ed. 790]; *State v. Woodruff S. & B. Coach Co. supra*.

The power of the Federal Congress over all matters of interstate commerce, broad as the modern decisions declare it to be, does not absolutely exclude state legislation touching commerce between the States. Police power not delegated to the general government resides in the States, as an inherent attribute of sovereignty. *United States v. Dewitt*, 76 U. S. 9 Wall. 41 [19 L. ed. 593]; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21 L. ed. 394]; *United States v. Reese*, 92 U. S. 214 [23 L. ed. 563]; *Sherlock v. Alling*, 93 U. S. 99 [23 L. ed. 819]; *Patterson v. Kentucky*, 97 U. S. 501 [24 L. ed. 1115]; *Civil Rights Cases*, 109 U. S. 3 [27 L. ed. 835]; *Smith v. Alabama*, 124 U. S. 465 [31 L. ed. 508]; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96 [32 L. ed. 352].

The States may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with interstate commerce. *Sherlock v. Alling, supra*; *Mobile Co. v. Kimball*, 102 U. S. 691 [26 L. ed. 238]; *Smith v. Alabama and Nashville, C. & St. L. R. Co. v. Alabama, supra*.

It is almost impossible, however, in view of the conflicting and confused state of the law as declared by the Federal Supreme Court, to determine what that tribunal, with which rests the ultimate decision of the question, will eventually regard as a legitimate exercise of the police power of the States, since the doctrine declared in the case of *Western U. Tele. Co. v. Pendleton*, 122 U. S. 347 [30 L. ed. 1187], is much more restrictive of the rights of the States than that asserted in *Smith v. Alabama, Nashville, C. & St. L. R. Co. v. Alabama, supra*, *Munn v. Illinois*, 94 U. S. 113 [24 L. ed. 77], and many earlier cases.

But it is evident that the Act under consideration cannot, under the rule laid down by the court of last resort, be deemed a legislative exercise of the police power. The Act does not assume to provide for the safety, health or comfort of the citizens; but its object is to prevent the sinking of gas wells, and the laying of pipe lines, by persons who desire to convey gas out of the State. It is not a regulation of the mode of procuring, transporting or using natural gas designed to secure the health, safety or comfort of

the citizens of Indiana. Neither in the title nor in the body of the Act is it professed to be the legislative purpose to regulate the mode of procuring, transporting or using natural gas. From beginning to end the purpose is plainly and unmistakably manifested; and that purpose is to prohibit the transportation of natural gas beyond the limits of the State. The Act is in effect, as it is in words, a legislative prohibition directed solely against a designated class of persons. It is not the mode of transportation against which prohibition is directed, but the persons who engage in the business. Plainly, too plainly for denial, the object of the Statute is to keep natural gas within our borders. Its object is not to protect our citizens from injury from the mode of procuring and transporting gas adopted by those who engage in the business of procuring or transporting it. The Act cannot be taken out of the operation of the federal decisions upon the theory that it is a valid exercise of the police power resident in every sovereign State, for the theory is without foundation.

The right of eminent domain resides in every State, as one of the great elements of sovereignty. It was at one time held by the Supreme Court of the United States that the general government could not exercise the right within the territorial limits of a State. *Pollard v. Hagan*, 44 U. S. 3 How. 212-223 [11 L. ed. 565]. But this doctrine was denied in *Kohl v. United States*, 91 U. S. 367 [23 L. ed. 449].

Whether the right of a State is or is not exclusive, or how far that of the general government extends, is, however, not material here; for there can be no doubt that the right dwells in the State. But whether the State can, by the exercise of this right, or by the denial of it, interfere with interstate commerce, is a question of no little difficulty and importance. Happily, we are spared the delicate and difficult task of determining whether a State can delegate the right of eminent domain to persons who confine their business exclusively within the territorial limits of the State, and deny it to those engaged in a business extending from State to State. The language of the Act forbids the conclusion, which counsel seek to establish, that the Legislature meant to do no more than deny the right of eminent domain to persons desiring to transport natural gas from Indiana. The language of the section we have quoted leaves no room for construction; for, beyond controversy, its meaning is that no person shall be permitted to transport natural gas to another State. But, if there were doubt, it is entirely banished by other parts of the Act. In the title is written: "An Act to Prohibit any Person, Firm or Corporation, Company or Voluntary Association, Organized under the Laws of this State, or any Other States, from Piping, or Otherwise Conveying, from any Point or Points in this State, to any Point or Points without the State of Indiana, any Natural Gas or Petroleum." The third section of the Act prescribes a penalty for a violation of its provisions; and the provisions of this section

apply to persons who acquire rights by purchase as well as those who secure rights by condemnation. The provisions of the Act are therefore firmly interlaced. There is a complete and indivisible unity. The unification is so thorough that no separation can be effected; and nothing remains but to read the Act as an entirety, and as it is written. Taking the Act as it is written, the only possible conclusion is that it was meant to prohibit the transportation of natural gas from the State by any person, natural or artificial, no matter whether the right to the gas and its transportation is acquired by contract or by condemnation.

We are not unmindful of the rule that statutes upon the same subject should be construed together, and we have given all the statutes relating to natural gas careful study. The only conclusion which can be maintained is, as an investigation has convinced us, that the Act under immediate mention is not affected by any of the other Acts; for it is complete in itself, and has a clearly defined purpose, and that purpose is to prohibit gas from being transported out of the State.

It is not possible to sustain the Act, as counsel endeavor to do, upon the principle that the States may impose restrictions on foreign corporations. We have more than once enforced the rule that the Legislature may regulate or restrict the business of foreign corporations within this State. *Phoenix Ins. Co. v. Burdett*, 112 Ind. 204, 11 West. Rep. 239; *Ins. Co. of North America v. Brim*, 111 Ind. 281, 9 West. Rep. 830; *State v. Ins. Co. of North America*, 115 Ind. 257, 15 West. Rep. 93; *Blackmer v. Royal Ins. Co.* 115 Ind. 291, 15 West. Rep. 307.

But we have not adjudged that the rule can be applied where it operates upon matters of interstate commerce, nor can we do so without coming in direct conflict with the law, as declared by the court invested with exclusive appellate jurisdiction of such questions. The decisions of that court utterly demolish the theory of counsel, that under the power to restrict foreign corporations may be placed the right to legislate in matters respecting the commerce between the States. Those decisions are absolutely conclusive.

There may be, and doubtless there are, objections to the Act not argued by counsel nor discussed by us. One objection occurs to us which we believe it proper to notice. That objection is this: It is not in the power of the Legislature to prevent one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control. It is unnecessary to determine to what limitations the general rule we have stated is subject, for it is enough to assert the general rule, and affirm that it applies to such property as natural gas, petroleum and coal. We can find no tenable ground upon which the Act can be sustained, and we are compelled to adjudge it invalid.

Judgment affirmed.

UNITED STATES CIRCUIT COURT, E. D. OF ARKANSAS.

LITTLE ROCK & MEMPHIS R. CO.

v.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO., The Hot Springs R. Co., and J. N. Conger.

(....Fed. Rep.)

A court of equity has no power, either at common law, or under the Interstate Commerce Act, to compel a railroad company to enter into a contract with another company for a joint through rate or joint through routing of freight and passengers.

(Decided March 20, 1890.)

MOTION for an injunction. *Denied.*

Statement of facts by the Court:

The material allegations in the plaintiff's bill are: That "the Little Rock & Memphis Railroad Company is engaged in operating the railroad between the Cities of Memphis, in the State of Tennessee, and Little Rock, in the State of Arkansas. That its traffic has consisted principally in the transportation of through passengers and freight from points east of the Mississippi River bound to western and southern points in the States of Arkansas, Texas and elsewhere, and in the reverse direction.

"The St. Louis, Iron Mountain & Southern Railway Company, a corporation created by the laws of Arkansas, and an inhabitant of said district, operates a railroad from the City of St. Louis in the State of Missouri, passing through the City of Little Rock, to the City of Texarkana on the boundary between the States of Arkansas and Texas, where it makes connection with extensive systems of railroads in Texas.

"The defendant, the Hot Springs Railroad Company, is engaged in operating a railroad in the State of Arkansas from Malvern, on the line of the St. Louis, Iron Mountain & Southern Railway, to Hot Springs. Said Hot Springs Railroad Company is a corporation created by the laws of Arkansas and is an inhabitant of said district.

"Said St. Louis, Iron Mountain & Southern Railway is one of the largest feeders of the road operated by your orator, contributing during the half year ending June 30th, 1888, 2387 passengers, of whom 1591, or nearly half, came upon through tickets over the Little Rock & Memphis Railroad and the St. Louis, Iron Mountain & Southern Railway, with a traffic substantially equal in the opposite direction.

"The said St. Louis, Iron Mountain & Southern Railway is by far the most important connection of your orator, the exchange of passengers with it during the six months ending June 30th, 1888, amounting to 11,139.

"In May, 1888, the St. Louis, Iron Mountain & Southern Railway opened a branch road from Bald Knob in the State of Arkansas to Memphis in the State of Tennessee, running parallel with your orator's line, and built for the express purpose of competing with it. It

is fifteen miles longer than your orator's line, and its facilities for accommodating through traffic at Memphis are much inferior to those of your orator's.

"For these reasons, notwithstanding the opening of the Bald Knob branch, the traffic of your orator remained substantially unchanged as long as it had equal facilities accorded by defendants, the traveling public preferring it to its adversary.

"For the purpose of breaking down the legitimately acquired business of your orator, and crushing a rival, the St. Louis, Iron Mountain & Southern Railway Company has directed all the railroads connecting with it to call in all through tickets reading over the Little Rock & Memphis Railroad and thence over the St. Louis, Iron Mountain & Southern Railway, leaving on sale only the through tickets over the Bald Knob branch; and the Hot Springs Railroad Company, conspiring with it to injure your orator, has signified its assent to this direction and has actually withdrawn the tickets over your orator's line, in connection with the St. Louis, Iron Mountain & Southern Railway, and refuses to sell the same, though requested by your orator to do so, but still continues to sell tickets over the Bald Knob branch of the St. Louis, Iron Mountain & Southern Railway.

"The object of this is to force the traveling public to purchase tickets exclusively over the Bald Knob branch, or else to pay higher local rates and to be subjected to the annoyance of repeated purchase of tickets and re-checking of baggage; and, unless something is done for the protection of your orator, all through traffic will be diverted over the Bald Knob branch, to the great inconvenience of the public, and great and unjust pecuniary loss to your orator.

"Wherefore your orator prays that the said defendants may be required to answer this bill, but not under oath; and that a mandatory injunction may issue from this court commanding said defendant, the Hot Springs Railroad Company, and its agents, to sell to all applicants going on its road to Memphis, and to points beyond, tickets over the road of your orator on the same terms and at the same price as it charges to passengers who get tickets over said Bald Knob branch, and to check baggage with the same."

The defendant the St. Louis, Iron Mountain & Southern Railway Company filed the affidavits of its general and assistant general passenger and ticket agents to be read on the hearing of the motion for a preliminary injunction.

These affidavits admit that tickets reading *via* the Little Rock & Memphis Railroad in connection with the St. Louis, Iron Mountain & Southern Railway Company have been withdrawn from sale, but deny that this was done for the purpose of breaking down the plaintiff's road, and say it was done for the purpose of legitimately building up the passenger traffic over the St. Louis, Iron Mountain & Southern Railway, and its Bald Knob branch to Memphis. The assistant freight and ticket agent

states that, "the arrangement at present existing between the railroads forming a through route and rate from Hot Springs to Memphis, and points east of there, exists by reason of a contract or agreement between the St. Louis, Iron Mountain & Southern Railway Company and the railroads east of Memphis. By way of illustration, the through route agreement now in existence between Malvern, where the St. Louis, Iron Mountain & Southern Railway connects with the Hot Springs Railroad, and Norfolk, is as follows:

"The St. Louis, Iron Mountain & Southern Railway Company, which has a line of its own from Malvern to Memphis, has by agreement with the Memphis & Charleston R. R. Co. and the East Tenn., Va. & G. R. R. Co., and its eastern connections to Norfolk, arranged for a through rate and route, and for a *pro rata* division of revenue derived therefrom.

"In making this arrangement, the St. Louis, Iron Mountain & Southern Railway Company, having a line of its own from Malvern to Memphis, had no occasion to and did not include the Little Rock & Memphis R. R. in such agreement.

"I have read that portion of the brief of J. S. Blair, in the case of L. R. & M. R. R. Co. v. E. T., V. & G. R. R. Co. and St. L., I. M. & S. Ry. Co.

"The statements made by him on pages 4 and 5 of said brief is a correct explanation of the manner in which agreements for through routes and a through rate between two or more distinct railway companies are made, and I adopt as a part of this affidavit so much of the language employed by Mr. Blair as follows, to wit:

"The issuing by one road of tickets to be used beyond its own terminus is for various reasons a matter of agreement between the companies. From whichever side the proposition comes or in whatever manner, the other party has always been regarded as at full liberty to decline to sell on the one hand or refuse to honor on the other. The consent has not always been in writing, although at present every ticketing arrangement of this kind to which the Iron Mountain Road is a party is evidenced by a written agreement. Sometimes the arrangement is one requiring little if any negotiation as to the division to be made of the proceeds of the sales of the tickets, but very frequently the basis of division requires serious consideration, and, if the parties fail to agree, there is no standard or custom to which to appeal, and the negotiation terminates.

"When the parties have agreed upon all the terms, the party issuing does not obtain the tickets from any or all the roads over which they are to be used, but prints them, and at the end of every month reports to every road the number and kind of tickets sold and the amount for which it is responsible. It receives similar reports from other companies who have issued over its road, and later on the differences are paid. The coupon when taken up by the conveying road is retained and not transmitted to the issuing road as a voucher.

"Where the rate is made by the parties participating in the traffic without influence or control by competing connections, it consists of the sum of the local rates, and the division ap-

portions to each its own local. But where shorter and competing routes force the price of the ticket below the sum of the locals, the rate is divided on certain agreed bases, which vary according to circumstances.

"For illustration, if a rate were to be made to Texarkana from Atlanta *via* Chattanooga, Cincinnati, St. Louis, Bald Knob and Little Rock, it would be no greater than *via* Chattanooga, Memphis and Bald Knob, and each road could not get its local rate, but in the division regard is first to be had for those roads which would divide the Chattanooga, Memphis and Bald Knob rate. That is to say, the passenger going by way of Cincinnati and St. Louis travels between Atlanta and Chattanooga and between Bald Knob and Texarkana over the same rails as if he went by Memphis—for these portions of his journey the railroads should receive the same sum as if he had taken the Memphis route, and these amounts having been taken the remainder is divided among the other roads on a mileage basis, subject, however, to such arbitraries as are agreed upon by them."

The defendants the Hot Springs Railroad Co. and Conger answered jointly, alleging among other things that the Hot Springs Railroad does not connect with the plaintiff's road; that it connects at Malvern, its eastern terminus, with the St. Louis, Iron Mountain & Southern Ry., and plaintiff's road terminates at Little Rock, a distance of forty-three miles from Malvern; that the Hot Springs road does not sell through passenger tickets over its line in connection with other railroads, or pro-rate in the matter of charges with any other road, or engage in interstate traffic; on the contrary it sells a local ticket over its line from Hot Springs to Malvern. That the defendant Conger is the agent of the St. Louis, Iron Mountain & Southern Railway Company, at Hot Springs, for the sale of through tickets over said road and its connecting lines; that these tickets are prepared by and under the authority of such companies as have agreed to pro-rate the charges of transportation and form connecting lines and are furnished by said companies or by the St. L., I. M. & S. Ry. Co. to the defendant Conger to be sold by him. That "the defendants are perfectly willing that the tickets of the plaintiff or any other carrier that has or may unite with the St. L., I. M. & S. Ry., which is the only connecting line with the Hot Springs Railroad, for the purpose of forming through rates and agreeing upon a basis for the division of charges, may be sold at any and all stations of the defendant, the Hot Springs Railroad; but until plaintiff shall have made such arrangements with such other connecting lines as will secure the recognition by them, and especially by the St. L., I. M. & S. Ry. Co., of such tickets, respondents would not feel warranted in undertaking to sell through tickets over plaintiff's road.

"It is true, as alleged, that the Hot Springs Railroad Company has refused to check baggage of passengers over plaintiff's road, but it has done so simply because it was advised that no arrangement existed as between the St. L., I. M. & S. Ry. Co. and the plaintiff for the receiving and transporting of baggage so checked over the line of the St. L., I. M. & S. Ry., and

that said road would not receive baggage so checked.

"Further answering, defendants say that they and each of them and the plaintiff are all citizens of the State of Arkansas, said corporation having been organized and incorporated under the laws of said State and the said J. N. Conger residing at Hot Springs in said district; the Hot Springs Railroad does not do business as a carrier of interstate commerce, but its line begins and ends in this State and its passenger traffic is wholly local; it does not issue through tickets in connection with other lines."

Messrs. U. M. & G. B. Rose for plaintiff.

Messrs. Dodge & Johnson for St. L., I. M. & S. R. Co.

Mr. John M. Moore for the Hot Springs R. Co. and J. N. Conger.

Caldwell, J., delivered the opinion of the court:

The precise question in this case is: Can a United States circuit court, in the exercise of its equity powers, require a railroad company engaged in interstate commerce traffic to enter into an agreement with another railroad company, engaged in like traffic, for a joint through routing and joint through rates, and upon the refusal of the company to comply with such a requirement, may the court itself make such a contract for the parties?

It is apparent from the affidavits and is common knowledge that to effect through routing and through rates over independent lines of railroads, contract relations must be established between the companies operating the roads.

The share which each road is to receive of the through rate, the mileage rate to be paid or allowed on cars passing over each other's lines, the method of adjusting terms, the arrangement of time tables, the rates for passengers and freight and other matters, are necessarily matters of contract.

The solvency of the respective lines, their ability to handle in a satisfactory manner the joint traffic and their ability to contribute to that traffic and various other considerations enter into and influence the terms of such contracts.

The common law imposes no obligation on railroad companies to enter into such contracts.

"At common law, a carrier is not bound to carry except on his own line, and we think it quite clear that if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ." *Atchison, Topeka & Santa Fe R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667-680 [28 L. ed. 291-296].

Making contracts for parties "is not within the scope of judicial power." *Express Cases*, 117 U. S. 1-26 [29 L. ed. 791-802].

In the case last cited the court, speaking of the decree of the court below fixing and regulating the terms upon which the railroad company and the express company should do business, said:

"In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for them-'
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selfes,' and that we said in *Atchison, Topeka & Santa Fe R. Co. v. Denver & New Orleans R. Co.* 110 U. S. 673 [28 L. ed. 294], followed at this term in *Pullman Palace Car Co. v. Missouri Pacific R. Co.* 115 U. S. 587 [29 L. ed. 499], could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it does come, from some source of legislative power, we do not doubt." Id. 29 [803]. See, to the same effect, *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co.* 2 Inters. Com. Rep. 351, S. C. 37 Fed. Rep. 567.

Has the jurisdiction been conferred by the Act of Congress? Complainant maintains that it has by the third section of the Interstate Commerce Act. It would serve no useful purpose for the court to engage in an extended discussion of this question. It has been discussed and decided by the Interstate Commerce Commission in *Little Rock & Memphis R. Co. v. East Tenn. Va. & Ga. R. Co.* 2 Inters. Com. Rep. 454. In that case the present plaintiff was seeking the same relief that it seeks in this case and its petition was dismissed on the distinct ground that the Act of Congress does not, as does the present English Statute, invest the Commission or the courts with the power to compel companies to enter into through-routing and through-rate contracts. The case of *Chicago & A. R. Co. v. Pennsylvania Co.*, 1 Inters. Com. Rep. 360, and the opinion of Judge Jackson in *Kentucky & Indiana Bridge Co. v. Louisville & Nashville R. Co.*, 2 Inters. Com. Rep. 351, S. C. 37 Fed. Rep. 567, are to the same effect.

I am satisfied to rest the decision of the question on the reasoning of the opinions in the cases cited, which, to my mind, cannot be satisfactorily answered.

The sole ground of complaint in this case is that the principal defendant refuses to enter into a contract with the plaintiff for through routing and through rating over its road.

No discrimination against the traffic carried on by the plaintiff over its own line is claimed. The defendant Company receives and carries passengers and freight that have come over or that are destined to go over the plaintiff's road without any discrimination on that account, but its relation to such passengers and freight begins where they are received and ends where the plaintiff's road receives them.

What the plaintiff seeks to accomplish by this suit is a practical extension of its line over the defendant's line beyond Little Rock. The plaintiff's road extends from Memphis to Little Rock; the defendant's road extends from Memphis to Little Rock and from the latter place south to Texas. The abstract justice of requiring the defendant to give up for the plaintiff's benefit all or a part of the advantages gained by the defendant by building a competing line to the plaintiff's road from Memphis to Little Rock is not very obvious.

Prior to the construction by the principal defendant of this competing line, the plaintiff enjoyed a monopoly of the traffic between Little Rock and Memphis.

Competing lines afford the best and surest

protection the public can have against oppressive rates, and, however injuriously the business of the plaintiff's road may have been affected by the construction of the competing line, the public was not injured by it, and is not here complaining.

Is it, under these circumstances, an unfair or unjust preference or discrimination for the defendant in the sale of tickets to prefer its own line to that of the plaintiff? If it is, the incentive to the construction of competing lines will

be very much lessened. Roads enjoying a monopoly of a given traffic will be benefited, but the public will probably be injured.

But it is unnecessary to discuss or decide this aspect of the case. The court has no jurisdiction to grant the relief prayed for. *The motion for a mandatory injunction is denied.*

At a later day in the term the defendants filed a demurrer to the bill, which was sustained and the bill dismissed.

THE INTERSTATE COMMERCE COMMISSION.

GEORGE D. SIDMAN

v.

THE RICHMOND & DANVILLE R. CO.

(No. 221.)

1. The respondent issued commutation tickets for a stated number of trips within a specified time, subject to several conditions, one of which was that the purchaser should have no claim for rebate on account of non-use of the ticket from any cause; another that it be presented to the conductor for cancellation of each trip when taken. A commuter had to pay the conductor full fare if he did not have his ticket, but in such cases the respondent had fallen into the habit of refunding the same on presentation of the ticket for cancellation of the trip at the proper office of the Company. About three weeks prior to the complainant's purchase of his ticket, the respondent had discontinued this habit and had given notice to that effect in a new tariff sheet filed with the Interstate Commerce Commission and posted in the stations of the railroad as required by law on a change of tariff rates. *Held, that it was not an unlawful discrimination to refuse to refund to the complainant who held such ticket, but had forgotten to take it on a certain trip and had paid his fare, notwithstanding he supposed the former custom was in vogue when he purchased his ticket.*

2. It was a regulation of the respondent Company, published on its public tariff schedules filed and posted as required by the Act to Regulate Commerce, that the conductor should collect fare on trains from passengers without tickets by adding 25 cents to single-trip rates. *Held, that it was not unjust discrimination against the complainant to exact this addition from him.*

3. The complainant purchased what the respondent termed a quarterly commutation ticket on the 13th day of June, specifying the number of trips that might be taken thereon as 180, but it provided that the term should expire on the 31st day of the following August, and this was known to the complainant when he made the purchase. It was similarly stated on each one of such

quarterly tickets when it was to expire viz.: at the end of the third calendar month after it was issued. *Held, that the complainant was not entitled to recover any portion of the purchase price for the thirteen days less than a full quarter.*

(Complaint filed August 5, 1889.—Answer filed August 21, 1889.—Answer withdrawn November 4, 1889.—Amended complaint filed November 8, 1889.—Answer filed November 26, 1889.—Heard and submitted February 10, 1890.—Decided April 5, 1890.)

PETITION for relief from alleged discrimination in rates between holders of commutation tickets. *Dismissed.*

Complaint *ante*, p. 578.

Mr. George D. Sidman for complainant.

Mr. James T. Worthington for defendant.

Veazey, Commissioner:

The complainant charged in substance that he is a clerk in a government department at Washington and a resident of Herndon, Virginia; that the defendant is a common carrier and subject to the Act to Regulate Commerce; that the complainant held a commutation ticket on the Washington, Ohio & Western division of defendant's railroad, dated June 13, 1889, and good for 180 rides between Herndon, Virginia, and Washington, D. C., during the three months ending August 31, 1889; that on the morning of July 10, 1889, he boarded the defendant's train at Herndon, Virginia, en route to Washington, having inadvertently left his said ticket at home, and was compelled to pay the regular cash fare, 80 cents, between Herndon and Washington, and in addition thereto 25 cents, called train rates, being in the nature of a penalty for not having procured a regular ticket before starting; that the same sum was also paid in the absence of his ticket on his return to Herndon in the evening of the same day; that he received the conductor's receipts for said payments; that on the next day he called at the defendant's general office in Washington and presented the said receipts and demanded of the defendant's agent a refund of \$2.10 thus collected from him by the conductor on the day previous, at the same time offering his commutation ticket for cancellation of the two rides; that the said agent refused to make the refund and explained why he so refused; that the complainant had been informed that the defendant had previously refunded fares to various persons under like circumstances, and charging that the refusal to

refund to him was a violation of the Act to Regulate Commerce, in that it was a discrimination in rates between patrons of the defendant Company, and praying that the defendant may be required to make restitution of the \$2.10.

The respondent Company answered the several charges in the petition specifically and denied any violation of the Act to Regulate Commerce. It is not deemed necessary to further set forth the answer.

The facts established by the evidence are as follows:

The respondent Company has for a long time issued a quarterly commutation ticket which provided that the person whose name was inserted therein was entitled to a specified number of trips, formerly 162, now 180, between Washington and the station on its line of road named in the ticket, "during the three months ending on date canceled in the margin subject to the contract named on back hereof, which must be signed by purchaser before ticket is valid for passage."

On this ticket was a printed contract in part as follows:

"In consideration of the reduced rate at which this ticket is sold I agree that its use shall be subject to the following conditions:"

* * * * *

"2d. That it is good for passage only during the period designated on its face."

* * * * *

"5th. That I have no claim for rebate on account of the non-use of the ticket from any cause.

"6th. It is to be presented to the conductor each trip, who will cancel one of the marginal numbers, and is to be surrendered on the last trip taken during the period for which it is issued.

"7th. That the privilege of subsequent commutation will be forfeited by any violation of these conditions."

Then follows the signature of the purchaser.

The conditions here omitted do not bear on the points in this case.

The respondent always, when it sold one of these tickets, provided for its termination on the last day of the third calendar month following its sale by a clause thereon in these words, "During the three months ending on date canceled in the margin" and by punching that date on the margin, so that, although it was denominated a quarterly ticket, it would expire on the last day of the third month after it was purchased, notwithstanding its purchase was subsequent to the first day of the month, thereby shortening the term of the ticket to less than three months if purchased subsequently to the first day of the month, but not lessening the number of trips specified. To illustrate: If the ticket was purchased on the 10th of a month it would expire in ten days less than three months, but the number of trips named on the ticket might be taken within its life.

Prior to May 25th, 1889, the respondent Company had been in the habit, as a favor to such ticket passengers, but not by obligation, of waiving the 5th and 6th conditions of the contract above stated in cases where a passenger by inadvertence did not have his commu-

tation ticket with him on boarding a train, and of refunding to him the amount of fare which he had paid to the conductor, on presentation to the Company's office of the conductor's receipt for the same and of the ticket for cancellation of the trip. But prior to said 25th of May, 1889, for the reason largely that this privilege to this class of passengers had become the subject of abuse and trouble to the respondent Company, it decided to discontinue said habit. It accordingly issued a new passenger tariff of first-class passenger rates for single trip, round trip, school and commutation tickets to take effect May 25th, 1889, between Washington and stations named thereon, and giving the number of miles to each station and the price and the rates for each kind of ticket. Then after giving instructions as to each kind of ticket specified there followed this notice: "Tickets sold at the above rates are good on any train making regular stop at destination, to be presented to the conductor each trip for proper cancellation, and admit of no stop-over privilege. No refund or rebate will be made for failure to observe the conditions under which they are issued. Conductors will collect fare on trains from passengers without tickets by adding 25 cents to single-trip rates."

This tariff notice was plainly printed and filed with the Interstate Commerce Commission and posted in the stations of the Washington & Ohio Division of the respondent Company, seasonably before the said 25th of May, pursuant to the requirements of the Act to Regulate Commerce. From that date said Company adhered to the above notice and the condition of the contract on the commutation tickets, and discontinued the former practice of refunding to commuters who failed to have and present their tickets to conductors for cancellation of the trip. On the 13th day of June, 1889, the complainant purchased one of said quarterly commutation tickets between Washington, D. C., and Herndon, Virginia, specifying that he was entitled to 180 trips between said stations, during the three months ending August 31, 1889, subject to the contract thereon, which was signed by the complainant. On the 10th day of July following he boarded a train at Herndon for Washington, and, having forgotten to take his said ticket with him, was compelled by the conductor to pay the single-trip rate and twenty-five cents in addition and took the conductor's receipt for the same. This was repeated on his return the same day from Washington. He did not know when he purchased said commutation ticket of the said change of custom in respect to refunding to commuters who failed to have their ticket on the train, but supposed the former custom was still in vogue. Neither had he observed said new tariff sheet and notices thereon in the stations and did not know of the same. He did not, however, leave his ticket behind at Herndon in reliance on the continuance of the former practice of refunding, but because he forgot to take it.

The next day after these payments he applied to the proper office of the respondent at Washington for repayment of the money, presenting the conductor's receipts and his ticket for cancellation of the trips, but his application was refused. Thereupon he brought this petition.

The facts developed on the hearing make it probable that the complainant has brought his proceeding under a misapprehension as to the rule of the Railroad Company in force when he bought the ticket and at the time of his journey. This case rests on the theory that a practice once followed is of continuing obligation, and that because the respondent at a former period refunded to holders of commutation tickets the fares paid under circumstances similar to those in his case, it was unlawful discrimination to refuse repayment to him.

There might be force in such claim if the custom had not been discontinued before he bought his ticket. The question before this tribunal is whether the complainant has been the victim of unlawful discrimination. The evidence establishes that he has been treated precisely like all other commuters in respect to refunding since the last passenger tariff was issued and posted. Public notice was then given as fully as is required in case of a change of rates that there would thereafter be no refunding on failure to observe the conditions under which all tickets are issued. This was in effect notice of discontinuance of the former practice, and it was in fact discontinued, there having been no refunding since. Under the proof, which was undisputed on this point, the complainant clearly has no foundation for his claim of discrimination.

The complainant further contended that having purchased his ticket on June 13th it should have continued in force three months and until September 13th, and having been deprived of the twelve days in September, he is entitled to be repaid \$3.24, the proportionate rate for that period, the price of the ticket having been \$24.80.

This was not claimed in the petition but it could be amended in that regard.

The answer to this claim is that the complainant knew just what he was buying at the time he purchased the ticket. It was plainly expressed on the ticket and was then noticed by him, and made the subject of inquiry and explanation. So that he bought the ticket understandingly and without fraud on the part of anyone.

The complainant makes the further contention that the exaction of twenty-five cents on each of said two trips in addition to single-trip rates was in violation of the Act to Regulate Commerce, inasmuch as this rule of the Company is a discrimination between passengers who purchase tickets before boarding trains and those who do not; especially in view of the fact that it is a regulation of the Company that ticket offices on the line of the road shall be closed two minutes before the arrival of trains.

When the matter is not regulated by statute it seems to be generally held that it is a reasonable requirement that passengers who neglect to purchase tickets at stations before embarking on cars shall be charged additional fare, if proper conveniences and facilities are furnished them for procuring tickets. *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460; *Stephen v. Smith*, 29 Vt. 160; *State v. Gould*, 53 Me. 279; *Railroad Co. v. 2 INTER S.*

Skillman, 39 Ohio St. 444; *Crocker v. Railroad Co.* 24 Conn. 249; 2 Wood, *Railway Law*, 1402; 2 Beach, § 877.

No question was made that the amount was too much if anything extra was allowable.

It would seem to follow from this generally recognized doctrine that it is not unjust discrimination to exact some additional train fare under the circumstances existing in this case. In some of the above cases and in others not cited it is held that it is immaterial whether the rule was previously known to the passenger or not. There is no evidence to show that there were not proper conveniences and facilities for the sale of tickets, both at Herndon and Washington, on the said 10th day of July before the starting of the trains on which the complainant paid the extra train rates. But, however that may have been, it did not affect the complainant as he did not intend or want to buy a ticket, as he relied on using his commutation ticket.

No unlawful discrimination being established, the petition is dismissed.

Cooley, Ch., absent, ill, took no part in hearing or decision of this case.

P. H. LOUD, JR.,

v.

THE SOUTH CAROLINA R. CO., The Blackville, Alston & Newberry R. Co., The Charlotte, Columbia & Augusta R. Co., The Carolina, Cumberland Gap & Chicago R. Co., The Virginia Midland R. Co., The Barnwell R. Co., The Richmond & Danville R. Co., The Port Royal & Western Carolina R. Co., The Pennsylvania R. Co. and the North Carolina R. Co.

(No. 252.)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 10th day of March, A.D., 1890,

Present:

Hon. William R. Morrison,
Hon. Augustus Schoonmaker,
Hon. Walter L. Bragg,
Hon. Wheelock G. Veazey,
Commissioners,

The following order was made:

Upon reading the complaint and answers in this case and the notice of one of the respondents to have the complaint made more certain and definite,

It is ordered, That the complainant file with with the Commission within twenty days from service of this order a verified statement showing as nearly as he may be able each shipment of melons over the respondent lines during the period covered by the complaint, with the quantity and weight and the point of origin and point of destination, and the dates of shipment.

Abstract of complaint *ante*, p. 732.

INTERSTATE COMMERCE COMMISSION.

THE KANSAS CITY, WYANDOTTE AND
NORTHWESTERN R. CO. *et al.*

v.

THE BURLINGTON AND MISSOURI
RIVER R. CO. *et al.*

ABSTRACT of answer of the Chicago, Burlington & Quincy Railroad Company, filed March 17, 1890.

See complaint, *ante*, p. 720.

Respondent admits its own organization and incorporation as alleged. It admits that the line of railroad from Beatrice, Nebraska, to Denver, Colorado, mentioned in the complaint, is owned and operated by it, but denies that the Burlington & Mo. River R. Co. in Neb. either owns, controls or operates said line of railroad, or any other.

It admits that at the times and places mentioned in the complaint, the respondent refused for transportation at full local tariff rates the certain cars of the complainant loaded with coal, as alleged, but denies that it has entered into any combination, agreement or understanding whatever with respect to the traffic mentioned in the complaint. It further denies that it has "refused to furnish cars for the transportation of coal originating at Leavenworth and destined to places upon its lines in Nebraska," as stated in the complaint, and alleges that it is and ever has been ready and willing to furnish the complainant cars for such purpose in the usual and customary manner, and upon the customary terms and conditions.

Respondent further alleges that it has simply refused to furnish its cars to be used by the complainant upon its lines of road for the transportation of coal between Leavenworth and Beatrice; that it has given no undue or unreasonable preference or subjected either the complainant, or the traffic mentioned, to any undue or unreasonable prejudice or disadvantage.

The respondent alleges that it has afforded and continues to afford, according to its power, all reasonable, proper and equal facilities to the complainant, and that it has not and does not discriminate in the matter of rates or charges between its and complainant's lines.

It alleges that, for the purpose of carrying on its business aforesaid, it owns and operates a large system of railroads in the States mentioned, which includes the line of railroad particularly referred to in the complaint, but alleges the fact to be that the line of railroad aforesaid extends from Kansas City, Missouri, to said Beatrice, and from Beatrice to Denver, Colorado, and it further alleges that, for most of the way between Kansas City and Beatrice, it is practically parallel to the lines of the complainant; that said system is fully equipped with all necessary appliances and facilities, especially at Beatrice, where it is provided with tracks, depots, warehouses, platforms, and all other facilities essential to carry on its ordinary business; that it is not advised whether or not its line at Beatrice is connected with that of the complainant, and therefore charges the fact to be that, except by means of the tracks of other railroad companies, there is no mechanical union or connection between them.

2 INTER S.

It alleges that it is and always has been ready and willing to receive any and all business from the complainant when offered by it at the places provided for such purpose in Beatrice aforesaid, and in the usual and customary manner, and upon the same terms and conditions offered to the public and to other connecting lines.

It further alleges that no agreement or understanding whatever has been made or had between it and the complainant providing for a through line for continuous business or the interchange of traffic, or for the hauling of each other's cars.

This respondent further alleges that it is not usual or customary, except where some agreement or understanding to that effect exists, for it to receive and haul the cars of connecting lines, the respondent claiming and exercising the right, under the law, of using its own cars and equipment for the transaction of its own business upon its own lines.

The respondent, further answering, respectfully submits that it has a lawful right to select such agencies and associates as it may determine for the purpose of carrying on its business, and to form with them through lines for the interchange of traffic and cars, and other facilities, and that an agreement or understanding for such purpose, and the execution thereof, in no way violates the provisions of the Interstate Commerce Act.

Respondent finally, answering the complaint, alleges that heretofore and by means of the line of railroad aforementioned, it has been carrying on a good traffic business between Kansas City, Missouri; Leavenworth, Kansas; Beatrice, Nebraska, and other places located upon its system in the State last aforesaid; that for the purpose of transacting such business it has acquired and maintained at a considerable expense the requisite appliances and facilities and conveniences which it uses and enjoys as it lawfully may; that since the construction of its lines of railroad aforesaid, the complainant has, with respect to the business last mentioned directly, and with respect to other business indirectly, been engaged in active competition with the respondent; and that, for the purpose of such competition, and with the intent to divert the business aforesaid from respondent's to its own lines, and for the purpose of otherwise disturbing and demoralizing it, it now seeks to compel the respondent to furnish it at Beatrice the appliances, facilities and conveniences aforesaid; and that, if respondent be compelled to do so, the complainant will be in a situation to use many of respondent's lines to accomplish the intents and purposes aforesaid, all of which, aside from being unjust and unreasonable to respondent, will occasion it great loss and injury.

The respondent therefore asks that the prayer of the complaint herein be denied, etc.

(Duly verified.)

Upon the same day, and in the same case, the following motion was filed:

And now comes the respondent, The Chicago, Burlington & Quincy Railroad Company, and moves that the complaint herein filed be

dismissed and all proceedings thereunder discontinued, for the reasons following:

1st. That it appears from the complaint that the Kansas City, Wyandotte & Northwestern Railroad Company owns and operates the Kansas City & Beatrice Railroad Company, and that both Companies are under the same management and control.

2d. That the Chicago, Burlington & Quincy Railroad Company owns and operates the Burlington & Missouri River Railroad Company in Nebraska.

3d. That the sole acts complained of by the petitioner are that the respondent refused for transportation certain cars loaded with coal in transit from Leavenworth, Kansas, to various places on its lines in Nebraska, and which were tendered it by the complainant upon a certain connecting track at Beatrice in the State last aforesaid.

4th. That it does not appear from the complaint that the respondent has entered into any combination, agreement or understanding with any other railroad company, or with any other person, firm or corporation, to prevent the continuous carriage of the said coal between the places therein named, or between other places, or for the purpose of embarrassing the complainant and discriminating against it, or for the purpose of discriminating against the coal mines at Leavenworth, Kansas, or for any other purpose whatever.

5th. That it does not appear that the respondent has discriminated, or is discriminating, against the complainant, or against any person, firm, company, corporation or locality, or against any particular description of traffic, in any respect whatsoever.

6th. That it does not appear that the respondent has discriminated or is discriminating against the coal mines at Leavenworth in the State of Kansas.

7th. That it does not appear that any person, company or corporation interested in the coal mines at Leavenworth, Kansas, has made or is making any complaint before this Commission or elsewhere, against the defendant Company on account of any unjust discrimination.

8th. That it is immaterial upon what pretext the respondent based its refusal to comply with the demands of the complainant so long as its acts, either of omission or commission, violated no provision of the Interstate Commerce Act or of the law of the land, but on the contrary were such as it might justly and lawfully perform.

9th. That it does not appear that the respondent has refused to receive coal from the complainant when tendered to it at its depot or warehouse, or upon its tracks at Beatrice aforesaid, and in the usual course of business and upon customary terms and conditions.

10th. That it does not appear that the respondent has refused to receive cars loaded with coal from the complainant at Beatrice, Nebraska, or elsewhere, when tendered in the usual course of business and upon the customary terms and conditions existing between railroad companies for the interchange of traffic.

11th. That the facts stated in the complaint do not entitle the complainant to either the order or the relief therein prayed.

2 INTER S.

The respondent, for the reasons above stated, as well as for various others appearing upon the face of the complaint herein, makes this motion and submits the same to the judgment of this Honorable Commission.

Chicago, Burlington & Quincy Railroad Company, Respondent.

By C. J. Greene, Attorney.

KAUFFMANN MILLING CO.

v.

THE MISSOURI PACIFIC R. CO. *et al.*

(No. 257.)

COMPLAINT, filed March 28, 1890.

The petition of the above named complainant respectfully shows:

I. That it is a corporation organized under the laws of the State of Missouri, engaged now, and for a long time past, in manufacturing flour from wheat in the City of St. Louis.

II. That the defendants above named are common carriers, and, under a common control, management and arrangement for continuous carriage or shipment, are engaged in the transportation of persons and property wholly by railroad, between the City of St. Louis, Missouri, and other points in the States of Missouri and Kansas, and Waco, Dallas, Fort Worth, Galveston and other points in the State of Texas, and as such common carriers are subject to the Act to Regulate Commerce.

III. That the said defendants charge and collect for the transportation of flour from St. Louis, and other northern and western points named, to points in Texas, a greater rate than they charge and collect for the transportation of wheat between the same points, making a differential between wheat and its manufactured product, flour, of five cents or more per hundred pounds.

IV. That this differential is only charged in rates from St. Louis and other points in Missouri and Kansas to the southwest; that it is not based upon or warranted by any difference in the cost of service between the raw commodity and its manufactured product, and that no difference whatever between the rates on wheat and flour is warranted by the cost of service; and that said difference in rates operates as a direct discrimination against complainant and other flour millers in Missouri and Kansas, to their undue and unreasonable prejudice and disadvantage in their business.

V. That said difference in rate, or any difference in rate, between wheat and its manufactured product, flour, between the points named, is an unjust and illegal discrimination against complainant and all other millers in the territory named, and that no difference whatever is warranted by the cost of service; and any difference in rates between wheat and flour operates to subject complainant and said other millers to undue and unreasonable prejudice and disadvantage.

Wherefore the petitioner prays that the defendants may be required to answer the charges herein, and that, after due hearing and investigation, an order be made commanding the defendants to cease and desist from said violations

of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises.

D. S. ALFORD

THE CHICAGO, ROCK ISLAND & PACIFIC R. CO.

(No. 225.)

1. In the absence of statutory provision the rights of a railroad company under a lawful agreement for a specified use of the tracks of another railroad company are measured in respect to the track use by the terms of the contract, and the provisions of the Act to Regulate Commerce apply to the situation created by the contract and add no authority for a different use of the tracks.
2. The duty of a railroad company operating its own road or a road that it controls to serve the local stations on its line does not apply to a company that has only a running privilege for through trains to reach points on its own line over a part of the road of another company which it does not control. In such a case the company is not required to disregard the conditions of its agreement, and does not violate the provisions of the Act to Regulate Commerce by not receiving and discharging traffic on the tracks of the proprietary company, the sufficiency of the local service rendered by the latter not being questioned.
3. The Union Pacific Railway Company entered into a contract with the Rock Island Railway Company by which for a valuable consideration the latter Company acquired the right to run its through trains from and to points on its own road over the road of the Union Pacific Company between Kansas City and Topeka upon the condition that no intermediate business should be done by the Rock Island Company on any part of the line used under the agreement, the Union Pacific Company retaining control of the road and of its operation, and supplying transportation accommodations for the intermediate points between Kansas City and Topeka. Upon complaint made against the Rock Island Company by a resident of Lawrence, one of the intermediate towns, for refusing to perform the ordinary duties of a common carrier in receiving and discharging traffic at his town,—*Held*, That the duties of the Rock Island Company were limited by its rights and powers under its contract, and that it was not bound to do the local business prohibited by the agreement on the line used by its through trains.

2 INTER S.

(Complaint filed August 9, 1889.—Answer filed August 28, 1889.—Heard at Kansas City, Mo., September 24, 1889.—Brief for complainant filed December 12, 1889.—Decided April 9, 1890.)

RIGHTS AND DUTIES of a railroad company under a contract for a running privilege for through trains over part of the tracks of another railroad company.

Complaint *ante*, p. 582.

Messrs. **Samuel A. Riggs** and **D. S. Alford** for complainant.

Mr. M. A. Low for defendant.

Mr. A. L. Williams for Union Pacific Railway Co.

Cooley, Chairman:

The complaint in this case avers that complainant is a citizen of the State of Kansas, and a resident of the City of Lawrence in that State, which city has a population of about 12,000, and is an important business point in said State. That the Chicago, Rock Island & Pacific Railway Company operates, among other lines of railway, a line of road extending from Kansas City, in the State of Missouri, through said City of Lawrence, to the City of Colorado Springs in the State of Colorado; and that said Railroad Company wholly refuses to afford any railway facilities whatever to the inhabitants of said City of Lawrence, or to stop any of its trains at said city for the accommodation of its people; and unreasonably subjects said locality to great disadvantage thereby; and does and has wholly refused to transport the complainant from said Kansas City to said City of Lawrence, or to sell tickets to complainant for transportation on its said road between said points; the said Company alleging as its excuse therefor that it operates its trains between said Kansas City and through said City of Lawrence over the railway track of the Union Pacific Railway, and under a contract with the Union Pacific Railway Company that said Chicago, Rock Island & Pacific Railway Company shall do no business at said station of Lawrence, and accept of no business to or from said City of Lawrence to or from any other point; which contract, if any such exists, the complainant alleges was made after the Act to Regulate Commerce went into effect, and is in conflict with the terms of said Act, and particularly with that portion of section 1st thereof, which provides that "the term 'railroad,' as used in this Act, shall include * * * all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease," etc.; and also of section 3d of said Act.

Complainant therefore prays that said Railway Company may be ordered and required to afford all reasonable and proper facilities for railroad traffic over said line, to the said City of Lawrence and its inhabitants; and that said Company be also ordered and required to transfer complainant over said line to or from said City of Lawrence to or from points outside of said State of Kansas, upon his hereafter tendering to the proper agents of said Company proper and usual compensation therefor.

The answer of the respondent admits that complainant is a citizen of Lawrence as alleged, and that said city is situate on the Union Pacific Railway, in the State of Kansas, and on

the portion of that railway over which respondent operates trains; admits the importance of the city; and that respondent operates trains from Kansas City in the State of Missouri, by way of said City of Lawrence, to the City of Colorado Springs, as alleged; that it has wholly refused to furnish any railway facilities whatever to the inhabitants of said City of Lawrence, and has refused to stop its trains at said city for the accommodation of the people thereof; that it has refused to transport the complainant from said City of Lawrence to said Kansas City, or to sell to him or to any other person tickets for such transportation. It denies that the several acts alleged and so admitted are illegal or unreasonable. It alleges that it owns no railway which extends to or through said City of Lawrence; that it has acquired by contract the right to operate freight and passenger trains along and on the tracks of the Union Pacific Railway Company, from Topeka in the State of Kansas to Kansas City in the State of Missouri, subject to certain conditions and stipulations in the contract set out and expressed; and that among the covenants and agreements therein contained is one on the part of the respondent that it will not carry freight or passengers on such trains to or from any stations between Topeka and Kansas City. That this respondent has kept and performed said covenant, and has never become a common carrier to or from said City of Lawrence; and that a willful violation of its covenant would result in a forfeiture of its rights under said contract of lease, and deprive it of the power to operate any trains over said Union Pacific Railway between the points named, or any other points.

For these reasons respondent prays that the complaint be dismissed.

Upon the issue thus made, the parties proceeded to a hearing; and the complainant introduced evidence tending to show the importance of the City of Lawrence as a business point, and that it is a point of junction between the Wyandotte & Northwestern branch of the Atchison Road and of the Southern Kansas branch of the Atchison Road, with the Union Pacific Railway; also that at this point there is a junction between the main line of the Union Pacific Road and its Leavenworth branch; also that the United States Express Company operates over the lines of the respondent, in the State of Kansas, and that that express company has no office in the City of Lawrence, though it is the only express company operating over the respondent's lines. It was admitted in the case that the agreement set up in the answer was made by the Union Pacific Company with the Chicago, Kansas & Nebraska Railroad Company, and that the respondent is the assignee of the last named company of all its rights thereunder. It was further shown on the part of the respondent, as a reason for the making of this contract, that the Chicago, Rock Island & Pacific Railway, and other corporations which were created in its interest, had at the time a line of road from Kansas City, in the State of Missouri, to St. Joseph, also in the State of Missouri, and were engaged in extending their lines west. In order to reach their western termini from Kansas City they would have to run to St.

Joseph, then over their line to the points desired, making a very roundabout route; and it was manifestly a convenience for them to shorten that line if they could do so. This contract was made for that purpose, giving them the right to run their trains over the Union Pacific between Kansas City and Topeka. It was merely a trackage arrangement, constituting in no sense a lease of the line of the Union Pacific. That company continued to operate its own lines as before. The Chicago, Kansas & Nebraska Railroad did not extend to Kansas City and did not reach Lawrence. It was not incorporated to reach Lawrence. It was therefore merely to shorten their line that the respondent road desired to use the track of the Union Pacific from Kansas City to Topeka, and to save the expense of building parallel tracks between these points. It was not the purpose of the contract to divest the Union Pacific Railway Company of its rights, or duties, or privileges, in any respect whatsoever, but merely to enable the respondent to run its trains from points upon its own track to its own grounds in Topeka, taking no business at intermediate points. And it was claimed that if a contract of that kind and thus limited could not be made, then the cause of the complainant is at an end, because the respondent, doing business at Kansas City, and having neither a railroad nor franchises nor business facilities at Lawrence, could not be compelled to do business there.

The agreement, dated the 17th day of March, 1887, was put in evidence, and the material parts thereof are in substance as follows:

It recites that the party of the first part, the Union Pacific Railway, now owns and operates a railway, a portion of which extends from Kansas City in the State of Missouri, by way of Topeka in the State of Kansas, to Denver in the State of Colorado; and the party of the second part is engaged in constructing its railway from a point on the Missouri River opposite the City of St. Joseph, Missouri, by way of Topeka, to a point indefinitely fixed on the southern boundary and in the western portion of the State of Kansas, which railway when completed will be operated in connection with the Chicago, Rock Island & Pacific Railway, at said Kansas City and other points. Therefore the party of the first part leases to the party of the second part, for the term of nine hundred and ninety-nine years, commencing on September 1st, 1887, the right and privilege to connect the tracks of its railway with the track of the party of the first part, at North Topeka and Kansas City and Armstrong, and to run, operate and manage its engines, cars, freight and passenger trains in both directions over the railway of the party of the first part, between said points of connection, and to make use of said tracks, etc. The party of the second part covenants that it will pay to the party of the first part, for the use of said railway and appurtenances, annual sums which are particularly specified, together with taxes, etc. The parties covenant, promise and agree with each other as to the manner in which business shall be conducted, controversies settled, etc., and the party of the second part agrees that it "will do no business as a carrier of persons or property to or from points between North To-

peka and Kansas City: it will give reasonable notice to prevent the entry of passengers into the trains, and if despite such notice passengers do enter such trains, it will account for and pay to the party of the first part all fares which may be collected from them." It is further agreed that "this contract is hereby attached to, and shall run with, the railways of the parties, and inure to and bind the lessees, grantees and successors of each," with a provision, however, for the termination thereof by the party of the second part on giving a specified notice of its intention in writing. It was agreed by the parties to this proceeding that it was under this agreement that the respondent was operating its trains over the line of the Union Pacific, through the City of Lawrence.

The position of the complainant, as stated on the hearing, and also more fully in a printed brief filed in the case, is as follows:

A railway company is incorporated only to do business as a common carrier; when constructed, its road is a public highway, and the public, and every portion of the public, has a right to the use thereof on reasonable and proper terms; and no corporation holding a franchise for the construction and operation of such a road has the right by contract to deprive the public, or any portion of it, of such use, or to absolve itself from its obligation to perform its duties to the public. It can do no act amounting to a renunciation of its duties to the public, or directly tending to disable itself from performing the same. The respondent, in operating its trains over the tracks of the Union Pacific Company, does so in the capacity of a common carrier, for in no other capacity has it the right to move a train. The record clearly discloses the fact that the respondent is accepting both freight and passengers at Kansas City and carrying them over the leased line to Topeka, and claiming to do so rightfully. It is therefore, by its own admissions, a common carrier over a railway running through the City of Lawrence. There is therefore no suspension of its functions as a common carrier between Kansas City and Topeka, even if it had the power to suspend. Again, it is not in the power of the Union Pacific Railway Company to farm out its franchises or the use of the railway to other companies by contracts that relieve such other companies from their obligations to the public, or to secure itself against a natural competition by imposing terms of lease which limit the use of the public, of its road. If such a power be conceded, that company may, by a system of leasing, practically renounce its obligations to the public, and surrender the operation of its road to other companies who would be relieved from their obligation to serve the public as common carriers. It is further claimed that the clause in the contract under which respondent justifies its action, is in contravention of Statutes of Kansas which are quoted in the brief, and cannot therefore be relied upon to prevent the full and strict enforcement of the Act to Regulate Commerce. These Statutes are not quoted here, as they are similar to those existing in other States, and have for their object to require the performance of the duties of railway companies as common carriers for

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the general convenience of all the public, and without unjust discrimination. It is further claimed that the manner in which the respondent conducts its business over the Union Pacific Road constitutes a violation of section III. of the Act to Regulate Commerce. To receive business at Kansas City destined for Topeka and points beyond, and to refuse like business at Lawrence destined for the same points, constitutes an undue and unreasonable preference and advantage to the persons whose business is so received, and to the localities between which it is carried on. To offer to the people of Kansas City transportation facilities for trade and commerce over the leased road, with those sections of Kansas, Colorado and Nebraska and the Indian Territory, which lie upon the line of respondent's railway, and to refuse like facilities, or any facilities, to the people of Lawrence, is to subject that people to an undue and unreasonable disadvantage. This point is presented very forcibly, and the mischiefs resulting from a discrimination are pointed out. To the point made by the respondent that if the discriminating clause of their contract complained of should be declared void, the entire contract will fail, it is answered that the principle is well settled that a contract illegal in part, but legal as to the residue, is only void as to all its provisions when the parts cannot be separated, and that when the illegal part is separable the provisions that are legal will be sustained.

The question which the complainant seeks to raise upon this second point has an importance which extends far beyond the rights involved in the particular case, and the interests of the parties directly concerned or represented therein. It concerns the general right of one railroad company to grant trackage privileges to another, with limitations thereon of any sort which shall make the rights of the latter, as between itself and the public, less complete or its obligations as a common carrier less extensive upon the track to which the privilege extends, than they would be if such latter company were absolute owner and were running its trains over the track as such.

Briefly stated, the case presented is as follows: At the time the contract was entered into, the Union Pacific Railway Company had a very direct line of road from Kansas City, in Missouri, through the City of Lawrence, to Topeka. The Chicago, Rock Island & Pacific Railway Company had a line from Chicago, by way of St. Joseph, Missouri, to Topeka, Kansas, and from thence, extending through western Kansas, into Colorado. It has also a line from St. Joseph to Kansas City. It could therefore reach Topeka and the points to the west thereof from Kansas City by running its trains by way of St. Joseph, but this would be a route so long and so indirect that the Company could not expect to do business over it between Kansas City and Topeka and the towns further west, with either the promptness or the economy necessary to enable it to meet the competition of other lines. It must therefore, if it would successfully compete, provide itself with a shorter line. This it might do by constructing a line direct from Kansas City to Topeka; but such a line would parallel that of the Union Pacific, running

practically side by side with it, and necessarily competing with it for the local business. Whether the traffic that would be secured would be sufficient to warrant the building of such a line would naturally be the first question to be considered by the respondent Company; if it did not promise to be, the thought of obtaining it must either be abandoned or some other means be devised to that end. The Union Pacific Railway Company, on the other hand, it may be assumed, would not desire its road to be thus paralleled, and the interest of the two companies therefore led to negotiations which resulted in the agreement which is now before us. By that agreement, the Union Pacific says, in substance, to the respondent Company: "We will save you the necessity of building a new line, and enable you to accomplish the purpose at which you aim, by giving you the privilege of running your trains over our tracks between Kansas City and Topeka, provided you will undertake not to interfere with our business between those points, and not to make yourselves a common carrier of the local traffic." The proviso is accepted by the respondent, and the contract is entered into. Now it is contended on the part of the complainant that while it was perfectly competent for the parties to enter into such a contract as they have made, so far as concerns its main purpose, to give trackage privileges, the proviso which thus undertakes to preclude the acceptance of traffic at points the trains of the respondent will pass, is repugnant to law, and for that reason must be declared void, and the contract enforced as if the proviso were not contained in it.

In passing upon this contention, it is to be observed, *first*, that by this contract the Union Pacific Railway Company does not in any respect undertake to narrow its own obligations or relieve itself of any duties imposed upon it by law. It remains a common carrier to the full extent as before, and the people of Lawrence may enforce against it any right that would have existed if the contract had not been made. We agree fully with the complainant that no common carrier by rail can by any contract with another confer upon the latter any privileges which, either directly or otherwise, can have the effect to limit the rights which any locality or any person would otherwise under its charter, or under common-law principles, have against it. But we do not understand that it is claimed in this case that the Union Pacific is performing its duties as a common carrier between Kansas City and Topeka any less completely than it was performing them before the contract was made; that it runs a less number of trains, or gives to any locality or person fewer facilities or privileges. If such a claim were made, it could not be passed upon without that company being made a party to the proceeding, that it might have opportunity to be heard; and as that has not been done, we may assume, for all the purposes of this case, that the Union Pacific Company, so far as the management of its own business is concerned, is not now found fault with. It is the respondent Company, if anyone, that now wrongs the City of Lawrence, by refusing to receive or deliver traffic at that point.

The grievance of the complainant is that the

arrangement as it now exists is unjustly discriminating as against Lawrence, since it gives to Kansas City and Topeka and towns further on, over a road extending through Lawrence, the advantage of trains which are not allowed to accept or deliver traffic at that city, and that it thereby favors to the prejudice of Lawrence the other localities referred to. So far as this discrimination is claimed to operate unjustly, the respondent meets the complaint by the allegation that the arrangement merely accommodates conveniently a business passing between Kansas City and Topeka which without such arrangement would be taken on trains not passing through Lawrence, and therefore not capable of accommodating its people; so that by no possibility does the contract wrong that city. Nevertheless it is probably true that the arrangement made between these two railway companies has the effect to benefit to some extent the Cities of Topeka and Kansas City, as well as the companies themselves; and this benefit, if it results from privileges which are unjustly or illegally denied to Lawrence, might of itself be proof of unjust discrimination.

But the main question which concerns us now is whether, while the agreement is conceded to be legal so far as it makes a trackage arrangement, it is ineffectual in so far as it provides that the respondent shall not accept traffic between Kansas City and Topeka. Can the one part be sustained and the other part held void?

Now it must be admitted, we think, that, if this contract were to be sustained and enforced with the proviso stricken out, it would be a very different contract from that which we now have before us. It would moreover be a contract which we cannot think it probable these parties themselves would ever have agreed to make. The proviso was beyond doubt a principal inducement on the part of the Union Pacific for entering into the arrangement, and we cannot conceive that its managing authorities would ever have consented to the respondent coming upon its track to be competitor with it for traffic at all local points. To strike out the proviso by holding it void would therefore be to take from the Union Pacific what probably constituted on its part a vital consideration and inducement for entering into a contract which, it is assumed, must now stand and be enforced without it. This assumption is grounded on the legal principle that an unlawful provision in a contract otherwise good may be rejected and the contract in other respects be sustained. We do not, however, understand this principle to go so far as to warrant the sustaining of a contract when that which is illegal in it is the consideration itself; and the contention in this instance must go to that extent, or it will fail to meet the requirements of the case. The answer to it will then be, that a contract whose consideration is immoral or otherwise illegal and therefore void is itself void, because it then lacks one of the necessary requisites to any legal validity whatever.

It must further be conceded that to enforce the contract according to the views of complainant would be in effect to make a new contract for the parties, very essentially different

from the one to which they gave assent. It would not only give to the Union Pacific a competitor upon its own tracks, but it would force the respondent into a competition to which it never gave assent, and which might perhaps be altogether undesirable and unprofitable. We do not think we have any power to make any such contract for the parties; they must make their own contracts, and when made the contracts must either be valid in their essential provisions, or they must be altogether void. Courts or other tribunals cannot remodel and then enforce them, especially when if so remodeled it is obvious the parties themselves would not have made them.

Either, therefore, this proviso which attempts to preclude the respondent from accepting traffic between Kansas City and Topeka must stand, or the whole contract must be held void. Complainant does not attack the contract as a whole, but concedes that it gives to the respondent rights of trackage, and contends that it not only imposes upon respondent duties and obligations to the full extent contemplated by the parties in making it, but also further duties and obligations under the laws of the State and of the nation. This view, for the reason already given, we cannot accept. We think we are wholly without power to give to the complainant the relief desired.

It will be observed that we abstain from discussing the question of the legal validity of the contract which is before us in its entirety, the parties themselves not having raised it, and the Union Pacific Railway Company not having been brought in, as would be essential if that question were to be passed upon. The broad question stated in the beginning of this opinion must therefore, so far as this case is concerned, remain undecided.

By the Commission:

The other members of the Commission concur in most of the foregoing opinion, but think the decision in this case can properly go farther than the opinion indicates, and there are public reasons why the question raised should be decided. The exact point presented by the pleadings, and the one of public interest, is whether the refusal of the respondent to accept and deliver traffic, whether passengers or freight, at stations between Kansas City and Topeka, by reason of its contract with the Union Pacific Railway Company, is a violation of the second section of the Act to Regulate Commerce prohibiting unjust discrimination, or of the third section in respect to undue or unreasonable preference or prejudice.

We think the question is before us for decision, and, as it relates to the conduct of the respondent in the management of its business and the manner and method in which its business is conducted, it can be passed on with only the present parties before us. The contract which is the ground of the respondent's refusal is only important as furnishing the reason for the refusal and as showing the relations of the respondent to the road of the Union Pacific Company. If an adjudication upon the contract between the contracting parties were called for, all the parties to it would be necessary upon the record.

We think the refusal of the respondent, un-

der the evidence in this case, is not in contravention of the Statute. The argument of the complainant founded on the provision of the first section that the term "railroad" as used in the Act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement or lease, might apply to the extent claimed if the respondent operated the road or part of the road of the Union Pacific Company. But it does not. The Law deals with the actual situation, and does not create a different one. Its provisions apply to powers that exist and regulate their exercise. The Union Pacific Company operates its own road. The respondent has only a running privilege over a portion of it, to reach points on its own line by a shorter route, operating its own trains, but the tracks, stations, switches, train dispatchers and line employees remain in charge of the Union Pacific Company, which company also makes the rules and regulations for the operation of the road. The respondent has no control over the road or its instrumentalities. It has no contract right to use the stations of the Union Pacific Company or its facilities for business on its route, except switches, water tanks and telegraph lines. It receives and discharges passengers and freight on its own tracks and at its own stations, both at Kansas City and Topeka. Its rights, therefore, are not the general rights of a common carrier upon its own road, but are limited and qualified by the agreement. They are simply contract rights which the law does not and cannot enlarge. There is nothing to show that any action under state authority, either legislative or judicial, has condemned the agreement.

The duties of a common carrier are bounded by its rights and powers. Where there is no right or power to render a particular service there can be no duty in that respect. And there cannot be unjust discrimination, nor undue preference or prejudice, in refusing a service that it has no right by statute or contract to perform.

The Union Pacific Company is not bound, in the absence of a statute requirement, to grant the use of its road to another company, and in the voluntary grant of a use it may limit the privilege when not otherwise regulated by statute so as to protect itself from injury. This is all that has been done. A running privilege only over its tracks has been given by the Union Pacific Company to the respondent, but no privileges as a common carrier for traffic originating or terminating on the line used by the respondent between Kansas City and Topeka. It can only be used for through traffic. The local business on that line is the business of the Union Pacific Company. There is no complaint that it does not run sufficient trains to accommodate the public, or that its local service is not entirely adequate. If the respondent ran no trains on that line the local service to the public would be the same. The question, therefore, of compelling the respondent to perform a local service is apparently an abstract question more than a practical one. It rests on theoretical reasons rather than grounds of public convenience or necessity. We fail to see that there is any un-

just discrimination against the local business on this line, or any undue preference to Topeka or Kansas City for through business.

The respondent under existing arrangements has no authority to do otherwise. The offenses charged against it must be predicated of something done for others under similar conditions that is not done for the complaining party. There is nothing done for anyone located on the line used under the contract that is not done for complainant. The whole force of complainant's contention is that more facilities would be afforded if respondent rendered the service in question. Conceding this to be true, the respondent explains by showing that it has no power to do so, and this answers the charge.

If the Union Pacific Company, which owns and operates the road, should refuse to do the local business, the contention of the complainant would apply, but it has no application to the respondent. The through business at Kansas City to and from points on the road of the respondent west of Topeka is undoubtedly facilitated by the running privilege in question, and in this respect it is in the public interest. No actual prejudice to the local business at Lawrence, either in rates, in service of cars or otherwise, has been shown, and probably none exists. It is probable the respondent would be glad to share in the local business if at liberty to do so without bad faith and without losing the privilege for through business.

Running arrangements like the one in question, and with like restrictions, exist in many other parts of the country, and are of great service in transportation. In some instances in large cities several companies run their trains over the tracks of one company for through business, but take no local business from the company that gives the privilege. It has never been shown that this practice injures anyone, or that it is not in the public interest. It certainly saves large expenditure for parallel lines and for terminal rights in cities. A decision adjudging such arrangements unlawful could only demoralize transportation to a large extent, and prove extremely prejudicial to carriers as well as to the public.

Upon the grounds considered, *the complaint should be dismissed.*

G. W. RUMBAUGH *et al.*

v.

THE BALTIMORE & OHIO R. CO., Operating the Confluence and Oakland Railroad.

(No. 255.)

ABSTRACT of complaint filed March 4, 1890.

Complainants are farmers, merchants, manufacturers and shippers doing business at Friendsville in the State of Maryland.

The Confluence and Oakland Railroad was built by the Yough Manor Lumber Company, and during the month of November, 1889, was opened for business, and since that date has been operated by the defendant as a branch line. Friendsville, in the State of Maryland, is situate on said branch line, and is 17.4 miles distant from Confluence, in the State of Penn-

sylvania, a station on the Pittsburgh Division of defendant's line, and the northern terminus of said branch line. Prior to January 1, 1890, complainants were accorded equal facilities for shipment under through bills at single or through rates to and from stations on defendant's lines in the State of Pennsylvania with shippers at stations on defendant's branch lines known as the Mount Pleasant, Fayette County and Somerset and Cambria branches, and said rates were relatively just and reasonable, but since that date complainants have been and now are forced to ship freight to Confluence at the local rates charged by defendant, and there re-bill the same to destination at the schedule rates of defendant from Confluence; and, as consignees, complainants are compelled to pay local rates from Confluence to Friendsville on freight originating at points beyond Confluence and destined to Friendsville, in addition to the rates charged on such freight to Confluence. The rates thus charged on the fifth and sixth classes of freight amount to \$32 per carload of 40,000 pounds for a haul of 17.4 miles, nearly four times more than formerly charged for similar service over the same line on like traffic originating or destined beyond Confluence.

Said advance in rates was made for the purpose of unjustly discriminating against complainants and others in favor of the said Yough Manor Lumber Company, the reputed owner of said Confluence and Oakland Railroad. Said Lumber Company is, or the persons representing and controlling its affairs are, a party or parties to a contract, agreement or arrangement with defendant, not within the power of complainants to exhibit, whereby the control and operation of said railroad is vested in defendant. The effect of said advance is to stifle competition with said Lumber Company by complainants and others engaged in the lumber trade, and the discrimination herein complained of is effected by an arrangement or device in contravention of the provisions of section 2 of the Act to Regulate Commerce.

Defendant has never posted printed schedules of its rates, fares and charges at its depot, station or office in Friendsville on said branch line, nor did it give public notice of the advance in rates herein complained of.

On the facts hereinbefore recited complainants charge that defendant has violated the following sections of the Act to Regulate Commerce, to wit: section 1, by charging unjust and unreasonable rates for the transportation of property between Friendsville and Confluence aforesaid, and between Friendsville and stations on its lines beyond Confluence; section 2, by charging, demanding, collecting and receiving from complainants a greater compensation for the transportation of property than it charges, demands, collects and receives from the Yough Manor Lumber Company, or persons connected therewith, for doing a like and contemporaneous service in the transportation of like kinds of traffic under substantially similar circumstances and conditions, thereby unjustly discriminating against complainants directly or indirectly by giving to said Lumber Company, or persons connected therewith, special rates, rebates and drawbacks, or by

other devices; section 3, by subjecting complainants to undue and unreasonable prejudice and disadvantage and giving undue and unreasonable preference and advantage to other persons doing business at stations on other branch lines of defendant and engaged in shipping and receiving commodities similar to those shipped and received at Friendsville by complainants; and also by subjecting traffic shipped from or destined to Friendsville and other points on said Confluence and Oakland Railroad to undue and unreasonable prejudice and disadvantage and giving undue and unreasonable preference and advantage to like kinds of traffic shipped from or destined to points on the Mount Pleasant, Fayette County, and Somerset and Cambria branches of defendant line; section 6, by failing and neglecting to print and keep open to public inspection at its depot, station or office in Friendsville schedules showing the rates, fares and charges for the transportation of passengers and property in force from time to time upon its Confluence and Oakland branch line, and by failing and neglecting to give ten days' public notice at said depot, station or office of advance in rates, fares and charges over said branch line; section 7, by preventing the carriage of freights from being continuous between Friendsville and points on defendant's lines beyond Confluence, such interruption being caused by defendant's refusing to forward freight between said points under one bill of lading at single or through rates and requiring said freight to be detained at Confluence for re-billing, etc.

Wherefore, the petitioners pray, etc.
(Duly verified.)

THE NEW ORLEANS COTTON EX-
CHANGE

v.

THE ILLINOIS CENTRAL R. CO. *et al.*

THE NEW ORLEANS COTTON EX-
CHANGE

v.

THE CINCINNATI, NEW ORLEANS
AND TEXAS PACIFIC R. CO. *et al.*

(Nos. 180, 195.)

1. When questions involve the reasonableness of rates upon the transportation of cotton from the Southern States by all-rail lines to northern and eastern mills and Atlantic ports upon through rates and a long haul, on the one hand, and, on the other, the local rates of rail carriers to a near port upon a short haul at which their service terminates, they having no associated line of steamships for a continuous carriage to ultimate destination, but the cotton so carried by them to such near port being chiefly for export, and all such rail lines penetrating the same territory and competing for the same business, running north, south and east in opposite directions, such questions can only be disposed of on broad lines and not from narrow considerations.

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2. In considering such questions thus presented, the circumstances and conditions surrounding the traffic in the respective services performed in its carriage by the rail carriers may be, and in these proceedings are found to be, substantially dissimilar and wholly unlike.
3. The proportion of one carrier in a through rate upon a long haul often is, and frequently well may be, considerably less than its local rate for hauling the same freight over its own line, without there being any unjust discrimination, unlawful preference or extortion involved in such a method.
4. The active competition of all these rail carriers for the transportation of such freight, thereby giving them the benefit of a participation in it and lowering the rates for the benefit of the producer and consumer, and furnishing many outlets to markets, is one of the results contemplated by the Act to Regulate Commerce and which it was intended to promote.
5. In determining such questions, a comparison of rates based upon the doctrine that the rate per ton per mile for each of the different services so performed should be the same is not applicable, citing former decisions of the Commission upon this subject.
6. In solving questions of this character, the Commission will look at and consider every fact, circumstance and condition surrounding the traffic and of the service performed in its transportation, and if the competition of water carriers at any point is such as to be large, active, and of controlling force, the all-rail lines competing for the traffic at the same point may make rates that are reasonable and just, in view of such competition, and which will enable them to participate in the carriage of the traffic, and are not obliged to go out of the business and leave it as a monopoly to water carriers.
7. The method of compressing cotton for shipment from the Southern States is one that is found to be absolutely necessary in the case of long through hauls by rail, or where the cotton is carried by coastwise steamers or by ocean vessels for export, and the difference in the rate of transportation of compressed and uncompressed cotton by rail carriers should be the actual and necessary cost of compressing.
8. Upon the facts found in these cases, the Commission will not order the rail carriers to transport cotton on flat cars instead of in box cars to New Orleans, the rate being the same on each, no injury being shown to have resulted to petitioners or to that city, or to any shipper or producer from the carriage in box cars.
9. The Commission by adjustment corrects the rates at Meridian and

Jackson, Mississippi, on compressed and uncompressed cotton carried to New Orleans, respectively, over the lines of the Cincinnati, New Orleans & Texas Pacific Railway and the Illinois Central Railroad; and holds that the complaint as to the relative reasonableness of rates at other stations on the Illinois Central Railroad in Mississippi and Tennessee to New Orleans is not sustained.

(Complaint against Ill. Cent. R. Co. filed March 18, 1889.—Additional complaint adding new parties defendant filed April 22, 1889.—Answers filed April 8th to June 7th, 1889.—Complaint against C. N. O. & T. P. R. Co. and others filed May 4, 1889.—Answers filed May 28th to June 7th, 1889.—Intervening answer of the Meridian Board of Trade filed, on application duly granted, June 17, 1889.—Cases heard June 25, 26 and 27, 1889.—Briefs filed July 8th to November 6th, 1889.—Decided April, 11th, 1890.)

COTTON RATES from interior stations to New Orleans and Boston points; rates on compressed and uncompressed cotton, and methods of transportation of cotton by rail carriers.

Complaints *ante*, pp. 460, 545.

Mr. B. R. Forman for petitioner.

Mr. John Dunn for the Illinois Central Railroad Company.

Mr. H. H. Poppleton for Cleveland, Columbus, Cincinnati & Indianapolis Railway Company and The Indianapolis & St. Louis Railway Company.

Mr. J. W. Fewell for Meridian Board of Trade.

Mr. Edward Colston for the Cincinnati, New Orleans & Texas Pacific Railway Company, and affiliated Companies.

Mr. George C. Greene for Lake Shore & Michigan Southern Railway Company.

Mr. C. W. Fairbanks for Ohio, Indiana & Western Railway Company.

Mr. J. T. Brooks for Pennsylvania Company and Pittsburgh, Cincinnati & St. Louis Railway Company.

Mr. J. A. Buchanan for New York, Lake Erie & Western Railroad Company and New York, Pennsylvania & Ohio Railroad Company.

Mr. James A. Logan for Pennsylvania Railroad Company.

Mr. Ashley Pond for Michigan Central Railroad Company.

Mr. Frank Loomis for New York Central & Hudson River Railroad Company.

Mr. Samuel Hoar for Boston & Albany Railroad Company.

Mr. E. W. Meddaugh for Chicago & Grand Trunk Railway Company.

Mr. John G. Williams for Terre Haute & Indianapolis Railroad Company.

Messrs. Johnson & Slick for Chicago & Atlantic Railway Company.

Mr. E. W. Strong for Cincinnati, Washington & Baltimore Railroad Company.

REPORT AND OPINION OF THE COMMISSION.

Bragg, Commissioner:

The main question in each of these cases being the same, and the lesser in each being much alike, by agreement of parties and for their convenience, as well as that of the Commission, they were heard together, it being 2 INTER S.

agreed that the evidence taken on the hearing, so far as competent and relevant, should be considered as applying to each case separately.

The main question in the one is the relative reasonableness of rates from stations on the lines of the Illinois Central Railroad Company in Kentucky, Tennessee and Mississippi, on cotton transported by this carrier to New Orleans, as compared with the rates from the same stations to eastern markets, mills and Atlantic ports, compared according to distance. The points particularly selected on the Illinois Central Railroad are Aberdeen, Parsons, Durant, Vaiden, and points south of Wickliffe, Kentucky. And the main question in the other case is the relative reasonableness of rates from Meridian, Mississippi, on cotton transported over the line of the Cincinnati, New Orleans & Texas Pacific Railway Company from Meridian to New Orleans, as compared with the rates on cotton transported by this carrier from Meridian over its line *via* Cincinnati and associated lines to eastern mills, markets and Atlantic ports, as compared with each other according to distance, and the station particularly selected on the Cincinnati, New Orleans & Texas Pacific Railway is Meridian.

Another question made in the case of each carrier is of the hauling of uncompressed cotton to New Orleans in box cars instead of hauling it on flat cars. No objection seems to be made by the complainant to the difference allowed by the Illinois Central Railroad Company in the rates between compressed and uncompressed cotton to New Orleans, which is usually 25 cents per bale. But the complainant insists that the difference made by the Cincinnati, New Orleans & Texas Pacific Railway Company of 65 cents per bale between compressed and uncompressed cotton carried from Meridian, Mississippi, to New Orleans, is entirely too great.

The relative reasonableness and justness of cotton rates from certain points in Mississippi and Tennessee to New Orleans:

The Board of Trade of the City of Meridian was allowed to intervene as a party in the case made by the petitioner against the Cincinnati, New Orleans & Texas Pacific Railway Company.

The main question involved in these cases is one of the most important that has yet been brought before us in its practical bearings upon the movement of agricultural products, and the other and lesser questions are such as are very vital to shippers as well as carriers. To some extent it becomes necessary that the findings of fact made by the Commission in these two cases should be separate, although as to the main question, and the hauling of uncompressed cotton on flat or in box cars to New Orleans, they are in substantial effect much the same.

In the case against the Illinois Central Railroad Company, from the evidence adduced, we find the material facts to be as follows: The complainant is a corporation organized under the laws of the State of Louisiana, composed of merchants, traders, etc., dealing in cotton. The Illinois Central Railroad Company is a corporation created by the laws of the State of Illinois and operates under lease the Chicago, St. Louis & New Orleans Railroad between East

Cairo and New Orleans through Kentucky, Tennessee, Mississippi and Louisiana, and also the Yazoo & Mississippi Valley Railroad between Parsons, Jackson and Durant, Mississippi, and the Canton, Aberdeen & Nashville Railroad. All of this portion of its system of roads is known as the Southern Division of the Illinois Central Railroad Company.

The table below shows the comparative rates per bale on cotton from stations on the Southern Division of the Illinois Central Railroad Company to New Orleans, and the Illinois Central's proportion to Cairo on through shipments to eastern points:

| Miles. | Rates per bale to New Orleans. | I. C. proportion to Cairo of through rate to eastern points. |
|----------|--------------------------------|--|
| 50..... | \$1 30 | \$1 67½ |
| 100..... | 1 75 | 1 80 |
| 150..... | 2 25 | 1 80 |
| 200..... | 2 50 | 2 00 |
| 250..... | 2 70 | 2 55 |
| 300..... | 2 75 | 2 65 |
| 350..... | 2 75 | 2 75 |
| 400..... | 2 75 | 2 80 |
| 450..... | 2 75 | 2 85 |
| 500..... | 2 75 | 2 95 |

The following table shows the distances from the principal stations on the Southern Division of the Illinois Central Railroad to New Orleans and Cairo, respectively:

ILLINOIS CENTRAL RAILROAD, SOUTHERN DIVISION.

Statement Showing All Stations on Southern Division, Illinois Central Railroad, with Distances from Cairo, Ill., and New Orleans, La.; also Junction Stations and Names of Connecting Roads.

| Name of station. | Miles from Cairo. | Miles from New Orleans. | Opposite junction station, name of connecting road. |
|-------------------|-------------------|-------------------------|---|
| Cairo, Ill. | 550 | | |
| East Cairo, Ky. | 548 | | |
| Wickliffe, " | 543 | | |
| Bardwell, " | 534 | | |
| Arlington, " | 528 | | |
| Clinton, " | 520 | | |
| Fulton, " | 506 | | |
| Martin, Tenn. | 495 | | Newp. News & Miss. Val. |
| Sharon, " | 487 | | Nash., Chatta. & St. Louis. |
| Greenfield, " | 481 | | |
| Bradford, " | 475 | | |
| Milan, " | 464 | | Louisville & Nashville. |
| Medina, " | 455 | | |
| Jackson, " | 441 | | Mobile & Ohio. |
| Medon, " | 430 | | |
| Toon's, " | 420 | | |
| Bolivar, " | 413 | | |
| Hickory Valley, " | 402 | | |

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| Name of station. | Miles from Cairo. | Miles from New Orleans. | Opposite junction station, name of connecting road. |
|-----------------------|-------------------|-------------------------|---|
| Grand Junction, Tenn. | 156 | 394 | Memphis & Charleston. |
| Michigan City, Miss. | 162 | 388 | |
| Lamar, " | 168 | 382 | |
| Holly Springs, " | 181 | 369 | |
| Waterford, " | 189 | 361 | |
| Abbeville, " | 200 | 350 | |
| Oxford, " | 210 | 340 | |
| Taylor's, " | 218 | 332 | |
| Water Valley, " | 227 | 323 | |
| Coffeeville, " | 240 | 310 | |
| Torrance, " | 248 | 302 | |
| Grenada, " | 256 | 294 | Miss. & Tenn. for Memphis. |
| Duck Hill, " | 268 | 282 | |
| Winona, " | 279 | 271 | |
| Vaiden, " | 289 | 261 | |
| West's, " | 299 | 251 | |
| Durant, " | 309 | 241 | Branch to Kosciusko. |
| Goodman, " | 317 | 233 | |
| Picken's, " | 324 | 226 | |
| Vaughan's, " | 330 | 220 | |
| Canton, " | 344 | 206 | |
| Madison, " | 355 | 195 | Natchez, Jackson & Columbus. |
| Jackson, " | 367 | 183 | Vicksburg & Meridian. |
| Byram, " | 376 | 174 | Vicksb'g, Shrevep't & Pac. |
| Terry, " | 383 | 167 | |
| Crystal Springs, " | 392 | 158 | |
| Hazlehurst, " | 401 | 149 | |
| Beauregard, " | 411 | 139 | |
| Wesson, " | 412 | 138 | |
| Brookhaven, " | 421 | 129 | |
| Bodue Chitte, " | 431 | 119 | |
| Summit, " | 442 | 108 | |
| McComb City, " | 445 | 105 | |
| Magnolia, " | 452 | 98 | |
| Chatawa, " | 458 | 92 | |
| Osyka, " | 462 | 88 | |
| Tangipahoa, La. " | 472 | 78 | |
| Amite, " | 482 | 68 | |
| Hammond, " | 497 | 53 | |
| Manahae, " | 513 | 37 | |
| Kenner, " | 540 | 10 | |
| New Orleans, " | 550 | | |

The rates of the defendant, the Illinois Central Railroad Company, from interior points to New Orleans, are much about the same as those of other southern roads for similar distances and upon freight transported under substantially similar circumstances and conditions. To a considerable extent they are made to meet the competition of rail and water lines operated east and west crossing this road at junction points and reaching the Mississippi River; the competition of that river itself at several points, as also the Yazoo River; and this is also true of the rates made by it on shipments of cotton over its line *via* Cairo, east, to northern and eastern mills, markets and Atlantic ports.

The rate on cotton from Cairo to Boston and Lowell, and points taking same rates, is 37 cents per hundred pounds; to New York and New York points, 32 cents per hundred pounds; to Philadelphia and Philadelphia points, 30 cents per hundred pounds. The percentages of this rate are divided between the Illinois Central Railroad Company and the eastern lines, according to whether the freight leaves the Illinois Central at Effingham or at Mattoon, or by the different lines named below, in the proportion stated in this table:

Rates on Cotton from Cairo.

| Date. | Boston and Lowell. | New York | Philadelphia. |
|---------------------|--------------------|----------|---------------|
| Oct. 7th, 1885..... | 37c. | 32c. | 30c. |
| Oct. 1st, 1888..... | 37c. | 32c. | 30c. |

Divisions.—Via Odin and Continental Line.

| | | Miles. | Per cents. | Amount per 100 lbs. |
|---------------|-------------------------------|--------------|--------------|---------------------|
| To Boston ... | Ill. Central... Eastern Lines | 121 1,169 | 14.2 85.8 | 5.25 31.75 |
| To New York | Ill. Central... Eastern Lines | 121 1,071 | 15.3 84.7 | 4.9 27.1 |

Divisions.—Via Effingham and Star Union Line.

| | | | | |
|---------------|-------------------------------|----------|--------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 166 * | 11.3 88.7 | 4.18 32.82 |
| To New York | Ill. Central... Eastern Lines | 166 * | 14.4 85.6 | 4.61 27.39 |

Divisions.—Via Mattoon and White Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 193 1,096 | 14.97 85.03 | 5.54 31.46 |
| To Lowell ... | Ill. Central... Eastern Lines | 193 1,103 | 14.89 85.11 | 5.51 31.49 |
| To New York | Ill. Central... Eastern Lines | 193 1,040 | 15.66 84.34 | 5.01 26.99 |

Divisions.—Via Mattoon and Empire Line.

| | | | | |
|-------------|-------------------------------|----------|----------------|---------------|
| To New York | Ill. Central... Eastern Lines | 193 * | 16.26 83.74 | 5.20 26.80 |
|-------------|-------------------------------|----------|----------------|---------------|

Divisions.—Via Tolono and Red Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 228 1,083 | 17.39 82.61 | 6.43 30.57 |
| To Lowell ... | Ill. Central... Eastern Lines | 228 1,090 | 17.3 82.7 | 6.40 30.60 |
| To New York | Ill. Central... Eastern Lines | 228 1,027 | 18.17 81.83 | 5.81 26.19 |

Divisions.—Via Champaign and Lackawanna Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 237 1,180 | 16.73 83.27 | 6.19 30.81 |
| To New York | Ill. Central... Eastern Lines | 237 1,069 | 18.15 81.85 | 5.81 26.19 |

Divisions.—Via Champaign and Nickel Plate Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 237 1,083 | 17.95 82.05 | 6.64 30.36 |
| To New York | Ill. Central... Eastern Lines | 237 1,051 | 18.4 81.6 | 5.89 26.11 |

* Where eastern distance is not given the line is operated via two or more railroads.

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Divisions.—Via Tuscola and Lackawanna Line.

| | | Miles. | Per cents. | Amount per 100 lbs. |
|---------------|-------------------------------|--------------|----------------|---------------------|
| To Boston ... | Ill. Central... Eastern Lines | 215 1,214 | 15.05 84.95 | 5.57 31.43 |
| To New York | Ill. Central... Eastern Lines | 215 1,103 | 16.31 83.69 | 5.22 26.78 |

Divisions.—Via Tuscola and Erie Despatch.

| | | | | |
|---------------|-------------------------------|----------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 215 * | 15.24 84.76 | 5.64 31.36 |
| To Lowell ... | Ill. Central... Eastern Lines | 215 * | 14.82 85.18 | 5.48 31.52 |
| To New York | Ill. Central... Eastern Lines | 215 * | 16.68 83.32 | 5.34 26.66 |

Divisions.—Via Tuscola and Nickel Plate Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 215 1,137 | 15.9 84.1 | 5.88 31.12 |
| To New York | Ill. Central... Eastern Lines | 215 1,320 | 16.29 83.71 | 5.21 26.79 |

Divisions.—Via Tuscola and Traders Despatch.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 215 * | 14.77 85.23 | 5.46 31.54 |
| To New York | Ill. Central... Eastern Lines | 215 1,105 | 16.29 83.71 | 5.21 26.79 |

Divisions.—Via Paxton and Interstate Despatch.

| | | | | |
|---------------|-------------------------------|----------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 262 * | 18.32 81.68 | 6.77 30.23 |
| To Lowell ... | Ill. Central... Eastern Lines | 262 * | 17.82 82.18 | 6.59 30.41 |
| To New York | Ill. Central... Eastern Lines | 262 * | 19.98 80.02 | 6.39 25.61 |

Divisions.—Via Paxton and Midland Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 262 1,073 | 19.62 80.38 | 7.26 29.74 |
| To Lowell ... | Ill. Central... Eastern Lines | 262 1,080 | 19.52 80.48 | 7.22 29.78 |
| To New York | Ill. Central... Eastern Lines | 262 1,017 | 20.48 79.52 | 6.55 25.45 |

Divisions.—Via Matteson and Blue Line.

| | | | | |
|---------------|-------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 337 1,040 | 25.05 74.95 | 9.27 27.73 |
| To Lowell ... | Ill. Central... Eastern Lines | 337 1,047 | 24.93 75.07 | 9.12 27.78 |
| To New York | Ill. Central... Eastern Lines | 337 984 | 26.15 73.85 | 8.37 23.63 |

* Where eastern distance is not given the line is operated via two or more railroads.

Divisions.—Via South Larn and Great Eastern Line, National Despatch or West Shore Line.

| | | Miles. | Per cents. | Amount per 100 lbs. |
|---------------|----------------------------------|----------|----------------|---------------------|
| To Boston ... | Ill. Central... Eastern Lines | 346 * | 25.05 74.95 | 9.27 27.73 |
| To Lowell ... | Ill. Central... Eastern Lines | 346 * | 24.93 75.07 | 9.22 27.78 |
| To New York | Ill. Central... Eastern Lines | 346 * | 26.15 73.85 | 8.37 23.63 |

Divisions.—Via Chicago and Nickel Plate Line.

| | | | | |
|---------------|----------------------------------|--------------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 365 1,002 | 26.7 73.3 | 9.88 27.12 |
| To New York | Ill. Central... Eastern Lines | 365 970 | 27.34 72.66 | 8.75 23.25 |

Divisions.—Via Chicago and Erie Despatch.

| | | | | |
|---------------|----------------------------------|----------|----------------|---------------|
| To Boston ... | Ill. Central... Eastern Lines | 365 * | 24.38 75.62 | 9.02 27.98 |
| To Lowell ... | Ill. Central... Eastern Lines | 365 * | 23.83 76.17 | 8.82 28.18 |
| To New York | Ill. Central... Eastern Lines | 365 * | 26.55 73.45 | 8.50 23.50 |

This table shows rates from local points in Mississippi to New Orleans for cotton shipments over the line of the Illinois Central Railroad:

Rates on Cotton per Bale via Illinois Central R. R. to New Orleans.

| Miles. | | Uncom-pressed. | Compressed. |
|--------|---|------------------------|--------------------------------------|
| 183 | From Jackson, Miss.: July 16th, 1887 November 1st, 1887 September 10th, 1888 | \$2 50 2 50 2 25 | \$2 00 |
| 349 | From Aberdeen, Miss.: July 16th, 1887 November 1st, 1887 | 3 00 2 75 | 2 50 2 50 depot or shipside. |
| 369 | From Holly Springs, Miss.: July 16th, 1887 November 1st, 1887 September 10th, 1888 | 2 45 2 75 2 30 | 2 25 shipside. |
| 228 | From Yazoo City, Miss.: April 23d, 1887 November 1st, 1887 | 1 85 1 85 | + 2 35 shipside. + 2 35 shipside. |
| 298 | From Parsons, Miss.: April 23d, 1887 | 3 00 | No compress. |
| 261 | From Vaiden, Miss.: November 1st, 1887 September 10th, 1888 | 2 75 2 75 | No compress. |
| 241 | From Durant, Miss.: November 1st, 1887 September 10th, 1888 | 2 75 2 65 | No compress. |

* Where eastern distance is not given the line is operated via two or more railroads.
+ Includes 50 cents per bale for compression and 15 cents per bale for transfer at New Orleans.
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The table below shows the rates of freight on cotton in effect June 4th, 1889, from points named below to Boston, Mass., and Boston points, which are the prevailing rates. Rates via New Orleans are local rates to New Orleans with rates by vessel from New Orleans to Boston added.

| To Boston, Mass., from— | Rates in cents per 100 lbs. | | |
|-------------------------|-----------------------------|----------------|------------------|
| | Via Cairo, Ill. | | Via New Orleans. |
| | Com-pressed. | Uncom-pressed. | Com-pressed. |
| Jackson, Miss. | 75 | ----- | 78 |
| Aberdeen, " | 72 | 85 | 88 |
| Holly Springs, " | 70 | ----- | 83 |
| Yazoo City, " | ----- | 85 | 71 |
| Parsons, " | ----- | 100 | 98 |
| Vaiden, " | ----- | 100 | 93 |
| Durant, " | ----- | 100 | 91 |

Cotton from Parsons, Vaiden and Durant is shipped uncompressed to New Orleans and compressed at that point.

When cotton is thus shipped via New Orleans to Boston and Boston points from local stations on the Illinois Central Railroad, the rate is made up as follows: Local rate from station in Mississippi on the Illinois Central Railroad to New Orleans; then the vessel gives a through bill of lading from New Orleans to New York, and the cotton is taken from New York by another vessel or by rail to Boston or Boston points under this through bill of lading. The rates stated in this last table were those in effect June 4th, 1889. At that time the vessel rate from New Orleans to Boston points was 46 cents per hundred pounds, but since that time it is understood that this rate is 38 cents per hundred pounds, and that this is now the prevailing rate.

As a general rule, this Company charges 25 cents per bale less on compressed than on uncompressed cotton carried over its line to New Orleans, and in regard to this there seems to be no contest on the part of the complainant. When cotton is furnished to this Company by the shipper already compressed, to be shipped from its southern division to eastern points via Cairo, it pays nothing for the compression; but if cotton is furnished to it by the shipper which is uncompressed, with the right to compress it in transit, then the Company has it compressed at Cairo, where the charge for compression is usually about 10 cents per hundred pounds, and the cost of this is paid out of the entire through rate, because the lines east of Cairo will not receive any other than compressed cotton to be carried to eastern points, and therefore ten cents per hundred pounds for cost of compression at Cairo is allowed out of the entire through rate via Cairo to eastern points.

About 20 to 25 bales to the box car is what is carried of uncompressed cotton; about 40 to 45 bales to the box car is what is carried of compressed cotton; and about 51 bales of uncompressed cotton is what is carried on a flat car. There is more hazard arising from carrying cotton uncompressed on a flat car than in a box car, on account of liability to fire. There

is also some reason why it is preferable to carry uncompressed cotton in a box car instead of a flat car to avoid rain and consequent dampness and delay in drying it at its destination before turning it over to the compress to be compressed. During the season 1887-'88, about 91 per cent of the cotton from the Illinois Central stations to New Orleans was carried uncompressed. The rate made by the all-rail carriers from New Orleans to New York and eastern points on cotton is 50 cents per hundred pounds, and this is done to meet, by way of competition, the ocean rate from New Orleans to such eastern points. It appears, however, that very little cotton is carried by the all-rail carriers from New Orleans to these eastern points, and that during the last cotton season, from September 1st, 1888, to March last, there was only one shipment of this kind direct from New Orleans to Atlantic ports carried by the defendant, the Illinois Central Railroad Company, and that this consisted of seventeen bales.

The expenses of handling a flat bale of cotton in New Orleans are now \$1.10, which includes the following items:

| | |
|----------------------|-----------|
| Storage..... | 30 cents. |
| Sampling..... | 15 " |
| Drayage to ship..... | 15 " |
| Compressing..... | 50 " |

The expenses of a bale of free-on-board cotton for export in New Orleans are 16 cents, divided equally between the buyer and the seller of the cotton. If there is a sale of cotton in New Orleans the commissions are to be added, which are usually $2\frac{1}{2}$ per cent. "Free-on-board" business means cotton placed with an exporter in New Orleans. About two thirds of the cotton sold in New Orleans to exporters is bought without the aid of a broker. A broker is an expert who is employed by the exporter to buy cotton from factors or commission merchants. The broker samples it and has it put on the vessels designated by the exporter. Where cotton is bought by a broker, his charge is 15 cents a bale, and 10 cents for marking and sampling, making 25 cents per bale. Where cotton is bought in the interior for a foreign or American mill the only expenses attendant upon it in New Orleans would be the disbursements of the ships, drayage, fees to stevedores, and charges of that character. The ship makes an uncompressed rate from the fact that it pays 50 cents per bale for compressing. The exporters are the real buyers in New Orleans, and cotton bought there is called "spot" cotton. The cost of compressing except in the case of export cotton comes out of the cotton in one way or another. Foreign ships have a practice of screwing the cotton into the ships, but this is not done by coastwise vessels, and the ship pays out of the freight money for screwing into the ship. At New York they do not screw the cotton in the ship, but they demand that compressed cotton be given them and do not pay 50 cents for compressing.

A bale of cotton compressed in the interior and billed through New Orleans to Liverpool is not subjected to any charges in New Orleans; a through bill of lading by rail and steamer covers all the charges. If cotton comes to New

Orleans by railroad, which is not factors' cotton, the compressers take that cotton, haul it to the compress, compress it, and haul it to the ship for the sake of the compressing charged; but if it be factors' cotton then the cost of compressing does not include the drayage. There has been a reduction of fifty cents a bale in the expenses of handling cotton in New Orleans since the cheap rates north and east were made from the cotton-producing country. At every depot in New Orleans the Cotton Exchange has watchmen and supervisors to see that cotton is properly sampled and that not more than six ounces is taken out of each bale in sampling and that it is properly handled, and for this they charge the factors so many cents a bale and they turn over to the factors the loose cotton taken out by sampling, which does not exceed four ounces per bale, and this pays the factors the fee they are charged by the Cotton Exchange. The ship in New Orleans when it goes to foreign ports pays for the compression. Coastwise steamers that go to New York and other eastern ports do not pay for the compression; they make a rate on compressed cotton. The ocean rate from New York to Liverpool is about $\frac{1}{4}$ a cent lower per pound than the New Orleans rate. The rate from New York is on compressed cotton so that it reduces the apparent difference to the extent of 50 cents per bale. There are seventeen compresses in New Orleans. The depth of the river at its mouth has been increased from 20 to 26 feet within the last few years. The brokerage on free-on-board cotton used to be fifty cents per bale and is now twenty-five cents. If cotton when received at ship's side is found to be improperly compressed, then it is recompressed under the direction of the Maritime Association, which is constituted of ships' agents principally, and a party who would have received from the ship 50 cents for compression loses this.

Only about 10,000 bales of cotton are used at New Orleans in the mills there, but a great many people bring cotton there and keep it during the season to operate with, as they do in Liverpool or New York. "Operating" means holding for a rise or for speculation. The factor advances money to the people in the interior to make a crop of cotton, for which he charges legal interest, and, in addition, $2\frac{1}{2}$ per cent on sales. It appears that the through rates from interior points in Mississippi on cotton, all rail, and part rail and part water, to Boston and other eastern points, are made to meet the competition of rates *via* New Orleans and coastwise vessels to same points and are practically much the same.

The practice of buying cotton at interior towns and cities and shipping eastward for American mills and the European trade has sprung up in the last nine years and is a large business. By this method of dealing, country towns and cities, generally, in the interior, have become markets, and it has greatly reduced the receipts of cotton at many of the American ports to which cotton was formerly carried. Among these interior markets, one of the largest is the City of Memphis. At Memphis, for example, the following table will show in what proportion cotton was purchased during the period named, for export and by spinners:

Cotton Shipments from Memphis as Reported by the Secretary of the Memphis Cotton Exchange.

| September 1st to August 31st. | | 1886-'87. | 1887-'88. |
|--|-----------|----------------|----------------|
| | | 653,661 bales. | 631,859 bales. |
| Taken by southern rail and water transportation lines. | 138,379 " | | 148,152 " |
| Reported sales for export | | 362,625 " | |
| " spinners | | 238,025 " | |
| Shipments from September 1st, 1888, to May 10th, 1889. | | 680,423 " | |
| Taken by southern rail and water transportation lines | | 152,070 " | |
| Reported sales for export | | 371,625 " | |
| " spinners | | 223,250 " | |

But, notwithstanding these important changes, New Orleans is still by large odds the market at which more cotton is bought and sold and received than any other in the country. Gross receipts of cotton at New Orleans for years 1886-'87 were 1,930,771, and for 1887-'88 were 1,935,773.

The consumption of cotton in the United States is steadily increasing. The consumption of northern mills for the year 1888 was 2,030,000 bales and the southern 500,000. This was an increase in ten years of 805,000 bales. Of this it seems that 1,441,920 bales reached the spinners by overland rail movement, leaving to be carried from the ports, for home consumption, 1,088,080 bales.

The conditions of transportation and markets in the last few years in reference to the cotton trade have been much changed. Within that time new lines of railroad have been constructed in the cotton-producing country, many of them having their interests and terminals at other ports and in other directions than New Orleans. Where these have come in contact with the lines of carriers transporting cotton to New Orleans they have necessarily influenced and affected their action to some extent. These lines have their terminals at markets and ports that have been reaching out for a share of this cotton trade; and on account of their connecting lines and the business it furnishes it has been to the interest of the rail carriers to haul some of it to these markets, mills and ports. The outcome of all this is that under the present state of things the producer oftentimes is enabled to sell his cotton at interior points of production, all things considered, at a price nearly equal to that ruling at New Orleans; and this is as true of other Gulf and Atlantic seaports with their markets as it is at New Orleans. In this way a large amount of cotton in the States of Arkansas, Mississippi, Tennessee and Alabama, that would otherwise have gone to New Orleans, is diverted to other ports and to eastern mills.

The cotton transported to New Orleans over the line of the Illinois Central Railroad has not materially varied during each of the last four years, as appears from the following table :

| | | | |
|----------|----------|----------|-----------|
| 1884-85. | 1885-86. | 1886-87. | 1887-'88. |
| 200,637 | 242,092 | 207,822 | 251,148 |

The defendant, The Illinois Central Railroad Company, hauled over its lines to points other than New Orleans, for the season of 1887-'88, 103,190 bales of cotton. Of this amount 14,593 bales went to Memphis and the remain-

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ing 88,597 bales went to northern and eastern mills and markets. Of this aggregate of 88,597 bales 52,891 bales came from junction stations—that is, stations at which the lines of the Illinois Central Railroad Company were crossed by other and competing lines, or at junction points where lines competing with the Illinois Central Railroad Company existed.

From September 1st, 1888, to March 31st, 1889, the number of loaded box cars received at Cairo from the Southern Division of the Illinois Central Railroad Company, north-bound, was 11,012; and during the same period the number of empty box cars received at Cairo from the same lines, north-bound, was 6,739. It is claimed by the defendant, the Illinois Central Railroad Company, and the evidence so shows, that the bulk of the cotton carried by it over its line by way of Cairo to northern and eastern mills and markets during this period, as well as previously, and covering the time complained of by the complaint, was hauled in cars that would otherwise have gone north empty; and this is substantially true of the Cincinnati, New Orleans & Texas Pacific Railway Company.

The grades of the Illinois Central Railroad north of Cairo are undoubtedly lighter and better adapted to cheap transportation than those south of that point, but it does not appear that the grades of this road south of Cairo are heavy grades or peculiarly expensive. The proximity of that portion of the line of the Illinois Central Railroad north of Cairo to the coal fields of Illinois in relieving it from the greater cost of transportation is, indeed, quite an item. But that feature of the business north of Cairo which would reduce most the cost of transportation is the fact that the bulk of the traffic transported over the lines of this road is about three times greater, in proportion to the distance, north of Cairo than south of that point. When these three features of the transportation question north of Cairo are taken into consideration with their combined effects, they do undoubtedly show that the cost of transportation north of Cairo to the Illinois Central Railroad Company in operating its line would be largely less for a corresponding distance than south of that point. And when all the circumstances and conditions surrounding the traffic and the different methods and routes of transportation are considered, the fact becomes apparent that transporting cotton from this region north and east to northern and eastern mills, or south, chiefly for export, is not in each instance a like and contemporaneous service. The cotton goes in opposite directions, to different destinations, with the ocean rate as part of the through rate in one and with no ocean rate in the other, and under circumstances and conditions that are substantially unlike.

It appears from the evidence that the net earnings of this Company from its Southern Division during the year 1888 were 4.6 per cent on \$33,691,100 of its bonds and stock, though its permanent expenditures for that year amounted to the very small sum of only \$38,115.57.

In the case of the Cincinnati, New Orleans & Texas Pacific Railway Company the material facts found as to relative rates charged by de-

fendant on cotton carried by it from Meridian to New Orleans and, in the opposite direction, from Meridian *via* Cincinnati over its own lines and associated lines to northern and eastern mills and Atlantic ports, and the causes that have produced these are, in substance, much the same as in the case of petitioner against the Illinois Central Railroad Company, excepting that the evidence does not with the same distinctness show that there is the same large return of empty cars north-bound, although it is clearly inferable that this exists to a large extent. It has also the advantage of important coal fields along its line in Alabama. The substance of this evidence found in other respects in the case of the Illinois Central Railroad Company is also much the same, except as to the difference made in the rate between compressed and uncompressed cotton carried by the Cincinnati, New Orleans & Texas Pacific Railway Company from Meridian to New Orleans. And there are a few additional facts involved in the evidence in this case which are found, and which upon the evidence are necessary to be found, besides those set forth in the report of the case of the Illinois Central Railroad Company. Substantially all the cotton on the line of the New Orleans & Northeastern Railroad, one of the links of the Cincinnati, New Orleans & Texas Pacific Railway Company, extending from New Orleans to Meridian, a distance of 196 miles, is carried by this railroad to New Orleans.

The Cincinnati, New Orleans & Texas Pacific Railway Company has no funded debt, but, after paying taxes, rentals and deduction for reserve sinking fund, its net income for the year 1888 was \$187,636.66.

The through rate from Meridian to northern and eastern mills and Atlantic ports, compressed cotton, *via* the Cincinnati, New Orleans & Texas Pacific Railway, was 73 cents per hundred pounds, from October 23d, 1888, to September 7th, 1889, and since September 7th, 1889, has been 71 cents per hundred pounds, while by the line of the East Tennessee, Virginia & Georgia Railway from Meridian to the same eastern points it is 71 cents per hundred pounds.

In the fall of the year 1888, upon complaint of petitioner against the Cincinnati, New Orleans & Texas Pacific Railway Company (See *ante*, p.289, and 2 I. C. C. Rep. 375), the Commission then ordered that the rate on compressed cotton carried by this Company from Meridian to New Orleans should not exceed \$1.50 per bale, and under that order, in December, 1888, the Cincinnati, New Orleans & Texas Pacific Railway Company reduced its rate on compressed cotton from Meridian to New Orleans from \$2 to \$1.50 per bale, and, at the same time, reduced its rate on uncompressed cotton from Meridian to New Orleans from \$2.25 per bale to \$2.15 per bale. These reductions were immediately met by the Southern Railway & Steamship Association, which reduced the rate on cotton over its lines and in its territory from Meridian to Atlantic ports ten cents per hundred pounds, or 50 cents per bale. The effect of this was that the East Tennessee, Virginia & Georgia Railway, which is a member of the Southern Railway & Steamship Association,

carried out of Meridian to Brunswick, Georgia, about two thirds of all the cotton for northern and eastern mills and Atlantic ports received at Meridian during the season ending in 1889, which was a much larger proportion than that carrier ever carried from Meridian before, while the Cincinnati, New Orleans & Texas Pacific Railway, which had formerly carried more cotton from Meridian to northern and eastern mills, markets and ports than the East Tennessee, Virginia & Georgia Railroad Company, after that carried correspondingly less, and New Orleans received no additional cotton by this change.

The City of Meridian handles about 50,000 bales of cotton during a cotton season, the greater portion of which is brought there to be compressed. The charges for compressing cotton at Meridian paid by the different railroads to New Orleans and to eastern mills and Atlantic ports by different carriers are as follows: By the Cincinnati, New Orleans & Texas Pacific, on cotton, per bale, from Meridian to New Orleans, 65 cents; by the Mobile & Ohio Railroad, on cotton, per bale, to northern and eastern mills, 55 cents; by the East Tennessee, Virginia & Georgia Railway, on cotton, per bale, carried to northern and eastern points and for export, 65 cents per bale.

It costs from 30 to 32 cents on a good compress to compress a bale of cotton, and if there are less than 50,000 bales to compress it may cost a little more. The charge for compressing a bale of cotton at New Orleans and Cairo is 50 cents per bale. Two more bands are placed upon a bale of cotton compressed for export at Meridian than upon a bale compressed for domestic consumption; and this is said to be necessary on account of the greater length of haul, and perhaps is due also, to some extent, to the fact that cotton compressed for export has to undergo a process of screwing into the hold of the ship. When cotton is brought to a compress by a railroad carrier to be compressed, the compress unloads the cotton for the purposes of compressing it and then reloads it again without any extra charge except that which is embraced in the charge for compression.

If cotton goes to Brunswick from Meridian *via* the East Tennessee, Virginia & Georgia Railway, whether for export or for northern and eastern mills and markets, then that company pays the compress charge at Meridian and the ship at Brunswick refunds this to that carrier. If cotton is furnished to the Cincinnati, New Orleans and Texas Pacific Railway at Meridian to be transported to northern and eastern mills, markets and Atlantic ports for export, which is uncompressed, then that company has it compressed at Meridian, pays the compress charges, and the expense of these compress charges is paid from the through tariff rate by the Trunk Lines, and the shipper gets the benefit of it in the reduced rate on compressed cotton. If cotton is furnished the Cincinnati, New Orleans & Texas Pacific Railway at Meridian to be carried east, which has already been compressed by the shipper, then the charge for compressing is not refunded to the shipper, but the shipper receives the benefit of it in the lower rate.

The conclusions and opinion of the Commission upon the above findings of fact in these cases are now stated.

The chief question presented by the complaint is the relative reasonableness and justness of the rates on cotton transported by the defendant, the Illinois Central Railroad Company, from the stations on its lines south of Cairo to New Orleans, as compared with the rates on cotton transported by it and its connecting lines to northern and eastern points from the same stations. These rates not being charged over the same line, in the same direction, the shorter being included within the longer haul, it is not claimed that they are violative of the fourth section of the Act to Regulate Commerce. But it is insisted that they are violative of the first, second and third sections of that Statute in several respects. It is claimed that these rates to New Orleans being higher in proportion for a shorter haul in transporting the same kind of traffic than the rates to northern and eastern points from the same stations, that this demonstrates that they are not reasonable and just. It is also claimed that they are not relatively reasonable and just and that this results in an unreasonable and unjust discrimination against New Orleans and in favor of northern and eastern localities. Much stress is also laid upon the fact that these rates to New Orleans are considerably higher than the rates from Memphis and other points along the Mississippi River to New Orleans by way of the Louisville, New Orleans & Texas Railway, commonly called the Mississippi Valley Railroad.

The words "reasonable" and "just," as used in the Statute as applied to rates, are each relative terms. They do not mean to imply that the rates upon every railroad engaged in interstate commerce shall be the same or even about the same. The conditions and circumstances of each road surrounding the traffic and which enter into and control the nature and character of the service performed by the carrier in the transportation of property, such as the cost of transportation, which involves volume or lightness of traffic, expenses of construction and of operation, competition in some respects of carriers not subject to the Law, rates made by shorter and competing lines to the same points of destination, space occupied by freight, value of freight and risk of carriage to carrier, all have to be considered in determining whether a given rate is "reasonable" and "just."

Tested by these rules, a rate may be a very reasonable and just rate on one railroad and not reasonable and just on another. For example, a rate that would be reasonable and just on the New York Central & Hudson River Railroad may be so low that it would force the Minneapolis & St. Louis Railway into bankruptcy in less than thirty days; and a rate that might be reasonable and just on the Minneapolis & St. Louis Railway might be so high that if attempted to be enforced on the New York Central & Hudson River Railroad for thirty days it would practically destroy the business of the latter. This diversity is most observable in the different portions of the country, as, for instance, between lines of railroad in the Southern States or the States of the far west, on the one hand, and the railroad lines of the Middle

and Eastern States on the other. Where, however, railroad lines reach the same common points, are located in the same territory, and compete with each other, as well as with other lines, for the business of that territory, their rates are, in general, much the same, and this is one of the necessities of the situation. Even among the rail carriers where there is no opposing water competition there may be occasional differences in rates that will be found substantially justified by the different circumstances and conditions under which the lines are operated.

Citations made of previous decisions of the Commission only for the purpose of avoiding a repetition of discussing rules already settled will show that very many of the propositions involved in the main question here raised have heretofore been examined and considered by the Commission.

On the subject of the comparison of rates of one railroad with those of another in the case of the *Business Men's Association of the State of Minnesota v. The Chicago & Northwestern R. Co. ante*, p. 48, 2 I. C. C. Rep. 83, the Commission said:

"The subject of comparing rates in one portion of the country with rates in another and rates upon one line with rates upon another, operated under substantially different circumstances and conditions, has repeatedly been before us, and we have uniformly held that they do not constitute a fair basis of comparison. See *Evans & Reed v. The Oregon R. & Nav. Co.* 1 Inters. Com. Rep. 641, 1 I. C. C. Rep. 336; *The Business Men's Association of the State of Minnesota v. The Chicago, St. Paul, Minneapolis and Omaha R. Co. ante*, p. 41, 2 I. C. C. Rep. 52; *The La Crosse Manufacturers and Jobbers Union v. The Chicago, Milwaukee and St. Paul R. Co. ante*, p. 9, 1 I. C. C. Rep. 629."

The elements that enter into the cotton rates and make them what they are from interior points along the lines of the Illinois Central Railroad Company and the Cincinnati, New Orleans & Texas Pacific Railway Company to New Orleans, on the one hand, and from the same points to northern and eastern mills and markets, on the other, as disclosed by the evidence in this proceeding, may be briefly stated. To New Orleans these are a comparatively short haul of freight, the necessary use of a large car equipment in rushing this freight to New Orleans during a few months of the year, a large portion of which car equipment, after performing this service, cannot be otherwise profitably employed, and at intervals is obliged to return empty to the northern terminals of these railroads for other freight; the difference between the larger volume of the traffic which these railroads transport into New Orleans and the comparatively much lighter traffic which they transport out of New Orleans, rendering it unavoidably necessary that in the operation of their lines a large portion of their car equipment must go back empty from New Orleans to northern terminals, a distance of between five and six hundred miles; and the further fact that during about six months of the year there is little or none of this freight for the defendant to carry from these interior stations to New Orleans. To northern and eastern mills and markets, these elements are a large surplus of

north-bound returning empty cars in which the cotton may be hauled over the lines of the Illinois Central Railroad and the Cincinnati, New Orleans & Texas Pacific Railway, that cannot be otherwise employed, and which, if not used in this manner, would be, to a large extent, a source of heavy and dead expense to these companies; a joint through rate for this cotton from Cairo and Cincinnati north and east with connecting rail carriers in percentage proportions for a long haul to northern and eastern mills and markets in which there is employment found for a portion of their cars in the prosecution of their business and over lines where freight rates on account of the volume of the traffic are much lower upon property generally than in the Southern States; a fierce competition with other rail and water lines in many instances contending for the business; and the further fact that it is a kind of business out of which something may in this manner be made by the carriers in the use of their cars and which they do not, therefore, feel at liberty to decline.

Do these elements and considerations justify the difference in these rates?

The difference between a local rate of a railroad on a comparatively short haul, graded at stations, generally, according to distance, and, on the other hand, of a joint or through rate upon a long haul, made by percentages charged by a number of connecting lines, was considered by the Commission in the case of *W. B. Farrar & Co. v. The East Tennessee, Virginia & Georgia R. Co.*, 1 Inters. Com. Rep. 764, 1 I. C. C. Rep. 487, and it was there said by the Commission:

"It is a very familiar rule in the transportation of freight by railroads and has become axiomatic that while the aggregate charge is continually increasing the further the freight is carried, yet the rate per ton per mile is constantly growing less all the time. In consequence of the existence of this rule the increase of the aggregate charge continues to be less in proportion every hundred miles after the first, arising out of the character and nature of the service performed and the cost of service; and thus it is that staple commodities and merchandise are enabled to bear the charges of transportation from and to the most distant portions of our country. Examples showing the universality of this rule may be seen in the tariffs of railroad companies generally in the United States, where their length is sufficient to admit of its application. . . . The Act to Regulate Commerce, so far from throwing hampering restrictions or obstacles in the way of the operation of this salutary rule, gives it all the benefit and aid of its sanction and safeguards by providing that the carrier shall be entitled to receive a reasonable compensation for the service performed, upon open published rates, against which no competitor can take advantage by allowing shippers secret rebates and drawbacks in order to get the business."

To the same effect see *Business Men's Association of Minnesota v. The Chicago, St. Paul, Minneapolis and Omaha R. Co.* ante, p. 41, 2 I. C. C. Rep. 67.

In the discussion of through rates in the case of the *Milwaukee Chamber of Commerce v. The* 2 INTER S.

Flint and Pere Marquette R. Co., ante, p. 393, 2 I. C. C. Rep. 553, the Commission said:

"A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a way bill showing the route over which it is to go, with the percentages of all the other lines set forth on the way bill because the initial carrier charges its local rate as part of the total rate and the remaining lines charge an agreed rate made by percentages. It may occur where the freight is shipped under a through bill of lading from the point of origin to the final destination and has to pass over ten or a dozen different lines of railroad, and several of these, or, for that matter, each of these roads may charge its local rate, and still the total rate is a through rate. As through rates are made by the American system of roads, agreed percentages of the total rate considerably less in amount than the local rates of the respective roads receiving such percentages are usually a leading feature of such through rates, and it is eminently proper as a general rule that this should be so. This rule is illustrated in the percentages received by the defendants and their connecting lines east of Milwaukee of the proportion of 23 cents per hundred pounds of the Minneapolis rate, as well as their percentages of the 25½ cents per hundred pound rate on shipments of freight originating at Milwaukee. But, as we have already stated, it is not necessary that this should be so in order to constitute a through rate.

"Through rates, like any other agreements that parties competent to contract may make, admit of very great variety in the forms they may assume. In one shape or another they are in very general use upon the American roads, and in the case of long hauls are one of the necessities of the situation. Commerce and trade require it and competition compels it. Such rates when reasonable and fairly adjusted in their relation to local business are greatly favored in the law because they furnish cheapened rates and greater facilities to the public, while, at the same time, they give increased employment and earnings to a large number of carriers."

A proportion of a through rate charged by one carrier upon a long haul of the freight, whether it be called an "arbitrary" or a "percentage," may well be considerably less than a local rate charged by the same carrier for the same distance over its line.

In stating the rules governing through and local rates, in the case of the *Business Men's Association of Minnesota v. The Chicago & Northwestern R. Co.*, ante, p. 48, 2 I. C. C. Rep. 83, 84, the Commission said:

"We have also had occasion to consider the subject of the rate per ton per mile decreasing for the greater distance, as insisted on here, and we have held, as we have found, that while this is one of the incidents or elements, and, indeed, may be said to be a rule in the case of joint rates on long hauls or through rates on long hauls, unless modified by exceptional conditions of transportation, yet that it cannot, as a rule, be considered as a test in railroad operations in the case of local rates. The rates in question are the local rates of the Chicago & North-

western Railway Company at all its stations from Chicago to St. Peter."

The "arbitrary," as it is called, of the Illinois Central Railroad Company, being its local rate from interior points to Cairo, is, in most respects, not very considerably different from the rates from these points to New Orleans, according to distance. The proportion of the through rate it receives north of Cairo, while somewhat larger in proportion to the distance than that of the connecting lines with which it prorates, is not greater, in most instances, than is the percentage allowed to the initial line which originates the business. If it should be contended that rates on cotton from the interior stations of the lines of the Southern Division of the Illinois Central Railroad Company to Cairo, and the like rates on the Cincinnati, New Orleans & Texas Pacific Railway to Cincinnati, should be made the same according to distance as from the same points to New Orleans, and this would certainly be the most plausible form in which the complainant's complaint could be placed, we do not see how this could be done, because the differences now existing between these rates seem to be substantially accounted for in the different circumstances and conditions under which the service is performed.

No through rates on cotton from interior points in Mississippi *via* New Orleans, rail and water, by way of either of defendants' lines to eastern points, have been filed with the Commission. Whether this, in each instance, has been due to the fact that the defendant rail carriers of this class of freight to eastern points could agree among themselves on through rates, and could not agree on such through rates with the water lines at New Orleans, or whether it has been due to the fact that shippers east of the Mississippi, in many instances, preferred to ship their cotton in this manner to eastern mills, and in some cases to eastern ports for export, or whether it has been due to the fact that this to some extent may have been considered the most direct route for the carriage of freight, all rail, to eastern points, the evidence does not show, except in the case of shippers and business men at Meridian and Greenville, who testified very generally that the shippers in that part of the country preferred to send their cotton all rail to Atlantic ports, instead of by New Orleans. Such through tariffs *via* New Orleans, rail and water, have been filed with the Commission by the Southern Pacific Company, which has an associated line of steamships making continuous carriage of cotton on through rates, rail and water, from Texas and Louisiana points to eastern points. The defendants in these cases have no such associated lines of steamers. The Commission, as we have decided, has no authority under the Act to Regulate Commerce to compel railroad companies to enter into joint arrangements with other carriers, by rail or by water, for through carriage at through rates. The Commission has further decided that the fact that a railroad company makes such joint arrangements for one of its branches does not charge it with unjust discrimination for refusing to make identical arrangements on other parts of its system when it appears that from such

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other parts of its system it actually makes through arrangements by a more direct route and at the same rates which are presumptively of equal convenience to shippers. See *Re Joint Water and Rail Lines*, ante, p. 486, 2 I. C. C. Rep. 645.

The tariffs of the independent water lines from New Orleans to New York, Boston and other eastern points on cotton have not been filed with the Commission and there is no requirement of law that they should be. For this reason we are able to know, to some extent, what these rates are, only from other sources, and then not in a manner to make it absolutely conclusive. The evidence in this case tends strongly to show that, although through rates are not made from interior points in Mississippi *via* New Orleans, rail and water, to New York, Boston and other eastern points, yet, that upon the combination of the rail rate from these interior points to New Orleans added to the water rate from New Orleans to these eastern points, that by whichever route the cotton goes the rate may be practically much the same either way; and that the rail rates from these interior points to eastern mills and cities are made in competition with the rail rate to New Orleans with the water rate added from New Orleans to such eastern cities and points. The water rate from New Orleans for export and to eastern points by vessels, running independent of and not connected with any rail line by continuous carriage, is a matter of which, of course, the Commission has no jurisdiction. They are carriers who are independent of the Statute. Nearly all the cotton carried to New Orleans goes there for export. It is obvious, we think, that the rail carriers, the defendants in this case, have made their rates from the interior points in Mississippi largely to meet this competition of the water lines from New Orleans, coastwise, east, or for export, and that for this traffic there is a fierce competition between these long contending lines of transportation. To obtain it the vessel service may possibly give secret rebates with impunity, while the rail carriers can do nothing of the kind, without incurring the severe penalties of a violated statute. To obtain it, the vessel service is not required to publish any rates and may therefore give secret rates, while the rail carriers are obliged to publish their rates.

While New Orleans, therefore, has the advantage of these water lines with ocean rates combined, it labors under the disadvantage that some of these water lines and the rail carriers having the most direct routes to Atlantic seaports and eastern points, so far as cotton from the interior of Mississippi is concerned, are in direct competition with each other for the carriage of the freights; and although, in addition to its other advantages, New Orleans has its fine market, its proximity to deep water and to the ocean, yet it is also true that a large portion of this cotton is carried all rail to Atlantic ports, and thence to eastern cities by lines running east and west, which neither begin nor end at New Orleans, but have their terminal points at Atlantic seaports, on the one hand, and in the far interior, on the other, or still by other carriers, all rail, to eastern mills, markets

and Atlantic ports. We only state what is matter of general knowledge and of which we are bound to take notice when we say that at these interior cities and towns there are agents of American and European spinners bidding for and buying this cotton for Fall River mills and other American mills, for Liverpool, Bremen, Hamburg, Rotterdam, Havre, Barcelona and other European markets. These buyers, of course, have their voice as to the routes by which this cotton shall be shipped, as well as the carriers who transport it. Under such conditions and circumstances, it is absolutely impossible, in the nature of things, for New Orleans to receive all, or practically all, of this cotton. That New Orleans receives so much of it as it does receive, making it the first cotton market in the United States and a port at which more cotton is received than any other, is itself conclusive evidence of its great advantages and of the energy and capacity of its business men.

Now, when a comparison is attempted between the rate per ton per mile on a comparatively short haul from one of these interior points in the State of Mississippi to New Orleans on cotton, as compared with the rate per ton per mile on the long haul from the same interior points to eastern cities and mills, as is done by the complainant in this proceeding, the fact is overlooked that this standard of comparison is one that omits important considerations. Suppose the rate per ton per mile, for instance, from Meridian or Aberdeen, all rail, to Boston points is compared with the rate per ton per mile on cotton carried from Meridian by rail to New Orleans and from New Orleans by water lines to Boston points; then the standard of comparison of the rate per ton per mile, according to distance, would seem to be one that would be more nearly approaching justice and fairness, and in this supposed case it would, perhaps, be found to be not greatly different by one route from what it is by the other, although as a matter of fact, perhaps, nothing connected with transportation is better established than that the transportation by the water lines of heavy freight, like cotton, can be made much more cheaply, so far as cost of transportation is involved, than by all-rail lines; and we have several times held that rail carriers may meet the competition of water lines, where this is large, active and of controlling force, rather than sustain the loss of going entirely out of the business.

In the case of the *New Orleans Cotton Exchange v. The Cincinnati, New Orleans & Texas Pacific R. Co.*, ante, p. 289, 2 I. C. C. Rep. 382, 383, the Commission said:

"The sole cause of this falling off in the proportion of the crop annually received at that city (New Orleans) the Cotton Exchange finds in the alleged cotton-rate discriminations made by the defendants against New Orleans, diverting, as is claimed, a part of its cotton business to eastern cities. In urging this view the complainant apparently takes no account of the comparatively recent construction of several all-rail lines of transportation from Meridian and other cotton-shipping points to eastern ports and markets; nor of the construction of railroad lines connecting, through the ports of Virginia, Georgia and the Carolinas, with water

lines to such ports and markets or foreign ports. In thus assigning a cause for a change or modification in the direction of cotton traffic and movement no account is taken of extended facilities or improved methods. Through these, cotton is compressed at interior towns, railroad stations and in transit. When not yet on its way to market the price it is to bring may be made available on through bills of lading, domestic or foreign, at the county town next to the cotton field. Such facilities and accommodations were formerly to be obtained only in New Orleans or some other of the larger cities. That city is not the place of manufacture or ultimate destination of the cotton received. It is carried there for distribution—to be forwarded. Like other business this is largely controlled and directed by economy in time and cost. Any estimate is faulty which does not include these new conditions among the causes influencing the movements of cotton in the past fifteen years."

These conclusions, as there stated, apply with great force to the main question in the present cases.

And, again, in the same case the Commission said:

"It is as nearly settled as anything relating to railroad charges can be, that under like conditions freight can be profitably carried long distances at rates proportionately lower than short distances. The movement of freight short distances is necessarily by local trains with frequent stops and is much more expensive than movement by through trains over long lines. There are some items of cost, such as loading and unloading, which are common to long and short hauls, and which make a considerable item in the cost of carrying short distances but become very slight when apportioned on business over long lines.

"The rule of equal mileage rates asked for would often prevent legitimate competition and frequently give a monopoly in transportation to the best and shortest road. Enforce the equal mileage rate asked for at Shreveport and not a bale of cotton would pass over the Vicksburg and Shreveport Road to New Orleans, for the Texas Pacific being 81 miles the shorter route would take the freight. The mileage rate over it would be \$7.48 less on the carload. Put it in force at Meridian and not a bale of cotton would go east over the defendant roads. The East Tennessee, Virginia and Georgia, being 260 miles the shorter route, would take the freight \$24.24 lower per carload than its longer rival under the equal mileage rate. In view of such results the equal mileage-rate rule insisted upon by complainants must be refused."

According to the rule contended for by the petitioner, namely, the distance rate, or rate per ton per mile, as a rule of comparison as to what these relative rates should be, the Cincinnati, New Orleans & Texas Pacific Railway Company could carry no cotton from Meridian except such as it carried to New Orleans. That carrier would be precluded from availing itself of traffic over its own line and that of its connecting lines *via* Cincinnati to northern and eastern mills and Atlantic ports, and the shippers along its lines would also be precluded from availing themselves of this outlet for their production, no matter how much they might

desire to do so. As a consequence, New Orleans would enjoy a monopoly of this business. According to that rule, if any of this cotton went to any Atlantic port at all or northern or eastern mills from Meridian, it must go by the East Tennessee, Virginia & Georgia Railway Company *via* Brunswick, Georgia, and would be trivial in amount; and even by this shortest rail route from Meridian to an Atlantic port, according to this rule, that road would be practically out of the business. It is equally true that, according to the same rule contended for by petitioners, the Illinois Central Railroad Company could haul very little of the cotton along its line otherwise than to New Orleans, except from the extreme northern part of the State of Mississippi, and New Orleans would enjoy a monopoly of that business.

Such a result, if accomplished, would materially nullify the usefulness of the markets at interior towns and cities for cotton and of the compresses built at these towns, would deprive the producers of cotton in the interior of the competition afforded by many markets and long contending lines of transportation, and would paralyze to a large extent the usefulness of important rail lines, depriving them of large sources of revenue to which they are fairly entitled.

In view of the competition of the water lines surrounding this traffic on the Mississippi River and its navigable tributaries, and at Gulf and Atlantic ports, together with associated railway lines in some instances, and independent railway lines in others, and the difference between short hauls of the cotton to some of these ports and exceedingly long hauls to others, each in different directions, the observation made by the Commission in the case of the *Detroit Board of Trade v. The Grand Trunk Railway of Canada*, ante, p. 199, 2 I. C. C. Rep. 321, would not seem to be inappropriate: "It is not a service of preference to mere individuals or localities, but it is in a very large part the through carrying trade of the continent." It is a staple product of the country and has been for a long time. It stands on the same footing as freight with grain and other necessities of life. It seeks the markets and spinners of the world by these various and contending lines of transportation. It is an article of coarse fabric and compact bulk and therefore entitled to a low rate. It is to the interest of the producer, as well as of the consumer, that all these lines should be permitted to participate in the competition for its carriage, thereby increasing its price to the producer and cheapening the cost of carriage, and, at the same time, allow these carriers the benefits that they can respectively reap from its carriage. It is a subject that can be dealt with only upon broad lines and not from narrow considerations.

It may be true that the all-rail carriers from these local points in Mississippi make their rates on cotton to eastern points in competition with the water lines from New Orleans lower than the water lines do, but this we do not know and cannot know because the tariffs of the water lines are not filed with us, and these water lines can give rebates and preferences to individuals at will, as they may see proper. To meet such conditions of competition it is one of the inevitable consequences of the situ-

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ation that the rail carriers whose lines extend to Atlantic ports and not to New Orleans, and who desire to participate in this traffic, such as the defendants and the East Tennessee, Virginia & Georgia Railroad Company and others, should find it necessary to make their rates on its transportation as low as possible in order to get any share of the business. And, on the other hand, it is but natural, and to some extent may be necessary, that railway lines, like the Illinois Central Railroad Company and the Cincinnati, New Orleans & Texas Pacific Railway Company, having no associated line of steamers at New Orleans, like the Southern Pacific Company, may find it necessary to make their proportion of the through rate from local points in Mississippi to eastern ports and mills as low as possible in order to get as much of the carrying business of this cotton as they respectively can over their lines, and to accommodate shippers and buyers who desire to send their cotton by their routes.

Unless the rail carrier has an associated line of vessels for the continuous carriage of freight to final destination beyond the Port of New Orleans, the service of the rail carrier terminates when it has delivered the freight at New Orleans: and if the freight is taken at New Orleans for ocean carriage to final destination by independent vessel carriage, then we have no authority to prevent that vessel, in the shape of a rebate, from refunding to the shipper the cost of compressing the cotton. There seems to be but one instance in which the compress charge on cotton compressed at Meridian or at stations along the lines of the Illinois Central Railroad Company is refunded to the shipper, and that is where it is carried to New Orleans for export by one or the other of these rail carriers, and then it is refunded to the shipper by the ship which takes the cotton for a foreign destination.

The method of hauling uncompressed cotton to New Orleans in box cars instead of upon flat cars seems to be one that has its compensating advantages to the producer, as well as to the carrier, inasmuch as it saves the producer charges for storage at New Orleans and the delays of the market, while it protects the carrier against the risks of fire in transit. We are asked to require this carrier to haul uncompressed cotton to New Orleans in flat cars, but for reasons stated we cannot do this. This is a matter relating to the physical operation of the road and we cannot require the carrier to enter upon a method of transportation that involves greater risk to it in the carriage of freight, while, at the same time, it imposes upon the shipper expense and delay in preparing his products for market or for further shipment to final destination.

The rate is the same whether the carrier carries the uncompressed cotton in a box car or on a flat car, and, as the carrier can carry more than twice as much uncompressed cotton on a flat car as in a box car, it is obvious that it would be cheaper to the carrier, if this view of the matter alone were considered, to carry uncompressed cotton on a flat car than in a box car. In addition, however, to the considerations already named, of the risk arising from fire and dampness caused by rain, and delay in consequence thereof, as to uncom-

pressed cotton when carried on a flat car, there is the advantage to the carrier of more return loads in the box car than on a flat car; and this last, in the practical operation of railroads, is a very important feature, for no matter how able and excellent the management of a line of railroad may be, there will always be a large percentage of returning empty cars on long hauls without loads, and, where these can have return loads to any extent, such freight can be moved correspondingly cheaper by the carrier and is so much made as against a dead loss on hauling the returning cars empty. In either event, however, as the rate is the same whether the uncompressed cotton is hauled in a box car or on a flat car, it does not appear that the petitioner or the City of New Orleans sustains any damage by the carrier adopting one method in preference to the other, especially as it is not shown by the evidence that all the cotton from the cotton-growing region which is transported to New Orleans by these carriers is not carried through with sufficient promptness for the demands of the market and export.

We come now to consider the question made as to the difference between rates on compressed cotton and cotton uncompressed carried by the defendant, the Cincinnati, New Orleans & Texas Pacific Railway Company, from Meridian to New Orleans. It appears that such cotton is not compressed at Meridian to be shipped to New Orleans except chiefly for export, or, to a small extent, to eastern mills and Atlantic ports *via* New Orleans; in either event a very long haul. The compressing of cotton is a very important and valuable feature of its transportation, especially for long hauls, both to the shipper and the carrier, and as to such long hauls, upon anything like rates that will carry the cotton to far distant markets, it is indispensably necessary. Neither the foreign ship nor the coastwise steamer will receive cotton for carriage unless it is compressed. Nor can the rail carrier transport cotton to far distant markets or ports upon any schedule of rates which the shipper could afford to pay, unless it is compressed at the point of origin of the freight or in transit. It is therefore a necessary preparation of cotton for a long haul. When thus prepared the carrier may justly and reasonably make a considerably lower rate on compressed than on uncompressed cotton. Experience has shown that some general rule applicable to what should be the difference between the rate on compressed and uncompressed cotton should be announced. We have been appealed to by the parties to these proceedings to declare what such rule should be, and the facts seem to call for an expression of our views on this subject. The conclusion we have reached is that the rail carriers engaged in interstate carriage of cotton can, for the present, find no better or fairer rule than that the difference in the rate between compressed and uncompressed cotton should be the actual and necessary cost of compression. This rule gives the shipper the benefit of the lower rate to the exact extent of the expense he has incurred in the necessary packing of his freight by the compress for the long haul, and to the carrier it gives the benefit of the additional space in the cars on freight thus prepared. The difference in the rate upon the two classes of freight, compressed and uncom-

pressed, is in this way, in substance, reasonably and justly accounted for in the difference in the rate charged each respectively.

Some expenses, like those of drayage, storage, and, in case of sales, sampling and commissions, are unavoidable at a great market and port like that of New Orleans, and, while there is evidence that these are much objected to by shippers at Meridian and Greenville, we have not found it necessary in the conclusions which we have reached which dispose of these proceedings to pass upon the reasonableness of these expenses and charges at New Orleans.

Having disposed of the other and more general questions involved in these cases, there yet remains to be considered one other, and that is, whether these rates are relatively reasonable and just from points in the States of Mississippi and Tennessee to New Orleans.

As we have already stated they are in substance much the same as those charged by railroads generally in the Southern States for similar services. That they are considerably higher than the rates in the States north of the Potomac and Ohio Rivers and east of the Mississippi River, is undoubtedly true. But the causes of this have several times been referred to by the Commission, and latterly in its Third Annual Report, page 46 [*ante*, p. 685]. As to the effect of water competition on rates in the Southern States see First Annual Report of the Interstate Commerce Commission, pp. 16, 41 [1 *Inters. Com. Rep.* 650]. We find that, under all the circumstances and conditions surrounding the traffic in the case of the Illinois Central Railroad Company and the Cincinnati, New Orleans and Texas Pacific Railway Company, these rates are in substance relatively reasonable and just, with a few exceptions hereinafter named at certain points on the lines of the railroads where there is no competition by water carriers. In these instances there are relative differences in cotton rates, which we do not think ought to exist and which go also to their reasonableness. For example: The rate on a bale of compressed cotton from Jackson, Mississippi, to New Orleans, on the Illinois Central Railroad Company, a distance of 183 miles, is \$2 per bale, while from Meridian to New Orleans, a distance of 196 miles, the rate on a compressed bale of cotton is \$1.50. Again, the rate on an uncompressed bale of cotton from Jackson, Mississippi, to New Orleans, on the Illinois Central Railroad, is \$2.25, while from Meridian to New Orleans, on the Cincinnati, New Orleans & Texas Pacific Railway, the rate on an uncompressed bale of cotton is \$2.15. Upon the evidence at that time before us in the case of *The New Orleans Cotton Exchange v. The Cincinnati, New Orleans & Texas Pacific R. Co.* (see *ante*, p. 289, 2 *I. C. C. Rep.* 375), which really involved only the local rate on cotton from Meridian to New Orleans, we decided that this local rate on uncompressed cotton should be reduced by this company from \$2 per bale to \$1.50 per bale, leaving it to adjust its uncompressed rate to the compressed rate then ordered. Thereupon the Cincinnati, New Orleans & Texas Pacific Railway Company immediately put into effect a rate of \$1.50 per bale on compressed cotton from Meridian to New Orleans, and, at the same time, reduced its rate from \$2.25 per bale on uncompressed

cotton between the same points to \$2.15 per bale.

The entire subject of all these respective rates is now before us, and, after the best and most careful examination we have been able to give the subject, we find as a material fact in these cases, and so decide, that the rates on compressed cotton from Jackson, Mississippi, and Meridian, Mississippi, to New Orleans should be the same; and that the rates on uncompressed cotton from Jackson, Mississippi, and Meridian, Mississippi, to New Orleans should be the same. This, we think, is obviously true, and that they need to be adjusted upon a basis somewhat different from that which now exists. We find as a matter of fact, and so decide, that the rate on a bale of compressed cotton from Meridian to New Orleans, at present, when carried over the line of the Cincinnati, New Orleans & Texas Pacific Railway Company, may be as much as \$1.65 per bale, and not more, and that such rate is a reasonable and just rate. We further find, and so decide, that a rate of as much as \$2.15 a bale on uncompressed cotton from Meridian to New Orleans carried over the line of the Cincinnati, New Orleans & Texas Pacific Railway Company, and not more, is a reasonable and just rate for that service. We further find, and so decide, that a rate of as much as \$1.65 per bale on compressed cotton from Jackson, Mississippi, to New Orleans, carried over the line of the Illinois Central Railroad Company, and not more, is a reasonable and just rate for that service. We also find, and so decide, that a rate of as much as \$2.15 per bale on uncompressed cotton from Jackson, Mississippi, to New Orleans, carried over the line of the Illinois Central Railroad Company, and not more, is a reasonable and just rate for that service. In thus making these adjustments we have been influenced by what we find to be their relative reasonableness and all the circumstances and conditions connected with and surrounding the traffic as well as the service performed in each instance. We find, and so decide, that at river points along the line of the Illinois Central Railroad Company, such as Memphis and Yazoo City, where it is compelled to meet the competition of steamboats on navigable rivers at such points last named, it may make such reasonable and just rates as will enable it to compete with such water carriers for the business of carrying cotton from these points to New Orleans or to eastern mills and seaboard points.

The relative rates on cotton at other stations on the main line of the Illinois Central Railroad Company and its branches are referred to in the petition and have received the consideration of the Commission. Aberdeen is situated on the Canton, Aberdeen & Nashville Railroad, which is a short branch road 108 miles in length, and during the year 1888 its total earnings were only \$108,110.12, while its operating expenses during the same year were \$118,354.64, leaving a deficit of \$10,244.52. Parsons is a station on the Yazoo & Mississippi Valley Railroad, also a short road of the Illinois Central system, which, including the Lexington branch, is only 140 miles in length. The total earnings of this road during the year 1888 were \$186,606.13, while during the same period

its operating expenses and taxes were \$199,311.23, leaving a deficit of \$12,705.10. No doubt the main line was to some extent benefited by the traffic from the branches; but, still, taking into consideration all the circumstances and conditions surrounding the traffic and the rates charged, we find these rates to be relatively reasonable and just. At Durant, a station on the main line of the Illinois Central Railroad, 241 miles from New Orleans, and Vaiden, a station of the main line 261 miles from New Orleans, we find the rates to be relatively reasonable and just. A statement of the rates from these points with the distances is shown in a table in the preceding part of this opinion and report.

No better practical proof could exist of the fact that all these rates are relatively reasonable and just, so far as New Orleans is concerned, than is the result that the bulk of the cotton on the line of the Illinois Central Railroad generally, as well as near to Memphis, is carried to New Orleans upon a long haul, while very little of it is carried to Memphis by this carrier upon a short haul, and the proportion of it carried by the Illinois Central Railroad to Memphis and all the northern and eastern mills is very small compared with what it carries to New Orleans. It is obvious that New Orleans, owing to the advantages of its position, enjoys in a general way the benefit of these rates to an extent that Memphis and northern and eastern mills cannot, in receipts of cotton, although over the line of this carrier rates are made substantially the same on north-bound as upon south-bound shipments of cotton between New Orleans and Cairo. It would make this report and opinion, already unavoidably lengthy, unnecessarily long, to take up each of these numerous stations and show that this is true, as could easily be done. The transportation embarrassments that environ this carrier at many junction points along its line, occasioned by the near competition of the Mississippi River in conjunction with rail east and west lines, are serious indeed. It has already, according to the evidence, practically been driven out of the cotton-carrying business from Memphis by the competition of the Mississippi River and of the Mississippi Valley Railroad Company to New Orleans.

Now, this method of rate-making, necessary as it is to the business of this carrier, especially at junction points, in order to enable it to participate in the traffic along its line against the competition of the water and rail carriers, operating in effect in conjunction with each other upon east and west-bound rail lines crossing its line, might, as a mere question of the relative reasonableness of rates as between points on its line such as Cairo and New Orleans, be the subject of complaint that this was done in favor of New Orleans, if this carrier did not meet this phase of the subject by making the same relative rates, substantially, on north-bound as well as south-bound cotton transported over its line. But this it has done. This is apparent from the first and second tables in this report and opinion when the one is applied to the other. As, however, Cairo is not a cotton market while New Orleans is, under this system of rate making New Orleans has practically received the bulk of the cotton

along the line of this carrier, getting twice and one half as much as has gone to Cairo, Memphis, and all other points. One test of a rate that can never be ignored is its actual and practical effect.

The Illinois Central Railroad Company and The Cincinnati, New Orleans & Texas Pacific Railway Company will be allowed until the first day of June, 1890, to comply with the order made in these proceedings relative to adjusting their respective rates at Jackson, Mississippi, and Meridian, Mississippi.

An order will be entered in conformity to the facts found and conclusions reached in this report and opinion.

Cooley, Ch., absent, ill, took no part in hearing or decision of this case.

THE WORCESTER EXCURSION CAR COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

(No. 129.)

1. **Where a railroad company has by an arrangement with one car company procured a sufficient supply of sleeping and excursion cars for all the business of its lines, and refuses to haul excursion cars of other private car companies over its track for this reason, it cannot be forced to do so against its objection.**
2. **Unless the contrary is imposed as conditions in the grant of its charter, the right to construct and operate a railroad is a franchise in its nature exclusive, not held in common with the public, though the grant of the franchise is for the public use; and the tracks of a railroad are not a common highway upon which anyone can enter and use his own cars for transportation purposes against the objection of the company owning the tracks.**
3. **The extraordinary liability imposed by law upon a railroad company as a common carrier for the sufficiency and safety of its passenger cars and the competency of its employes in operating such cars is a highly important protection to the public; but such company might very reasonably claim that it was not responsible for a passenger car of a private car company, or the consequences of that passenger car being transported as part of its train in causing a wreck, collision or delay, when it had no volition in accepting or rejecting such car, but was forced to transport it by order of a civil tribunal.**
4. **A railroad company may acquire cars by construction, by purchase or by contract for their use, and no one has the power to compel a railroad company to select among these several modes or to contract with all comers.**
5. **The interest of the public in a matter of this kind is vitally important and lies in the direction of holding**

every common carrier by rail to the strictest responsibility in furnishing safe, suitable and sufficient car equipment for the transportation of persons over its line; and the law-making power in enacting the Act to Regulate Commerce has not undertaken to divide this responsibility with the carrier in the selection of its cars.

6. It would be directly at war with the rights and safety of the traveling public, as well as of the railroad company, if the line of the carrier should become an arena over which it should be compelled to make a contract of some sort with every car company or inventor of cars, and transport the public in trains of which such cars were part.

(Complaint filed April 3, 1888.—Answer filed April 24, 1888.—Heard June 19, 1888.—Briefs filed on behalf of parties July 16—October 8, 1888.—Brief filed for Pullman's Palace Car Company October 15, 1888.—Decided April 23, 1890.)

PROCEEDING to compel respondent to accept complainant's cars for transportation over its line. *Dismissed.*

Messrs. Rice, King & Rice for complainant.

Mr. James A. Logan for defendant.

Mr. William Burry for Pullman's Palace Car Company.

Bragg, Commissioner:

The complainant in this proceeding is a corporation, organized under the laws of the State of Massachusetts, for the purpose of building, constructing, furnishing and keeping in repair cars to be run upon railroads for the use of pleasure and hunting parties and excursions. The cars it manufactures and uses for this purpose have a general resemblance to the sleeping cars in use throughout the country. Its custom is to rent the cars to parties on terms agreed upon between the complainant and the parties hiring them, and they are then drawn over the various railways of the country. From the evidence it appears that there are several car companies in the country which do a like business, and among them are the leading sleeping car companies, the Pullman's and the Wagner.

The defendant refuses to receive the cars of the complainant and draw them over its lines, in that respect differing from some of the railroad companies, and perhaps a majority. It makes three objections to doing so. The first of these is that it has a contract with the Pullman's Palace Car Company, whereby it obligates itself to draw for the general use and convenience of the traveling public the sleeping cars of that company exclusively, and also its cars which are hired out for excursions, as are those of the complainant. The second objection is that the cars of complainant are in some important particulars so different from any others that it draws upon its roads that when anything is out of order with them the difficulty of repairing is very serious and may cause delay or the leaving of the car at the place where it thus gets out of repair, and the entailing upon the defendant of a large outlay in the way of machinery, appliances and ma-

terials at different points on its line for the purpose of keeping these cars in repair, when there are but few of them, in consequence of which the defendant cannot possibly be remunerated for any such outlay of expense. The third objection is that the cars offered by complainant to be transported were in fact out of repair.

We consider these different objections somewhat in their inverse order for the purposes of this report and opinion. As to the third objection made by the defendant, considerable evidence was given at the hearing, but in so far as it tended to show that the cars offered for transportation were not in proper condition, the proofs were conflicting. The question, however, whether defendant was or was not justified in its refusal in a particular instance is not so important. It is the right to refuse in all cases, regardless of the condition of the cars, that is the main point in issue. The defendant says that it is accustomed to keep on hand at convenient stations on its lines the several parts of the Pullman car which are liable to be broken or get out of repair, so that breakage or other injury can be easily and without delay remedied. The corresponding parts of the complainant's cars are not identical with them; and, as defendant cannot be expected to keep on hand the various parts of the excursion cars, not often used in running on its road, it is claimed that it would be unreasonable and unjust to require it to receive such cars, in view of the embarrassment and delay that might follow an injury. To this it is replied that the difficulty suggested is one that is constantly liable to arise when cars of any kind are received by a railroad company which differ from those which constitute its ordinary equipment. As, for example, in the case of refrigerator cars, special stock cars or tank cars, as well as excursion cars; and that when the cars, which are liable to the accidents and delays suggested, are merely drawn for the owner, upon whom and not upon the railroad company rests the responsibility for their being kept in condition for use, the embarrassment to the railroad company in consequence of any breakage or injury could hardly be very considerable. And it is further suggested, as an answer to this objection, that when a car becomes unfit to run, the railroad company would, of course, be relieved from any responsibility to run it, and might justifiably sidetrack it wherever convenient until it was repaired by the owner.

It is contended, also, that the accommodation of parties by the drawing of these excursion cars is something standing altogether apart from the furnishing of sleeping car conveniences for the general public, and that no reasons exist why, in the public interest, the railroad company should decline to receive and transport the excursion cars offered to it by anyone. It is further insisted that in the nature of things there are no impediments to a railroad company establishing general rules under which such excursion cars may be received indiscriminately—rules which in their operation would fully compensate the company for its service, and at the same time be equally fair to the owner of the cars, and in no way restrictive of the general public convenience.

It is likewise insisted that a carrier has not the right to give a single owner of excursion

cars a monopoly of the business, but is bound to receive excursion cars when offered by anyone to be transported over its line. The provision of the Statute relied upon to support complainant's contention is the third section of the Act to Regulate Commerce, which declares: "That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage whatsoever." It is claimed for the complainant that as defendant draws the excursion cars for the Pullman Company and refuses to draw like cars for complainant, this is giving to the Pullman Company a monopoly of the business and an undue and unreasonable preference and advantage over complainant; and that in the refusal of defendant to receive and transport the cars of complainant, the complainant is thereby subjected to an undue and unreasonable prejudice and disadvantage; and that in each of these respects the Statute is violated, and that under section thirteen the complainant is entitled to the relief prayed for.

The conclusions we have reached in this proceeding are adverse to the claim made by petitioner and we now proceed to state them and the grounds upon which they rest.

The right to construct and operate a railroad is a franchise and in its nature exclusive. It is not held in common with the public, though the grant of the franchise is for the public use. The right of the public is to be transported safely, properly and without partiality, and in like manner to have freight transported. Conditions may undoubtedly be imposed upon the grant of a franchise in the discretion of the Legislature, and Congress may regulate interstate commerce as it may deem best. But there has been no legislation giving private cars the right to use railroad tracks against the objection of the companies owning these tracks. The tracks of a railroad company are not, therefore, a common highway upon which anyone can enter and use his own vehicle of transportation against the objection of the company. A railroad is the property of the corporation, to be operated by it under such rules as the law has provided in the service of the public. The corporation must equip it with cars and engines and competent men to operate them and no one else has authority to put cars or engines upon its track without its consent, nor to demand a joint use and control of the franchise in any respect.

Primarily the line of the railroad is constructed for the transportation of its own cars, but if the diversities and peculiarities of the traffic are such that it is not always practicable for the carrier to supply all of its rolling stock from cars owned by it and it is necessary to obtain some portion of it from others, then the carrier at its peril must see to it that the rates charged are no higher on cars owned by it than they are on the cars it has obtained from others. As to freight traffic this is the rule indicated in the case of *Rice v. Louisville & N. R. Co.*, 1

Inters. Com. Rep. 722, 1 I. C. C. Rep. 503, 504; and also in the case of *Seofield v. Lake Shore & M. S. R. Co.*, ante, p. 67, 2 I. C. C. Rep. 90, 91.

But even in the case of freight cars the Commission has decided that the manufacturer and owner of a patent stock car designed for the transportation of cattle and other live stock in a less cruel way than they are now transported, and with less loss from shrinkage, did not have the right to demand that a rail carrier should transport his private stock car over its lines against its objection. In that case, which was the *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.*, 1 Inters. Com. Rep. 329, 1 I. C. C. Rep. 140, the Commission said:

"The Burton Stock Car Company does not receive and use the cars belonging to other carriers and there is no possible mutuality in this respect, such as exists between carriers exchanging cars in the ordinary way. The Burton Stock Car Company is in no sense a 'connecting line' entitled to equal facilities for interchange of traffic under the provisions of the second paragraph of section three of the Act to Regulate Commerce. Its counsel insists that it is not a common carrier. When freight is tendered to defendants in loaded cars by other carriers they have the option to take the car or to reload the freight into their own cars, and the latter course is often pursued when the cost of unloading is less than the car service for the proposed trip. The fact that carriers interchange cars with one another in the manner and on the terms above stated does not entitle the complainant to claim that it is unjustly discriminated against by a refusal to pay it the same rate which carriers adopt as the basis in adjusting their car-service accounts with each other."

The liability of railroad companies, as common carriers, for the sufficiency and safety of the vehicles they use as well as the competency of their employés, is a highly important protection to the public. To what extent this liability might be impaired by compelling a company to take into its passenger trains, against its objection, passenger cars of private companies or individuals, is a most important question. If it does so voluntarily it is responsible to the public for the condition of the cars and consequences arising from collisions and wrecks as well as long delays. But a company might reasonably claim that it is not responsible for a passenger car when it has no volition in accepting or using it.

In a matter of this kind there is a great deal more involved than the mere hauling of a car. Its adaptability to a train and the effect it may have on the movement of a train are important. The testimony in this case shows that embarrassments and delays have happened to the defendant from the use of petitioner's cars. The car couplers and platforms differ from those used by the defendant. The rear part of the car of the petitioner is more heavily loaded with coal, ice and other supplies than are other cars in defendant's train, causing such car to sink down considerably lower at the rear end. Provision is not made by petitioner at convenient points on defendant's lines for the necessary repairs to its cars, as is done by the Pullman Company, and in consequence longer

delays occur in repairing them and greater risk of accidents exists. The feature of coupling alone, and of the adaptability of petitioner's car to the defendant's trains, together with the other elements of its construction to which we have referred, are of vital importance in operating trains over defendant's line, with its heavy grades and sharp curves, in crossing the Allegheny Mountains, and might naturally at such points as well as others increase the danger of accidents.

According to the evidence, about four hundred trains per day are moved into and out of defendant's station at Broad Street, Philadelphia. To accommodate its freight business the defendant is obliged to operate large numbers of freight trains over its road on close-time connections. To accommodate the public, passenger trains are run at high rates of speed on defendant's road; they follow each other closely; prompt schedule time is sought to be made and is important; cars of the most careful and complete construction and adaptation to others in the same train are used, both for safety and celerity of movement. The traveling public are quite as much interested in these matters as the carriers. In view of all these considerations, the power of a tribunal like the Interstate Commerce Commission to interfere with the physical operation of a railroad like that of the defendant, and to require it to haul private cars in its passenger trains, to which it objects, and that might be prejudicial to the carrier and dangerous to its passengers, is one that in its very nature is so extraordinary that its existence would have to be found in the Statute, or else it does not exist. Where is the line to be drawn? If the Worcester Company can compel the defendant to accept its cars and haul them, there would seem to be no limit as to the number of cars, or the number of private companies, or individuals, that might enforce the same right.

The language of section 3 of the Act to Regulate Commerce is, in some respects, broad, and is relied upon to sustain the conclusion that it is the duty of the carrier to transport the excursion cars of the complainant. But that section evidently applies to cases and subjects altogether different from the question involved in this proceeding. The Statute has not relieved railroad companies from the duty of providing their own equipment nor changed the method of providing it. They may do it by construction, by purchase, or by contract for their use. But no one has a right to compel a railroad company to select among these modes or to contract with all comers. How cars shall be provided is entirely matter of private contract. And whether private cars of companies or persons shall be hauled is matter of discretion and private agreement.

The fact that a railroad company may arrange for the use of excursion cars of one private car company instead of another does not affect the question. It has the right to supply its own road in that manner with vehicles suited to its business and to its line, and by voluntarily using them they become the same as its own for the purposes of carriage. Every company judges for itself what style of car it desires for its passengers, and its reasons are unimportant so long as its patrons are properly

served, nor is it material how the cars are procured. Whatever discretion of preference a carrier may exercise in the choice of passenger cars in its business is outside of the Statute and only an exercise of legitimate authority. It relates to the physical operation of the road, for which the carrier is responsible to the public and to the law.

Upon the subject of a legal tribunal, or even a legislative body, interfering with the physical operation and management of a railroad, the report of a Royal Commission in Great Britain, appointed in 1874, shows how the subject is regarded in that enlightened country. In their report to Parliament, presented in 1877, they say:

"Large as are the powers now possessed by the Board of Trade and the Railway Commission in respect of railways, they are so adjusted and so limited as to leave with the companies the undivided responsibility of working their lines. The first and most important question, therefore, which we have had to consider, as affecting the entire character of our report, is whether an investigation leads us to advise a departure from this policy, which has heretofore characterized railway legislation; . . . but upon full consideration we are not prepared to recommend any legislation authorizing such an interference with railways as would impair in any way the responsibility of the companies for injury or loss of life caused by accident on their lines. To impose on any public department the duty and to intrust it with the necessary powers to exercise a general control over the practical administration of railways would not, in our opinion, be either prudent or desirable. A government authority placed in such a position would be exposed to the danger either of appearing indirectly to guarantee works, appliances and arrangements which might practically prove faulty or insufficient, or else of interfering with railway management to an extent which would soon alienate from it public sympathy and confidence, and thus destroy its moral influence, and with it its capacity for usefulness."

There is nothing in the Act to Regulate Commerce that indicates a different view on this subject so far as the mere physical operation of railroads is concerned in the carriage of passengers. That there must be no unjust discrimination, or unlawful preference, or undue prejudice or advantage, or disadvantage or extortion, is all true. But these cover a very different field from the power and duty of the carrier to legitimately exercise the authority of selecting cars of its own choice for the transportation of passengers over its line.

For the convenience of commerce, as a rule, carriers, to avoid breaking of bulk and as a method of business among themselves, adopted the rule of receiving and transporting freight cars of connecting lines under reciprocal arrangements, which went to the extent of the interchange of freight cars on agreements for allowance of car mileage. This was adverted to in the case of the *Burton Stock Car Co. v. Chicago, B. & Q. R. Co.* 1 Inters. Com. Rep. 329, 11 C. C. Rep. 140, and the Commission there said:

"As is well known, freight cars belonging to the different railroad companies throughout
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the land are, to a large extent, used interchangeably. A record of their mileage when away from home is made the basis of the payment of 'car service' at the rate of three fourths of a cent per mile. Of course if the cars of a carrier are used as much away from home as it uses the cars of other roads on its line, the monthly payments for car service will be offset by the amounts received. This is theoretically the nature of the transaction, a matter of mutual convenience which costs neither party anything. The payments and receipts in any one month could not be expected to exactly balance, but, if each road has cars sufficient for its use, the result in the long run will be very nearly equalized. In view of this fact, it is obvious that no great importance attends the making this payment an exact compensation for the use of the cars, and it would not be fair to make it the measure of payment required to be made for the use of cars hired from other persons."

The practice of carriers receiving and transporting freight cars of connecting lines under reciprocal arrangements which went to the extent of the interchange of freight cars on agreements for the allowance of mileage was followed by another practice among them of receiving and returning over their lines special freight cars, such as refrigerator cars and tank cars, owned in most instances by private car companies or shippers, at agreed rates and on certain allowances for the use of these special cars. But in these instances the cars thus transported by the carrier related exclusively to the transportation of freight, and for all the purposes of rates charged, liabilities incurred and services performed were made by the carrier its own cars for the purposes of such service, rates and journey. Under the rules settled by the Commission in the two *Cases of Rice and Scofield, supra*, there is no question whatever of the existence of the power to regulate the rates and methods of the carrier in these cases. It is wholly immaterial to that regulation whether the cars used by the carrier are owned by it or whether the carrier obtains them from others, for the rates must be the same and all shippers must be treated alike in furnishing sufficient cars and facilities by the carrier for the freight. These rules recognize that for all the purposes of such service the cars, no matter whether owned by the carrier or obtained by it from others for the carriage of freight, are for all the purposes of regulation the cars of the carrier in the performance of service over its line. They admit without friction of the same general application to every kind of freight car.

But, as a matter of practice or usage, rail carriers have never interchanged passenger cars loaded with passengers as they do freight cars loaded with freight; and though in some instances contracts are entered into between roads forming a through line for moving cars from one end of the line to the other, yet this stands upon an entirely different principle. While there may be, and doubtless are, many reasons for the practice and usage of railway carriers, as a rule, of not interchanging passenger cars loaded with passengers, as they do freight cars loaded with freight, one sufficient reason would seem to be that, in case of collisions or wrecks, the danger and liabilities aris-

ing in carrying passengers are far greater than in the carriage of freight and are altogether different. And in performing so extraordinary and, to some extent, hazardous service as that of transporting passengers over its lines, the carrier may well say that it will do so only in its own cars, or cars which it has made its own by selecting them for that purpose.

The question is pertinent, What interest has the public in the fact as to whether passenger cars belong to the carrier as absolute owner or whether the carrier has obtained them from one car company or another? The only features of every such transaction that the public are interested in, are whether the cars are safe, comfortable, furnished at reasonable rates alike to all, and without any element of unjust discrimination. The law making power has not undertaken to divide responsibility with the carrier in the selection of cars, nor has it clothed any civil tribunal with any such power. The responsibility of selecting safe, suitable and sufficient car equipment for the transportation of passengers over its line is left by law with the carrier; and in the performance of this duty the carrier has rights and grave responsibilities resting upon it. Whether seated in a Pullman car or a Worcester car, passengers traveling over defendant's line would be the passengers of the defendant, and it would be entitled to receive and collect their train fare and responsible for their safe carriage, and as part of the transaction the defendant would have to pay to the company owning the car a reasonable rental for its use during the journey.

It is unnecessary for the purposes of this discussion to consider the case of contracts or arrangements for the transportation of sleeping cars over its line made by the carrier with the owner of sleeping cars, because it seems to be settled that, under the principles laid down in the *Express Cases*, 117 U. S. 1 [29 L. ed. 791], this is a service for the proper and best performance of which a carrier might well make a separate arrangement with a car company to furnish sleeping cars. At the same time, for the ordinary and usual purposes of transportation, practically speaking, what substantial difference is there between a sleeping car and an excursion car? In their essential attributes each is substantially much the same. Though in some respects differently constructed, an excursion car is a sleeping car, and it would be a difficult task to assign any reasons that would make the transportation of one a service that might be best performed by one of these different kinds of cars, furnished by a car company, selected and designated by the carrier for that purpose, as indicated in the *Express Cases*, *supra*, that would not seem to apply equally to the other.

It appears that, by a contract, the defendant made an agreement with the Pullman's Palace Car Company by which the latter furnished to defendant, upon terms named, sleeping and excursion cars to be transported over the lines of the defendant. We refer to this contract simply because it has been filed in evidence as showing that the defendant has made an arrangement for a sufficient supply of these cars, and not because we attach the slightest importance to its terms in the conclusions we have reached. As the Worcester Car Company has

made no provision for the repair of its cars along defendant's lines, providing materials, machinery and skilled men to repair them, but has left this duty to be performed by the defendant, and as the evidence shows that the parts of the Worcester Company's cars are not interchangeable with those of the Pullman Company, and that in consequence of this the defendant itself would have to provide materials and machinery for the repair of the Worcester cars, only few in number such as complainant is shown to possess, it is manifest that this might entail upon the defendant an outlay of expense far beyond any remuneration it would probably receive from transporting the excursion cars of the complainant. There is no claim or pretense that the arrangements of the defendant are not ample and sufficient for furnishing sleeping and excursion cars for all parties desiring them over its line.

The loss or inconvenience occasioned to a carrier by an excursion car becoming unable to run on its line is not necessarily trivial for the reason that it can be switched off on a side track. At the point where it becomes unable to run along the carrier's line there may be no side track for many miles distant, and it might be necessary to delay the train many hours to repair such crippled car before it could be removed to such side track; or it might be so crippled that it would have to be taken out of the train and off of the track, involving great delay to the train and unusual expense to the carrier; or the condition of such excursion car might be such as to cause serious accident to the whole train of which it was a part; and it might occasionally and, indeed, often occur that the extent of the damage might be such that the owners or charterers of the excursion car would be unable to make good to the carrier the damages sustained by the latter, if this damaged car should be the means of wrecking a train, causing death and injury to passengers.

The interest of the public in a matter of this kind is vitally important and lies in the direction of holding every carrier to the strictest responsibility in furnishing safe, suitable and sufficient car equipment for the transportation of persons over its line. Perhaps nothing that could occur in railroad management would be more directly at war with the rights and safety of the traveling public than that the line of a railroad carrier should become an arena over which it should be compelled to make a contract of some sort with every car company or inventor of cars, and transport the public in such cars, in order that these car companies and inventors may carry on their strifes of competitive experiments in their business. A result of that kind would take away from the traveling public to a large extent the safeguards which require the carrier upon its own responsibility to furnish safe, suitable and sufficient car equipment for the transportation of persons over its line, and to operate its line with expedition, regularity and safety. That it would, on the other hand, place the carrier largely at the mercy of the car companies, builders and inventors, none of whom are common carriers, is too true to admit of question. In saying what we have here, as well as in other parts of this report and opinion, we do not mean to cast the slightest imputation upon the cars of the Wor-

chester Excursion Car Company, or upon their construction, or their safety, or comfort, or traveling qualities. It is the principles involved that we are discussing.

We confine this decision to the particular case before us—that is, where a carrier has made an arrangement with a car company to furnish excursion cars for transportation over its lines by which a sufficiency of excursion cars of a safe, comfortable and suitable character are supplied for that purpose, whether the carrier can be compelled to transport excursion cars of another car company over its lines and in its trains against its objection; and, tested by the rules, and for the reasons, we have stated, we are of opinion that in such a case this cannot be done.

The order of the Commission is that the petition in this proceeding be, and the same is hereby, dismissed.

IN THE MATTER OF THE APPLICATION OF F. W. CLARK, General Freight and Passenger Agent of the Seaboard Air Line.

1. Carriers of interstate traffic are not obliged to pay charges of steamboat lines when no agreement for a through rate exists.
2. Through rates in interstate traffic are the subject of agreement among carriers who transport the freight, and for their existence are dependent upon such agreement; and one of the features of such rates usually is that each carrier receiving the freight pays the charges upon it of the carrier delivering it.
3. Where a line of steamships, for example, plying between New York and Wilmington, N. C., makes a through rate from New York *via* Wilmington and the Carolina Central Railroad to interior points, by adding the steamer rate to the local tariff rate of the railroad to the interior points, there being no agreed through rates for such freight between the steamship and rail lines, the rail carrier, when the freight is tendered to it at Wilmington, is under no obligation to pay the rates earned by the steamer in transporting the freight from New York to Wilmington, but may decline to do so, leaving the steamship and the shipper to settle the matter of the steamship's charges before the carrier takes the freight and transports it to the interior point.

(Heard and Decided April 23, 1890.)

MEMORANDUM.

Bragg, Commissioner:

In this proceeding the Commission has received an application from F. W. Clark, General Freight and Passenger Agent of the Seaboard Air Line, as follows:

"Will you kindly advise me if a line doing business from an eastern Atlantic port has a right to publish and operate rates from the said eastern ports, *via* a southern port, based

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"upon whatever rates the steamer line may choose to make in connection with the local rates of a railroad from the southern port to the interior; and if the railroad line from the said southern port would, under the Interstate Commerce Law, be compelled to operate said rates, published and quoted without the consent of the railroad leading from the said southern port to the interior?"

"Our attorney is of the opinion that we would have a right to decline to pay charges between the eastern and the southern port, unless the through rate is made up upon an equitable and agreed basis, looking to the maintenance of rates agreed upon and established for all of the said railroad's connections.

"To be more explicit, has a steamship line from New York to Wilmington, N. C., a right to make rates from New York to a point on the Carolina Central R. R. without the consent of the said Carolina Central R. R.? And would the said Carolina Central R. R. be forced to pay the charges of the steamer line between New York and Wilmington, in case the said steamer line should make total rates between the points named, without any regard to the wishes of the Carolina Central R. R.? We have regular established rates *via* Portsmouth and *via* Richmond, made up in accordance with the Interstate Commerce Law, which we desire to have maintained."

It is indispensably necessary in interstate traffic that the consent of each of several lines over which freight is to be carried should be had in the establishment and operation of what are called "through rates." Such rates are the subject of agreement, and for their existence depend upon agreement. One of the features of such rates is usually that each carrier receiving the freight pays the charges on it to the carrier delivering it.

Assuming the facts to be true as stated in this application, it appears that there is no agreement between the Carolina Central Railroad Company and the steamship line from New York to Wilmington as to any through rate upon freight. This being true, the railroad carrier could only be required to carry the freight from Wilmington to the interior at its local, published tariff rates, and would be under no obligation whatever to pay the charges of the steamer line between New York and Wilmington.

The subject of the reasonableness of the local tariff rates of the rail carrier is not involved in this proceeding, and is therefore not passed on by the Commission.

Cooley, Ch., absent, ill, took no part in hearing or decision of this case

THE CHATTANOOGA BOARD OF TRADE

THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. CO.

(No. 258.)

A BSTRACT of petition of the Chattanooga Board of Trade, filed April 9, 1890.

The said Board of Trade is an incorporated association of the merchants and manufactur-

ers of the City of Chattanooga, in Tennessee, under the laws of said State. Among the objects of the organization is this: "To study the workings of the system of transportation upon which our commercial prosperity so much depends, and endeavor to remedy, by all proper means, the defects and abuses existing therein, and to secure fair and equitable rates to and from the city."

Defendant is discriminating in freight rates against the merchants of Chattanooga, and in favor of the merchants of Cincinnati, by giving undue and unreasonable preference and advantage to Cincinnati in making rates of freight from that city to points on the Alabama Great Southern Railway, a division of its system, greatly lower, in proportion to mileage and tonnage, than said defendant makes on property shipped from Chattanooga to said points, although Chattanooga is entitled to the same basis of rate-making, in violation of section 3 of the Act to Regulate Commerce.

In order to give preference to the merchants of Cincinnati the defendant makes rates of freight out of Cincinnati from twenty to ninety per centum lower to points on the Cincinnati Southern Railway, a division of its system, beginning at Cincinnati, than the rates said defendant makes on property shipped out of Chattanooga to points on the Alabama Great Southern Railway, another division of defendant's system, beginning at Chattanooga, these two divisions being consecutively continuous in the through line of said defendant from Cincinnati to New Orleans.

Petitioners refer to the tariffs on file in the office of the Interstate Commerce Commission, and to a comparison of the rates charged by the defendant with the rates charged by the East Tennessee, Virginia & Georgia, and with the rates charged by the Nashville, Chattanooga & St. Louis Railways,—both roads also running out of Chattanooga.

Petitioners pray, etc.

THE BOARD OF TRADE OF CHATTANOOGA

v.

THE EAST TENNESSEE, VIRGINIA & GEORGIA R. CO., and Seventeen Other Parties, Railway and Steamship Companies.

(No. 259.)

ABSTRACT of petition of the Board of Trade of Chattanooga, filed April 9, 1890.

The said Board of Trade is an incorporated association of the merchants and manufacturers of the City of Chattanooga, State of Tennessee, under the laws of said State.

Defendants, above enumerated, are common carriers, engaged in the transportation of passengers and property by railroad and water from seaboard points in the States of Massachusetts, New York, Pennsylvania and Maryland to points in the State of Tennessee, and as such common carriers are subject to the Act to Regulate Commerce.

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Defendants separately and jointly have been, and are now, transporting property, and participating in through rates of freight charges for transporting the same, from the following points, which are designated as eastern seaboard points: Boston in the State of Massachusetts, New York in the State of New York, Philadelphia in the State of Pennsylvania, Baltimore in the State of Maryland, to the following points in the State of Tennessee, viz.: Nashville, Memphis, Chattanooga, cities that compete for business in the same territory. That the defendants are transporting said property, and participating in through rates for the transporting of the same that are much lower to Nashville and Memphis than the said defendants charge and collect for transporting like property from the aforesaid seaboard points under the same, or substantially the same, circumstances and conditions to the City of Chattanooga.

The said defendants, being common carriers, transport property shipped at eastern seaboard points to the points in the State of Tennessee enumerated above, and transport it through the City of Chattanooga to the Cities of Nashville and Memphis, which cities are respectively 151 miles and 310 miles beyond Chattanooga, and therefore that many miles farther from the said eastern seaboard points, in violation of sections one, two, three and four of the Act to Regulate Commerce.

Rates charged to Chattanooga are too high, both in comparison with the rates given Nashville and Memphis, and in themselves.

The existence of water transportation for a portion of the way to Nashville, and for a portion, or for the whole, of the way to Memphis, does not warrant, force or compel the defendants to transport property from eastern seaboard points to Nashville and Memphis at lower rates of freight than said defendants can, and may, transport like property to Chattanooga.

Petitioners refer to the tariffs on file in the office of the Interstate Commerce Commission for proof of the foregoing allegations, and ask permission to illustrate said tariffs, as follows:

Rates from New York and Boston.

| Classes | 1 | 2 | 3 | 4 | 5 | 6 |
|----------------------------------|-----|----|----|----|----|----|
| To Chattanooga, | 114 | 98 | 86 | 73 | 60 | 49 |
| To Memphis, 310 miles farther, | 100 | 85 | 65 | 45 | 38 | 35 |
| To Nashville, 151 miles farther, | 91 | 78 | 60 | 42 | 36 | 31 |

Rates from Boston and New York.

| | 1 | 2 | 3 | 4 | 5 | 6 |
|----------------|----|----|----|----|----|----|
| To Cincinnati, | 65 | 57 | 44 | 30 | 26 | 22 |

Rates from Cincinnati.

| | 1 | 2 | 3 | 4 | 5 | 6 |
|---------------------------|----|----|----|----|----|----|
| To Chattanooga—335 miles, | 49 | 41 | 42 | 43 | 34 | 27 |
| To Nashville—296 miles, | 26 | 21 | 16 | 12 | 10 | 9 |

Relief is prayed, etc.

Memoranda of distances and a diagram showing relative positions of railways were appended to the petition.

THE DELAWARE STATE GRANGE OF
THE PATRONS OF HUSBANDRY

v.

THE NEW YORK, PHILADELPHIA &
NORFOLK R. CO., The Delaware R.
Co., The Philadelphia, W. & B. R. Co.
and The Pennsylvania R. Co.

(No. 102.)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22d day of April, A. D. 1890,

Present:

Hon. **William R. Morrison,**
Hon. **Augustus Schoonmaker,**
Hon. **Walter L. Bragg,**
Hon. **Wheelock G. Veazey,**
Commissioners,

The following notice was issued:

The Commission being informed that negotiations have heretofore taken place between the parties to this case for an adjustment of the matter in controversy upon an equitable basis, and it being desirable that such an adjustment, if possible, be made at the earliest practicable day, the respective parties to this proceeding, by their authorized representatives and their counsel, are requested to meet at the office of the Interstate Commerce Commission, in the City of Washington, D. C., on the 29th day of April inst., at 11 o'clock A. M., for the purpose of considering and arriving at such adjustment; and the representatives of the water-carriers that are competitors of the respondent at Norfolk are also requested to be present.
(Authenticated.)

See complaint in this case, 1 Inters. Com. Rep. 649.

THE KAUFFMANN MILLING COMPANY

v.

THE MISSOURI PACIFIC R. CO. *et al.*

(No. 257.)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22d day of April, A. D. 1890,

Present:

Hon. **William R. Morrison,**
Hon. **Augustus Schoonmaker,**
Hon. **Walter L. Bragg,**
Hon. **Wheelock G. Veazey,**
Commissioners,

The following order was made:

It being made to appear in this case that millers of the State of Texas have an interest in the controversy presented by the complaint and the answers thereto on file, and that their interest is in supporting the rates of which complaint is made, and the said millers of the
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State of Texas, by a duly appointed executive committee, having asked for permission to intervene;

It is now ordered, That permission be granted, and that J. Reymershoffer, S. T. Stratton and Mark Evans, executive committee of the said millers of the State of Texas, be permitted to appear on the taking of testimony in this cause, and to produce and examine witnesses, and to cross-examine the witnesses that are produced on behalf of the complainant; that notice be served upon them of the taking of any testimony by deposition on behalf of the complainant; that they also have notice of the hearing of the cause and be allowed at the hearing to be heard by counsel or otherwise, or to file argument in support of the case of the defense, as they may be advised.

(Authenticated.)

See complaint, *ante*, p. 770.

GEORGE RICE

v.

THE ATCHISON, TOPEKA & SANTA
FE R. CO. *et al.*

(No. 218.)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 23d day of April, A. D. 1890,

Present:

Hon. **William R. Morrison,**
Hon. **Augustus Schoonmaker,**
Hon. **Walter L. Bragg,**
Hon. **Wheelock G. Veazey,**
Commissioners,

The following order was made:

It is ordered in the above entitled cause that the same be set down for hearing and argument at the office of the Interstate Commerce Commission at the City of Washington at 10 o'clock in the forenoon on the 13th day of May, 1890;

And it is further ordered, That said cause be re-opened so far as pertains to paragraph seven (7) of the complaint, for the purpose of permitting The St. Louis, Iron Mountain & Southern Railway Company, The Texas & Pacific Railway Company and the receivers of the International and Great Northern Railroad Company to show the quantity of sea-transportation of oil from New York to Galveston during the year 1889, and the relative price of refined oil at New York, Cleveland, Marietta and Parkersburg on the 30th day of December, 1889; and for the purpose of showing the rate on oil in carload lots from Galveston to Houston, Aldine, Polk and Texarkana. And the testimony thus offered may be rebutted by the complainant.

(Authenticated.)

See complaint, *ante*, p. 573.

THE NEW YORK BOARD OF TRADE
AND TRANSPORTATION

v.

THE PENNSYLVANIA R. CO. *et al.*

(No. 248.)

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 21st day of April, A. D. 1890,

Present:

Hon. William R. Morrison,

Hon. Augustus Schoonmaker,

Hon. Walter L. Bragg,

Hon. Wheelock G. Veazey,

Commissioners,

The following order was made:

The Commission having reason to believe that other railroad companies subject to the Act to Regulate Commerce besides those named as respondents in the above entitled case carry from ports of entry to points in the United States traffic imported from foreign countries at rates that are lower than their published inland tariff rates in effect at the time and under which like traffic is contemporaneously carried;

And the Commission having authority to inquire into the management of the business of all common carriers subject to the provisions of the Act to Regulate Commerce and to be informed as to the manner and method in which the same is conducted;

It is ordered, That inquiry be made into the manner and method in which the common carriers hereinafter named conduct their business in respect to the carriage of traffic imported from foreign countries consigned to interior points on through bills or otherwise, the rates charged and received for such carriage, the rates contemporaneously charged and received for like traffic not imported and not so consigned, and that such investigation be made of the business of the following railroad companies, viz.:

The Southern Pacific Company; The Union Pacific Railway Company; The Northern Pacific Railroad Company; The Canadian Pacific Railway Company; The Texas & Pacific Railway Company; The Illinois Central Railroad Company; The Lehigh Valley Railroad Company;

And it is further ordered, That a copy of the
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complaint in this case be served upon each and every of said railroad companies, and that each of said railroad companies is required to file with this Commission within twenty days from the time of such service a verified statement setting forth whether it now carries or at any time since March 23, 1889, it has carried imported traffic, whether on through bills or otherwise, at lower rates than it contemporaneously charged for like traffic not imported or not shipped on through bills, and the reasons for such lower rates if charged;

And it is further ordered, That each and every of the above named carriers is required to appear upon the hearing and investigation of the above entitled case at the City of Washington on the 20th day of May, 1890, at the office of the Interstate Commerce Commission at 10 o'clock A. M., to be investigated concerning the manner and method in which its business is conducted in respect to imported traffic and to give evidence and be heard in relation to said business, to the end that such order may be made concerning the same as may be just and lawful.

(Authenticated.)

In the same case on the following day the following order was made:

It being made to appear in this case that the Commercial Exchange of Philadelphia has an interest in the controversy presented by the complaint and the answers thereto, and that its interest is adverse to the rates of which complaint is made, and the said Commercial Exchange of Philadelphia having asked for permission to intervene;

It is now ordered, That permission be granted, and that the said Commercial Exchange of Philadelphia be permitted to appear on the taking of testimony in this cause, and to produce and examine witnesses, and to cross-examine the witnesses that are produced on behalf of the defendants; that notice be served upon it of the taking of any testimony by deposition on behalf of the defendants; that it also have notice of the hearing of the cause and be allowed at the hearing to be heard by counsel or otherwise, or to file argument in support of the case of the complainant, as it may be advised.

(Authenticated.)

See pleadings and previous proceedings in this case, *ante*, pp. 660, 734, 755.

UNITED STATES SUPREME COURT.

THE LOUISVILLE, NEW ORLEANS
AND TEXAS RAILWAY COMPANY,

Plff. in Err.,

v.

STATE OF MISSISSIPPI.

1. The Mississippi Statute of March 2, 1888, as settled by the Supreme Court of that State, applies solely to commerce within the State; and this court must accept as conclusive such construction of the Statute of the State by its highest court.

2. The first section of said Statute, which requires railroads to provide separate accommodations for the white and colored races, is within the power of the State, and is not a regulation of interstate commerce and does not violate the commerce clause of the Constitution.

3. There is a commerce wholly within the State, which is not subject to the constitutional provision, and a distinction between commerce among States and between the citizens of a single State, conducted within its limits.

(Submitted Jan. 10, 1890.—Decided March 3, 1890.)

[N ERROR to the Supreme Court of the State of Mississippi to review a judgment sustaining a conviction for a violation of sec. 1 of the Mississippi Statute of March 2, 1888, requiring railroads to provide separate accommodations for the white and colored races. *Affirmed.*

The facts are stated in the opinion.

Messrs. W. P. Harris and Yerger & Percy, for plaintiff in error:

The decision of the Mississippi court, that the Act of March 2, 1888, is valid, is in direct conflict with the judgment of this court.

Hall v. DeCuir, 95 U. S. 485 (24 L. ed. 547); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244).

The carrier, its road, the process of commerce it conducts and the instruments employed, fall, with the business to which they are inseparably attached, under the commerce clause of the Constitution.

Sherlock v. Alling, 93 U. S. 99, 104 (23 L. ed. 819, 821); *Smith v. Alabama*, 124 U. S. 473 (31 L. ed. 510).

Imposing conditions upon the carrier are impediments to its free admission to the territory of the State as a carrier of interstate commerce.

Henderson v. Wickham, 92 U. S. 259 (23 L. ed. 543); *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 327 (28 L. ed. 1137); *People v. Compagnie Générale*, 107 U. S. 59 (27 L. ed. 383).

There is a distinction between the vessel or vehicle employed, and fixtures or wharves or conveniences and agencies strictly territorial and local.

Cooley v. Wardens of Phila., 53 U. S. 12 How. 299 (13 L. ed. 966); *Gilman v. Philadelphia*, 70 U. S. 3 Wall. 713 (18 L. ed. 966); *Mobile County v. Kimbal*, 102 U. S. 691 (26 L. ed. 238); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158).

Mr. T. M. Miller for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

The question presented is as to the validity of an Act passed by the Legislature of the State of Mississippi on the 2d of March, 1888. That Act is as follows:

"Sec. 1. *Be it enacted*, That all railroads carrying passengers in this State (other than street railroads) shall provide equal, but separate, accommodation for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by a partition so as to secure separate accommodations.

"Sec. 2. That the conductors of such passenger trains shall have power, and are hereby required, to assign each passenger to the car or the compartment of a car (when it is divided by a partition) used for the race to which said passenger belongs; and that should any passenger refuse to occupy the car to which he or she is assigned by such conductor, said conductor shall have power to refuse to carry such passenger on his train, and neither he nor the railroad company shall be liable for any damages in any event in this State.

"Sec. 3. That all railroad companies that shall refuse or neglect within sixty days after the approval of this Act to comply with the requirements of section one of this Act, shall be deemed guilty of a misdemeanor, and shall, upon conviction in a court of competent jurisdiction, be fined not more than five hundred dollars; and any conductor that shall neglect to, or refuse to, carry out the provisions of this Act shall, upon conviction, be fined not less than twenty-five nor more than fifty dollars for each offense.

"Sec. 4. That all Acts and parts of Acts in conflict with this Act be, and the same are hereby, repealed, and this Act to take effect and be in force from and after its passage." Acts of 1888, p. 43.

The plaintiff in error was indicted for a violation of that Statute. A conviction in the trial court was sustained in the supreme court, and from its judgment this case is here on error. The question is whether the Act is a regulation of interstate commerce and therefore beyond the power of the State; and the cases of *Hall v. DeCuir*, 95 U. S. 485 [24 L. ed. 547], and *Wabash R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244], are specially relied on by plaintiff in error.

It will be observed that this indictment was against the Company for the violation of section one, in not providing separate accommodations for the two races; and not against a conductor for a violation of section two, in failing to assign each passenger to his separate compartment. It will also be observed that this is not a civil action brought by an individual to recover damages for being compelled to occupy one particular compartment, or prevented from riding on the train; and hence there is no question of personal insult or alleged violation of personal rights. The question is limited to the power of the State to compel railroad companies to provide within the State separate accommodations for the two races.

Whether such accommodation is to be a matter of choice or compulsion does not enter into this case. The case of *Hall v. DeCuir, supra*, was a civil action to recover damages from the owner of a steamboat for refusing to the plaintiff, a person of color, accommodations in the cabin specially set apart for white persons; and the validity of a Statute of the State of Louisiana, prohibiting discrimination on account of color, and giving a right of action to the party injured for the violation thereof, was a question for consideration. The steamboat was engaged in interstate commerce, but the plaintiff only sought transportation from one point to another in the State. This court held that Statute, so far as applicable to the facts in that case, to be invalid. That decision is invoked here; but there is this marked difference. The Supreme Court of the State of Louisiana held that the Act applied to interstate carriers, and required them, when they came within the limits of the State, to receive colored passengers into the cabin set apart for white persons. This court, accepting that construction as conclusive, held that the Act was a regulation of interstate commerce, and therefore beyond the power of the State. The chief justice, speaking for the court, said: "For the purposes of this case we must treat the Act of Louisiana of February 23, 1869, as requiring those engaged in interstate commerce to give all persons traveling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. Such was the construction given to that Act in the courts below, and it is conclusive upon us as the construction of a state law by the state courts. It is with this provision of the Statute alone that we have to deal. We have nothing whatever to do with it as a regulation of internal commerce, or as affecting anything else than commerce among the States." And again: "But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The Statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced."

So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce.

Obviously whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with colored passengers, was a question of interstate commerce, and to be determined by Congress alone. In this case, the Supreme Court of Mississippi held that the Statute applied solely to commerce within the State; and that construction, being the construction of the Statute of the State by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a State, and not interfering with commerce between the States, then obviously there is no violation of the commerce clause of the Federal Constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this contention cannot be sustained.

So far as the first section is concerned (and it is with that alone we have to do), its provisions are fully complied with when to trains within the State is attached a separate car for colored passengers. This may cause an extra expense to the railroad company; but not more so than state statutes requiring certain accommodations at depots, compelling trains to stop at crossings of other railroads, and a multitude of other matters confessedly within the power of the State.

No question arises, under this section, as to the power of the State to separate in different compartments interstate passengers, or to affect in any manner the privileges and rights of such passengers. All that we can consider is, whether the State has the power to require that railroad trains within her limits shall have separate accommodations for the two races. That affecting only commerce within the State is no invasion of the powers given to Congress by the commerce clause.

In the case of *Wabash Railway Co. v. Illinois, supra*, Mr. Justice Miller, speaking for the court, said: "If the Illinois Statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid. For instance, a contract might be made to carry goods for a certain price from Cairo to Chicago, or from Chicago to Alton. The charges for these might be within the competency of the Illinois Legislature to regulate. The reason for this is that both the charge and the actual transportation in such cases are exclusively confined to the limits of the territory of the State, and is not commerce among the States, or interstate commerce, but is exclusively commerce within the State. So far, therefore, as this class of transportation, as an element of commerce, is affected by the Statute under consideration, it is not subject to the constitutional provision concerning commerce among the States. It has often been held in this court, and there can be no doubt about it, that there is a commerce wholly within the State, which is not subject to the constitutional provision, and the distinction between commerce among the States and the other class of commerce between the citizens of a single State, and conducted within its limits exclusively, is one which has been fully recognized

in this court, although it may not be always easy, where the lines of these classes approach each other, to distinguish between the one and the other. *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999]; *Hall v. DeCuir*, 95 U. S. 485 [24 L. ed. 547]; *W. U. Tel. Co. v. Texas*, 105 U. S. 460 [26 L. ed. 1067]."

The Statute in this case, as settled by the Supreme Court of the State of Mississippi, affects only such commerce within the State, and comes therefore within the principles thus laid down. It comes also within the opinion of this court in the case of *Stone v. Farmers Loan and Trust Co.*, 116 U. S. 307 [29 L. ed. 636].

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is therefore affirmed.

Mr. Justice Harlan, dissenting:

The defendant, the Louisville, New Orleans and Texas Railroad Company, owns and operates a continuous line of railroad from Memphis to New Orleans. If one of its passenger trains—starting, for instance, from Memphis to go to New Orleans—enters the territory of Mississippi, without having cars attached to it for the separate accommodation of the white and black races, the Company and the conductor of such train are liable to be fined as prescribed in the Statute, the validity of which is here in question. In other words, it is made an offense against the State of Mississippi if a railroad company engaged in interstate commerce shall presume to send one of its trains into or through that State without such arrangement of its cars as will secure separate accommodations for both races.

In *Hall v. DeCuir*, 95 U. S. 485 [24 L. ed. 547], this court declared unconstitutional and void, as a regulation of interstate commerce, an Act of the Louisiana Legislature which required those engaged in interstate commerce to give all persons traveling in that State, upon the public conveyances employed in such business, equal rights and privileges in all parts of the conveyance, without distinction or discrimination on account of race or color. The court, speaking by *Chief Justice Waite*, said: "We think it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The Statute now under consideration, in our opinion, occupies that position. It does not act upon the business through the local instruments to be employed after coming within the State, but directly upon the business as it comes into the State from without, or goes out from within. While it purports only to control the carrier when engaged within the State, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. This disposition of passengers taken up and put down within the State, or taken up within to be carried without, cannot but affect in greater or less degree those taken up without and brought within, and sometimes those taken up and put down without. A passenger in the cabin set apart for the use of

whites without the State must, when the boat comes within, share the accommodations of that cabin with such colored persons as may come on board afterwards, if the law is enforced. It was to meet just such a case that the commercial clause in the Constitution was adopted. The River Mississippi passes through or along the borders of ten different States, and its tributaries reach many more. The commerce upon these waters is immense, and its regulation clearly a matter of national concern. If each State was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each State could provide for its own passengers and regulate the transportation of its own freight regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the State in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and to secure it Congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be."

It seems to me that those observations are entirely pertinent to the case before us. In its application to passengers on vessels engaged in interstate commerce, the Louisiana enactment forbade the separation of the white and black races while such vessels were within the limits of that State. The Mississippi Statute, in its application to passengers on railroad trains employed in interstate commerce, requires such separation of races, while those trains are within that State. I am unable to perceive how the former is a regulation of interstate commerce and the other is not. It is difficult to understand how a state enactment, requiring the separation of the white and black races on interstate carriers of passengers, is a regulation of commerce among the States, while a similar enactment forbidding such separation is not a regulation of that character.

Without considering other grounds upon which, in my judgment, the Statute in question might properly be held to be repugnant to the Constitution of the United States, I dissent from the opinion and judgment in this case upon the ground that the Statute of Mississippi is, within the decision in *Hall v. DeCuir*, a regulation of commerce among the States, and is therefore void.

I am authorized by *Mr. Justice Bradley* to say that, in his opinion, the Statute of Mississippi is void as a regulation of interstate commerce.

INTERSTATE COMMERCE COMMISSION.

CHARLES ELVEY

v.

THE ILLINOIS CENTRAL R. CO.

1. Where a carrier by its published general tariffs charges the general public from and to all points upon a large portion of its lines certain rates upon a class of freight, and at the same time publishes and puts into force a special tariff by which it charges a class of persons named, from and to the same points on its lines, less than one half in amount of the rates on the same class of freight that it charges the general public in its general tariffs, such a discrimination is unjust and is violative of the Act to Regulate Commerce.
2. Such a discrimination cannot be sustained upon the ground that the special tariff is made to aid "emigrants" in moving from one State to another where land is cheap, and to develop a sparsely settled country, and to build up business along the carrier's lines, and upon the supposition that this constitutes substantially dissimilar circumstances and conditions to what exists when similar services are rendered by the carrier for the general public.
3. A shipper to whom, as an emigrant, is accorded the rate provided by the special tariff, for example, sixty dollars on a carload of freight weighing 20,000 pounds, from Chicago, Illinois, to Hammond, Louisiana, a distance of 863 miles, in December, 1888, and in May, 1889, makes return shipment of same freight from Hammond, Louisiana, to Chicago, Illinois, under the general tariffs of the carrier, there being no other tariffs on north-bound freight between these points, and is charged therefor \$122 per car, complains of an unjust charge: *Held, that as the carrier in each instance charged only its open published rates*, and no evidence is offered to show that the rates in either instance are unjust and unreasonable, and as the general tariffs of the Company have long been in use and published and open to the public, and the special tariff has been but recently issued, and is open to a certain special class only, and is unlawful, that the general tariffs afford a better standard of what are reasonable and just rates than the special tariff, and that the shipper in such case has not been injured in paying less than one half the amount charged the general public on the first haul, and only what was charged the general public on the second haul.
4. The carrier is ordered and notified to cease and desist from further operating the special freight tariff.

PETITION for reduction of charges on a shipment of freight from Hammond, Louisiana, to Chicago, Illinois. *Denied.*

MEMORANDUM.

Bragg, Commissioner:

An informal complaint was made in this proceeding by the claimant to the effect that an unjust charge has been made by the defendant, and as to the material facts involved in the proceeding there is no dispute. These facts, elicited after considerable correspondence with the parties, show that on the 17th day of December, in the year 1888, the claimant shipped by the line of the defendant from Chicago, Illinois, to Hammond, Louisiana, a distance of 863 miles, a carload, weighing 20,000 pounds, of household goods and stock, including three ponies, for which service a rate of \$60 was charged and paid. Afterwards on the 21st day of May, 1889, identically the same freight excepting two of the ponies was sent by return shipment by claimant over the line of the defendant from Hammond, Louisiana, to Chicago, Illinois, and then the rate charged by the defendant for the service was \$122.

The grounds upon which this difference of rate is justified by the defendant are thus stated by its general manager, E. T. Jeffrey: "It seems that for the purpose of stimulating immigration to Louisiana where land is cheap and population sparse, we have had in force a low rate on emigrants' movables. Copies of the way-bills inclosed herewith will show that the complainant, in December last, shipped a car of household goods and stock, including three ponies, from Chicago to Hammond at a rate of \$60 for 20,000 pounds. This was under the low emigrant tariff put in force by the Company for the purpose above set forth. In May, 1889, the complainant shipped from Hammond to Chicago a car of household goods, including one pony, at a charge of \$122 for 20,000 pounds. The distance from Chicago to Hammond is 863 miles. The service performed by the carrier is substantially the same in the south-bound as in the north-bound shipment. There is no other reason to present for your consideration in this case than the dissimilarity of circumstances and conditions growing out of the desire to settle the unoccupied lands in Louisiana, and thus add to the prosperity of that section of the country and thereby increase the volume of traffic and revenue on the line of our road.

"We do not want to work an injustice or hardship upon anyone, or upon any interest or locality, and if you think what we have done is wrong, we will correct it, and charge our tariffs to conform to your better and more disinterested judgment. My own impression is that it is not only good business policy, but also, in a broad sense, good statesmanship, for the government to permit the channels and arteries of commerce and traffic to develop and settle undeveloped and unsettled sections of the country, even though it be necessary in so doing to offer what seem to be advantages and

(Complaint filed July 8, 1889.—Decided May 9, 1890.)

preferences which are not afforded nor required under other circumstances and conditions.

"If you think we have made an error, I trust you will consider that we have meant to do right, and will therefore not censure us for what we have done, as we will willingly and cheerfully change our rates if need be, and satisfy in this particular case the complainant, if it appears to you that such satisfaction should be accorded.

"I inclose the special emigrant tariff from all stations in Illinois, Indiana, Wisconsin, Iowa, Minnesota and Dakota, to our southern points, a duplicate of which is on file with the Commission."

We have examined the tariff that is referred to. It purports to be and is an elaborate, voluminous and carefully prepared tariff, denominated "Emigrant Freight and Passenger Rates from all Stations in Illinois, Indiana, Wisconsin, Iowa, Minnesota and Dakota to Jackson, Tennessee, Aberdeen, Mississippi, Jackson, Mississippi, Hammond, Louisiana, and other stations on the Southern Division" of the Illinois Central Railroad Company. We find from examination of this tariff that the freight rate for emigrants for property of the class involved in this complaint per carload of 20,000 pounds from Chicago to Hammond, Louisiana, south-bound, is \$60, while the freight rate on such a carload for shippers, not emigrants, from Chicago to Hammond, Louisiana, between the same points, south-bound, for the same property and service, according to the general tariff of the Illinois Central Railroad Company, is \$122 per car. The rate is \$122 per car of 20,000 pounds for the same kind of freight and service by the general tariffs of the company from Hammond, Louisiana, to Chicago, north-bound. Proportionally much the same relative differences in rates are made on shipments of freight for emigrants by this special emigrant tariff from all stations in Illinois, Indiana, Wisconsin, Iowa, Minnesota and Dakota to all other stations on the Southern Division of the Illinois Central Railroad Company. The Southern Division of the Illinois Central Railroad Company embraces its lines south of Cairo extending to New Orleans and various other points in the States of Kentucky, Tennessee, Mississippi and Louisiana.

The question presented is, whether, under the Act to Regulate Commerce, such a discrimination as this is lawful. In the case of *Savery v. New York C. & H. R. R. Co.*, 2 Inters. Com. Rep. 217, 218, 2 I. C. C. Rep. 356-359, we had occasion to consider the passenger rates of transportation charged immigrants, the charges for their baggage, and the subject of whether the passenger transportation for them was suitable or not. In this emigrant tariff of the Illinois Central Railroad Company there seems to be no discrimination in passenger rates between what is charged by it, and by the general tariffs of the Company, from and to the points named, and in this respect it complies with the Statute. In *Savery's Case* there was no claim that household goods and freight of "immigrants" should be hauled at less rates than other freight of the same kind for other persons; and in point of fact the freight rates and classification of the Trunk Line Association, which were there involved, made no such

distinction. According to their classification and freight rates a carload of household goods could not and would not be transported any more cheaply over their lines for "immigrants" than for any other class of persons. Such a difference as is here made in emigrant freight rates on the Illinois Central Railroad, according to this tariff, and the freight rates charged other persons in the same localities from and to the same points, and for the same service, who are not "emigrants," is clearly a discrimination that is violative of the Act to Regulate Commerce and cannot be sustained.

The governing motives of the Company that prompted it in making this emigrant freight tariff were evidently such as are stated by its general manager. Its purpose in making this tariff was to afford cheap rates to "emigrants" from one portion of the country to another, in order to develop a sparsely settled country, where lands were cheap, and to build up the business along its line, and not to violate the Statute. It is a tariff that would, of course, benefit the emigrants, the sparsely settled country and the defendant, but it overlooks the rights under the Law of other shippers of similar freight from and to the points named who are the neighbors of these emigrants, and it discriminates against them, and in this respect is directly in conflict with the Act to Regulate Commerce. It does not appear that there is any such dissimilarity of circumstances and conditions in the service performed as justifies these differences in rates.

No evidence has been offered to the effect that either of these tariffs charge unreasonable rates for the services performed for complainant in these matters of which he has complained. His theory in submitting the case for our consideration seems to be that as here are two tariffs from and to the same points, under one of which, south-bound, he was charged \$60 per car, and on the other, north-bound, he was charged \$122 per car for the same freight, that therefore the greater charge is wrong to the extent of the difference between the two. But this does not necessarily follow. The charge of \$122 per car of 20,000 pounds for 863 miles is the general tariff of the Company, has long been in use, is open to the public generally, is a rate of 61 cents per 100 pounds, or one and four-tenths mills per ton per mile for the transportation of this freight for this distance, while the charge of \$60 per car is a special tariff made for a particular class of persons, not open to the public generally, is a rate of about 30 cents per 100 pounds, or slightly less than seven mills per ton per mile, and has very recently been put into effect under what is claimed are exceptional circumstances and conditions which as we have seen do not justify this special tariff under the Statute. And assuming, as we must do for the purposes of this proceeding and upon the case as here presented, that the general tariff is the one which furnishes a better standard as to the reasonableness and justness of the rates charged by it, than the special tariff, and as the special tariff is one that for the reasons stated is unlawful, and as the complainant in each instance was charged the published tariff rate of the defendant, it would seem to follow that the complainant has not been injured, but that on the contrary he

was charged less than he ought to have been charged in the south-bound shipment, and that he was only charged what the general public was charged in similar shipments of freight on the north-bound shipment.

It results from what we have stated that the claim of the complainant against the reasonableness and justice of the rates charged him must be denied, without prejudice to his further pursuing his claim if he may so desire. And the defendant having submitted its said special emigrant freight tariff to the Commission for its judgment and decision, as a defense in this proceeding, and the same having been fully considered by the Commission, it is now ordered by the Commission and notice is hereby given to the defendant, the Illinois Central Railroad Company, to cease and desist from further operating its said special emigrant freight tariff from and to the points therein named, because said tariff is in violation of the Act to Regulate Commerce.

At the hearing and decision of this case **Cooley**, *Chairman*, was absent because of illness, and did not in any way participate.

BENNETT D. MATTINGLY

v.

THE PENNSYLVANIA CO.

1. **The provisions of the Act to Regulate Commerce, construed in the light of the principles that apply to interstate commerce as enunciated by the courts of the United States, must be understood as intended to regulate all the commerce subject to the exclusive jurisdiction of Congress, including the agents and instrumentalities employed and the commodities carried, with only the limitations found in the Act itself.**
2. **The proviso in the first section that the provisions of the Act shall not apply to the transportation of passengers or property, as to the receiving, delivery, storage or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid, that is, by continuous carriage or shipment, only excludes from regulation the purely internal commerce of a State, that which is confined within its limits, which originates and ends in the same State.**
3. **When a state carrier engages in interstate commerce it becomes a national instrumentality for the purposes of such commerce and is subject to regulations prescribed by the national authority. It cannot limit its obligations in that business, but must serve the business offered impartially and without preference or discrimination.**
4. **The national regulations prescribed are not in all respects co-extensive with the power of Congress, and do not provide for ordering through routes and through rates. While it is the duty of a state carrier which engages in interstate commerce to forward traffic offered from a**

connecting line, there is no authority under the present Act to compel the carrier to forward the traffic over a route not operated or selected by itself.

(No. 220.)

(Complaint filed August 1, 1889.—Answer filed September 17, 1889.—Heard at Indianapolis, Ind., September 17, 1889.—Brief for complainant filed September 26, 1889.—Brief for defendant filed November 18, 1889.—Decision filed April 25, 1890.)

PROCEEDING to compel respondent to transfer freight cars from the tracks of one company to those of another. *Complaint dismissed.*

See complaint, *ante*, p. 575.

Mr. E. F. Trabue for complainant.

Mr. Charles H. Gibson for defendant.

REPORT AND OPINION OF THE COMMISSION.

Schoonmaker, *Commissioner* :

The complaint is, in substance, of an alleged wrongful refusal on the part of the respondent Company to transfer freight cars over its own tracks in the City of New Albany, Ind., from the terminus of the Louisville, Evansville & St. Louis Consolidated Railroad to the tracks of the Louisville, New Albany & Chicago Railway Company, to be hauled by that company over the Kentucky & Indiana Bridge into Kentucky.

The complaint sets forth that the petitioner is a distiller, and operates his distillery near the City of Louisville, in Kentucky, and that for the purpose of receiving and forwarding freight to and from the distillery the owners have constructed at their own expense and own a railroad track from the distillery to railroad tracks of the Kentucky & Indiana Bridge Company about one mile and a quarter long, and that he has no other connection with any railroad except over the switch and connecting tracks of the bridge company; that the Kentucky and Indiana Bridge Company owns a bridge across the Ohio River between New Albany, Ind., and the western part of the City of Louisville, together with about ten miles of railroad track connecting with various depots and railways in the City of Louisville; that the bridge is used in connection with the railroads on both sides of the Ohio River in the business of interstate commerce; that the respondent is the lessee of the Jeffersonville, Madison & Indianapolis Railroad, which it operates, including a branch road running from Jeffersonville, Ind., into New Albany, in the same State, connecting at State Street with the Louisville, Evansville & St. Louis Consolidated Railroad Company; that the latter company operates a line of railway westward through the southern parts of Indiana and Illinois, and connecting with other railroads in that region; that along the road operated by the respondent a connection is made at Vincennes Street, in the City of New Albany, with the Louisville, New Albany & Chicago Railway, a company owning and operating a railroad from New Albany, Ind., to Chicago, Ill.; that the tracks of the Kentucky and Indiana Bridge Company in New Albany cross the tracks of the Jeffersonville, Madison & Indianapolis Railroad and connect with the tracks of the Louisville, New Albany & Chicago Railway; that the only connection between the Louisville, Evansville & St. Louis

Consolidated Railroad Company and the Louisville, New Albany & Chicago Railway Company is made through the City of New Albany over the tracks of the Jeffersonville, Madison & Indianapolis Railroad; and that all freight interchanged between the two former companies is transported by the Pennsylvania Company, which receives cars from the one and delivers them to the other.

It is not important to set out the other allegations, as they are covered by the agreed facts.

The petitioner alleges that unlawful discrimination is made against his traffic, and asks that an order be made requiring the respondent Company to transfer the freight of the petitioner and receive and deliver the same without discrimination, and for any and all further orders in the premises to which he may be entitled.

The answer of the respondent sets out, among other things, that the portion of its railroad which will be used in transferring complainant's freight from the Louisville, Evansville & St. Louis Consolidated Railroad Company to the Louisville, New Albany & Chicago Railway Company, as described by the complainant, lies wholly within the State of Indiana; that respondent has no traffic arrangement with and no interest in or control of the Louisville, New Albany & Chicago Railway Company or the Kentucky & Indiana Bridge Company, over which said freight would have to pass in order to be taken out of the State of Indiana; and the respondent therefore says that the controversy between it and complainant is not within the jurisdiction of the Interstate Commerce Commission.

That the respondent has a continuous line of railway of its own extending from its point of connection with the Louisville, Evansville & St. Louis Railroad Company, at State Street, in New Albany, to the City of Louisville, Ky., where it connects with other railroad tracks having direct connection with the tracks leading to the railroad switch connected with the distillery of the complainant, and that it is feasible to deliver freight destined for said distillery over respondent's line of railroad and its said connections; that respondent has not made, and declines to make, any through route or through rate for traffic coming to it from the Louisville, Evansville & St. Louis Railroad Company and destined for Louisville and other points south, except over respondent's own line of railroad; that the making of a through route or rate on such traffic *via* the Louisville, New Albany & Chicago Railway Company and the Kentucky & Indiana Bridge Company to Louisville would result in diverting traffic from the respondent's own line to Louisville, and would require the respondent to grant the use of its terminal tracks and facilities in New Albany for handling such diverted traffic; that respondent's terminal tracks and facilities extend from State Street to Vincennes Street, in New Albany, and that the interchange of interstate traffic from the Louisville, Evansville & St. Louis Railroad Company to the Louisville, New Albany & Chicago Railway Company, *via* the respondent's railroad, necessarily requires the use of respondent's terminal tracks and facilities to make such interchange.

Upon the hearing an agreed statement of

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facts was submitted as the evidence in the case, which statement is as follows:

"1. That complainant is a distiller, operating the distillery described in the complaint, and that the railroad connections with said distillery exist as described in the complaint.

"2. That the connections between the Louisville, Evansville & St. Louis Railway Company and respondent, and the connections between respondent and the Louisville, New Albany & Chicago Railway Company and Kentucky & Indiana Bridge Company, exist as stated in the complaint.

"3. That respondent, as lessee of the Jeffersonville, Madison & Indianapolis Railroad Company, is a common carrier, engaged in the business of interstate commerce.

"4. That it is feasible and convenient for respondent to receive freight from the Louisville, Evansville & St. Louis Railway Company, at their point of connection at State Street, New Albany, and deliver the same to the Louisville, New Albany & Chicago Railway Company, at Vincennes Street, New Albany.

"5. That prior to May 1, 1889, the respondent, at the earnest solicitation of the Louisville, Evansville & St. Louis Railway Company, did so receive and deliver two several shipments of grain consigned to complainant at Louisville; that respondent at first refused, in each instance, to make such deliveries, and only did so finally as a matter of accommodation to the Louisville, Evansville & St. Louis Railway Company, to enable it to secure complainant's traffic as against competing lines, and said deliveries were made under an express stipulation with that railroad company that respondent should not thereby establish any precedent for its future action, and should not thereby establish a point of interchange of interstate traffic between it and the Louisville, New Albany & Chicago Railway Company at Vincennes Street, New Albany, and complainant's freight was received and delivered by respondent under said stipulation.

"6. That with the exceptions above stated, respondent has never delivered to the Louisville, New Albany & Chicago Railway Company, at Vincennes Street, any interstate traffic whatever, and at the time of delivering complainant's last shipment respondent notified the Louisville, Evansville & St. Louis Railway Company that it would not in future deliver any interstate traffic to the Louisville, New Albany & Chicago Railway Company at Vincennes Street, New Albany.

"7. That it is feasible and convenient for complainant's freight to be carried to Louisville over respondent's line of railway, and, by means of its connections in Louisville, delivered at the distillery named in the complaint.

"8. That the delivery by respondent of Louisville traffic to the Louisville, New Albany & Chicago Railway Company at Vincennes Street, New Albany, would result in diverting such traffic from respondent's own line extending to Louisville.

"9. That respondent in delivering cars to and from the Louisville, Evansville & St. Louis Railway Company and the Louisville, New Albany & Chicago Railway Company, at Vincennes Street, New Albany, destined for points not reached by or over respondent's lines, makes a

switching charge of one dollar per car, and, assuming that the respondent would make the same switching charge on cars destined for Louisville, it would cost complainant one dollar per car more to have his freight transported to Louisville over respondent's line than it would if it was transported *via* the Louisville, New Albany & Chicago Railway Company and the Kentucky & Indiana Bridge Company.

"10. That respondent has never established and refuses to establish any through route or rate to Louisville or other points south, on freight received from the Louisville, Evansville & St. Louis Railway Company except over its own line to Louisville, and that it has not established and refuses to establish any through route or rate to Louisville *via* the Louisville, New Albany & Chicago Railway Company and the Kentucky & Indiana Bridge Company.

"11. That New Albany, Ind., is a terminal point of respondent's railway; that between Vincennes Street and State Street in said city the respondent's tracks are laid almost wholly in the public highways; that at State Street it has its freight station and principal passenger station; that at Vincennes Street and the intermediate streets between it and State Street respondent has passenger stations at which passenger trains pass and stop at intervals of thirty minutes between 5:30 A. M. and 12 P. M. every day; that between Vincennes Street and State Street there are ——— private sidings connecting respondent's tracks with various business establishments in New Albany, from and to which respondent is constantly receiving and delivering cars shipped from and to said establishments; that the main and side tracks of respondent between Vincennes Street and State Street in New Albany are in constant and necessary use by respondent in delivering, receiving, shifting and transporting freight consigned to and shipped from New Albany.

"12. That respondent has no traffic arrangement or contract with the Louisville, New Albany & Chicago Railway Company respecting interstate traffic, and especially traffic passing from New Albany to Louisville from respondent's own line; that it has no interest in or control over the Louisville, New Albany & Chicago Railway Company or the Kentucky & Indiana Bridge Company, over which complainant's freight would pass in order to reach Louisville.

"13. That a compliance with complainant's demands would only require the respondent to switch complainant's cars from State Street to Vincennes Street in the City of New Albany, for which service it would receive a switching charge.

"14. That the respondent and the Louisville Bridge Company, over which respondent operates its line, are both controlled by the Pennsylvania Railroad Company."

This last statement was amended by consent on the hearing, to the effect that the respondent Company owns a majority of the stock of the bridge company, and the Pennsylvania Railroad Company owns a majority of the stock of the respondent, and the facts are so found.

Upon the agreed facts the complainant insists that it is the duty of the respondent Company to perform the switching service in the City of New Albany necessary to transfer the cars con-

taining his freight from the Louisville, Evansville & St. Louis Consolidated Railroad to the tracks of the Louisville, New Albany & Chicago Railway, to be taken over the Kentucky & Indiana Bridge, and thence to the distillery of the complainant. The ground upon which this duty is supposed to rest is that the freight is interstate traffic; that the road of the respondent, connected with the branch over which the freight in question must move in order to reach the Kentucky & Indiana Bridge, is engaged in interstate commerce, and subject to the provisions of the Act to Regulate Commerce, and is not therefore at liberty to refuse to handle the traffic in question as desired by the complainant.

The respondent Company denies that it is required by law to perform this switching service, and interposes three grounds of objection to the complainant's claim. The first is that the part of the road over which the switching service is desired is wholly within the State of Indiana, and therefore not subject to the provisions of the Act to Regulate Commerce in respect to this traffic, nor to the jurisdiction of the Commission. The second is that the respondent cannot be required under the Statute to give the use of its tracks and terminal facilities to another carrier engaged in like business. The third is that the respondent has a line of its own over the Louisville Bridge, by which it can deliver the traffic in question upon the terminal tracks of the Kentucky & Indiana Bridge Company, to be taken to complainant's distillery, and that it has a lawful right to discriminate in favor of its own line as against competing lines, and to refuse to unite in any through route or through rate that will result in diverting traffic from its own line.

The several objections, though differing in form, resolve themselves into the general proposition that the Commission has not authority under the Statute to order the performance of the service in question, which is the forwarding of interstate traffic in the manner desired by the complainant. It is more in this form than in the separate discussion of the particular points raised that the case will be considered. Some phases of the general question have had consideration in the cases cited on the hearing, and have also been referred to in the annual reports of the Commission. *Missouri & Ill. R. T. & L. Co. v. Cape Girardeau & S. W. R. Co.* 1 Inters. Com. Rep. 607, 1 I. C. C. Rep. 30; *New Jersey Fruit Exchange v. Central R. Co. of N. J.* 2 Inters. Com. Rep. 84, 2 I. C. C. Rep. 142; *Ex parte Koehler*, 30 Fed. Rep. 867; *Heck v. East Tenn. V. & G. R. Co.* 1 Inters. Com. Rep. 775, 1 I. C. C. Rep. 495; 2d Annual Rep. I. C. C. pp. 4, 5, 25, & 6, 70.

None of these cases are decisive of the broad question now presented, and involved other points upon which they mostly turned.

By the agreed facts the branch or portion of road over which the desired service is sought to be enforced is wholly in one State, but it is part of a road or line engaged in interstate commerce. The service required is the forwarding of carloads of interstate freight from the terminus of the road by which it is brought to New Albany over respondent's road for about a mile to another road to be carried by the latter into Kentucky, the respondent having a track con-

nection with both the other roads. It is not material whether the service be described as transportation, forwarding or handling. The several lines or roads are owned and operated separately, and are not under any common control, management or arrangement for a continuous carriage or shipment of interstate commerce.

The provisions of the Act by its terms "apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment, from one State or Territory," etc. The same section contains the proviso: "That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid."

Upon the import of these provisions of the Statute, considered with the Act as a whole so far as it has any bearing on these provisions, the controversy mainly arises.

The vital questions in this inquiry are, To what extent, both as regards the traffic and the transportation agencies engaged in it, was it the intention of Congress, as shown by the language of the Statute, to regulate interstate commerce? and, What was intended to be excluded from regulation by the proviso: "That the provisions of this Act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage or handling of property wholly in one State," etc.?

One theory, and this is the basis of the complainant's contention, is, that traffic which by reason of its origin and destination is interstate does not lose its distinctive character when taken up and carried forward by a state carrier to a destination in the State in which such carrier operates, or when so carried to be delivered to another carrier in the same State for further transportation beyond the limits of the State, but that the traffic remains interstate throughout its transit, with whatever incidents pertain to such commerce, and that the various successive carriers engaged in it are subject to the authority of Congress in that business and are embraced in the regulations of the Act. And furthermore, that when a carrier in one State engages in interstate commerce it becomes a national agency and subjects itself necessarily to the provisions of the Act to Regulate Commerce for all the legitimate purposes of such commerce, and must accept and forward the traffic offered indifferently, without unjust discrimination or undue preference.

Another theory is, and on this the respondent is understood to rely, that a state carrier which has not entered into arrangements for continuous carriage among the States does not become subject to the Act to Regulate Commerce by engaging in the carriage within one State of interstate traffic, and that it incurs no obligations under that Act either in respect to the traffic actually carried or other interstate traffic offered for carriage, but may, as an independent carrier, wholly in one State, accept or refuse interstate traffic in its discretion, and

fix such conditions with regard to rates or otherwise as it may desire.

This is claimed to be the necessary effect of the proviso in the first section of the Act, and under that proviso it is said that the service by a carrier wholly in one State, when not under an arrangement for a continuous carriage, is an independent employment of a separate agency to which the Act does not apply.

The extent of the regulation contemplated by the Act to Regulate Commerce is therefore directly presented, and perhaps the intention of Congress in the use of the language employed may more clearly appear by some reference to the principles that have been judicially declared to apply to interstate commerce, in the light of which the Statute was framed.

The commerce intended to be regulated by the Act is that over which the jurisdiction of the law-making power extends, and the regulations provided must be deemed co-extensive with the scope of the power, and with only such limitations as the Act itself makes. The jurisdiction to regulate applies to commerce with foreign nations, and among the several States, and with the Indian tribes. In defining commerce among the States the courts have declared that "'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary of each State, but may be introduced into the interior." *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 194 [6 L. ed. 69].

The immunity of interstate commerce from all interference by state authority has been declared in a variety of forms in which the question has arisen. This immunity applies from the beginning to the end of the transportation, alike to the passage out of the State in which it originates, through any other State, and into the State to which it is shipped to its point of destination. While in transit, and until it reaches the consignee and becomes mingled with his general property, it is clothed with the rights and subject only to the rules of interstate commerce. The freedom of its movement may not be impeded, nor rates and charges prescribed for its carriage by any action of a State. *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244].

This principle has been further applied as follows: "Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity has commenced. The fact that several different agencies are employed in transporting the commodity, some acting entirely in one State and some acting through two or more States, does in no respect affect the character of the transaction. To the extent in which each agency acts in that transportation, it is subject to the regulation of Congress." *The Daniel Ball*, 77 U. S. 10 Wall. 565 [19 L. ed. 1002]. In the same case it was further said: "We are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the States, when that agency extends through two or more States, and when it is confined in its action entirely within the limits of a single State. If its authority does not extend to an agency in such commerce when that agency is

confined within the limits of a State, its entire authority over interstate commerce may be defeated. Several agencies combining, each taking up the commodity transported at the boundary line at one end of a State and leaving it at the boundary line at the other end, the federal jurisdiction would be entirely ousted, and the constitutional provision would become a dead letter."

The immunity of interstate and foreign commerce from the taxing power of a State has also been applied. When goods have begun to be transported from the State in which they are produced they have become the subjects of interstate commerce and as such are subject to national regulation and cease to be taxable by the State of their origin, nor can they be taxed by another State while on the route to their destination, though detained temporarily within a State by some impediment to transportation or other cause. *Coe v. Errol*, 116 U. S. 517 [29 L. ed. 715].

A State cannot impose a tax upon the gross receipts of railroads for the carriage of freights and passengers out of, into or through the State, for the reason that it imposes a burden upon commerce among the States. *Fargo v. Michigan*, 121 U. S. 220 [30 L. ed. 888].

The same principle was applied to a telegraph company in a case arising under a state statute imposing a general license tax. It was held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such a tax is a burden on that commerce and amounts to a regulation of it. *Leloup v. Port of Mobile*, 127 U. S. 640 [32 L. ed. 311].

The exclusive authority of Congress to regulate commerce among the States is not restricted to goods, but applies to instrumentalities and persons as well, and alike on the navigable waters and on the land. In *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 229 [6 L. ed. 78], it is said: "Commerce in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care and various mediums of exchange become commodities and enter into commerce; the subject, the vehicle, the agent and their various operations become the objects of commercial regulation." In *Sherlock v. Alling*, 93 U. S. 103 [23 L. ed. 820], it is said: "The commercial power conferred by the Constitution is one without limitation. It authorizes legislation with respect to all the subjects of foreign and interstate commerce, the persons engaged in and the instruments by which it is carried on." In *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 [29 L. ed. 158], it is said, in reference to the commerce power of Congress: "It is the power to prescribe the rules by which it shall be governed—that is, the conditions upon which it shall be conducted. That it embraces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

And in the exercise of its power to regulate commerce among the States Congress has au-

thority to construct, or authorize individuals or corporations to construct, railroads across the States or Territories of the United States. *California v. Central Pac. R. Co.* 127 U. S. 1 [32 L. ed. 150]. The same power also embraces the construction of bridges across navigable rivers, their form and character, and the extent to which they may affect navigation. *Newport & C. Bridge Co. v. United States*, 105 U. S. 470 [26 L. ed. 1143]. This power may be exercised without the consent and against the protest of a State to authorize a state railroad company to erect bridges over navigable waters, piers and other instrumentalities to be used for interstate commerce, and to take lands belonging to a State or to individuals necessary for these purposes. *Stockton v. Baltimore & N. Y. R. Co.* 32 Fed. Rep. 9.

In *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1 [24 L. ed. 708], and other cases following that decision, the principle is declared that the exclusive powers of regulation by Congress are not confined to the instrumentalities of commerce in use when the Constitution was adopted, but keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances.

The reasons for exclusive regulation by Congress are set forth in many cases. In the case of the *State Freight Tax*, 82 U. S. 15 Wall. 279 [21 L. ed. 162], it is stated in substance that whenever the subjects affected by the regulation of Congress are in their nature national, or admit of one uniform system or plan of regulation, they are within the exclusive authority of Congress: that transportation of passengers or merchandise through a State, or from one State to another, is of this nature, and that it is of national importance, in order to prevent oppressive state interference, and guard against commercial embarrassment, that over that subject there should be but one regulating power.

The commerce not subject to national regulation has frequently been defined. In one case it was said: "The rule that the regulation of commerce which is confined exclusively within the jurisdiction and territory of a State and does not affect other nations or States or the Indian tribes, that is to say, the purely internal commerce of a State, belongs exclusively to the State, is as well settled as that the regulation of commerce which does affect other nations or States or the Indian tribes belongs to Congress." *Western U. Tel. Co. v. Texas*, 105 U. S. 466 [26 L. ed. 1069].

And in another case the court said: "The internal commerce of a State—that is, the commerce which is wholly confined within its limits—is as much under its control as foreign commerce or interstate commerce is under the control of the general government." *Sands v. Manistee R. Imp. Co.* 123 U. S. 295 [31 L. ed. 151].

In the elaborate report of the Senate Committee, made in January, 1886, reference is made to some of the foregoing cases, and the case of *Louisville & N. R. Co. v. Tennessee Railroad Commission*, 19 Fed. Rep. 679, is referred to approvingly. In this case it was decided that the power of the States relating to commerce and its incidents "is limited to domestic transportation, which means that car-

ried on exclusively within the boundaries of a State, and transportation can be domestic only when it begins and ends within those boundaries; and this definition cannot, for the purpose of enlarging state authority, be held to include so much of a transportation on a continuous shipment between two or more States as will cover the distance traveled within the limits of any one of those States; for this construction would destroy the exclusive power of Congress over interstate transportation, and enable the States to restrict, obstruct or impair that freedom of commerce between the States which it was the object of the constitutional provision to permanently secure. It can only include the transportation carried on upon roads lying wholly within the State, or else it may be to shipments beginning and ending in the State, without reference to the character of the road in that regard."

After an extended review of the decisions of the courts, the committee states its conclusions with regard to the regulation of commerce by Congress as follows:

"The decisions to which reference has been made conclusively establish, in the judgment of the committee, the following propositions as to the power of Congress, under the commercial clause of the Constitution, to regulate all railroads engaged in interstate commerce within the United States:

"(1) Commerce, in the meaning of the Constitution, includes the transportation of persons and property from place to place by railroad.

"(2) Commerce among the States includes the transportation of persons and property from a place in one State to a place in another State. Interstate commerce is all commerce that concerns more States than one, and embraces all transportation which begins in one State and ends in or passes through another State.

"(3) The power to regulate such commerce is vested exclusively in Congress, without any limitations as to the measures to be adopted or the means to be employed in its discretion for the public welfare.

"(4) The States being without power to regulate interstate transportation, the people must look to Congress alone for whatever regulation may be necessary as to interstate commerce."

In some of the cases language is used indicating continuity of carriage among States, or a contract for that purpose, as a feature of the transportation that de vests it of state regulation and gives it the character and immunities of interstate commerce. Such phrases as "transportation of goods through more than one State in one voyage," "contract that is a unit for the entire transportation," "continuous transportation over several States," are used in *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 [30 L. ed. 244], and evidently were regarded as elements of importance in the decision of the case.

They may have been referred to as facts of that case, which related to rates made in disregard of the rule prescribed by the State, and not in the sense of jurisdictional conditions; and in nearly all other cases where interstate commerce has been discussed no allusion is made to an entire contract for continuous car-

riage as essential to exclusive federal jurisdiction. Obviously, in the transportation of freight a bill of lading specifying its destination is necessary, and this implies one voyage for the property. And while an initial carrier cannot contract for a joint rate at less than the aggregate of the locals in the absence of an arrangement for the purpose, it can name the total rate at the sum of the locals in effect, and bill through to destination in that way. The Act, in describing the carriers that are subject to its provisions, defines them as those engaged in the transportation of passengers or property "for a continuous carriage or shipment." The words "under a common control, management or arrangement," preceding those last quoted, may be somewhat ambiguous as to their application, whether to combined rail and water carriers or generally to all. But that they are not intended as a limitation upon jurisdiction, or of the subjects regulated, is evident from the seventh section, which provides—

"That it shall be unlawful for any common carrier subject to the provisions of this Act to enter into any combination, contract or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this Act."

The term "continuous" no doubt implies joined, connected, without interval or interruption, for some purpose inconsistent with further carriage. Carriage does not cease to be continuous by incidental halts for inspection, customs purposes, or transfers from one carrier to another. When a shipment is continuous the carriage is deemed continuous for the purposes of the Act. In some branches of law a broad construction has been given to "continuous voyage," extending it beyond a stopping point where transshipment is to be made, and depending upon original intention and ultimate destination. *The Springbok*, 72 U. S. 5 Wall. 1, 28 [18 L. ed. 480, 486]; 3 Whart. Internat. Law, §§ 363, 388.

The sense in which "continuous carriage or shipment" is used in the Act to Regulate Commerce is defined by the Act itself in the section above cited, and carriers are not allowed by any device to "prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination."

As has been seen, the principles that apply to interstate commerce, as enunciated by the courts, constitute a comprehensive system, all the parts of which are embraced within the sphere of federal regulation. These principles may properly guide in the interpretation of the provisions of the Act, and indicate the ex-

tent of the regulation intended, so far as the power to regulate has been exercised. Plainly the Act does not in all respects go to the extent of the power. For example, it does not apply to independent carriers by water. The provisions adopted were perhaps regarded as sufficient until experience should show a necessity or propriety for further legislation. The general purpose of these provisions is to bring interstate commerce under a uniform system of defined rules. These rules are for the government of a business that is national in its character, that has a right of way through States and Territories, and cannot be hindered or obstructed by any other authority than Congress, and which includes all structures, agencies and instrumentalities employed in the business, as well as the commodities that are carried. Only commerce not national in its character—that is, the purely internal commerce of a State—is not subject to rules prescribed by the national authority. The boundary of authority is therefore clearly marked, and the Statute must be presumed to correspond with the scope of the power. This construction will give legitimate effect to all its provisions. A remedial statute is to be construed in furtherance of its declared objects.

Every common carrier, whether wholly by railroad or conjointly by railroad and water, engaged in the transportation of interstate or foreign commerce for a continuous carriage or shipment is declared to be subject to the Act. Transportation wholly within one State, unless for a shipment to or from a foreign country, is declared to be excluded. What is the scope of this exclusion? What is meant by transportation wholly within one State? The answer seems plain. It is evidently the transportation that is an element of the commerce not subject to the jurisdiction of Congress. This commerce the courts say is only that "which is confined exclusively within the jurisdiction and territory of a State and does not affect other nations or States or the Indian tribes—that is to say, the purely internal commerce of a State;" "the commerce which is wholly confined within the limits of a State." Under this principle transportation wholly within one State, to which the Act does not apply, must originate and end in the same State. If the transportation be part of a voyage from one State to another, or of a shipment to or from a foreign country, it is interstate or foreign commerce and subject to the Act.

And under the rule that commerce includes all the agencies employed in it, when a carrier located and operated only within one State engages in interstate transportation it becomes an instrument of commerce among the States, and is subject for all the purposes of such commerce to the provisions of the Act. Such a carrier was in contemplation in the provision in the sixth section respecting "continuous lines or routes operated by more than one common carrier." While so much of its business as is confined wholly to the limits of its State is not affected it cannot change the character nor impair the rights of interstate business. And when it becomes a national agency it cannot limit the extent of its obligations. It must comply with the rules prescribed by national authority, and neither territorial

boundary lines nor corporate existence derived from another source can prove effectual to relieve it from the rules of the service in which it engages. In this respect it does not differ from a person. If its relation to commerce is that of a national carrier its obligations are those prescribed by the national authority for such carriers. It cannot engage in the service and reject the obligations imposed for the regulation of the service. One of these obligations, founded on the public interests, is impartiality in receiving, forwarding and delivering interstate traffic. There can be no preferential service in this respect as regards persons, carriers or traffic, and no refusal to do for some what is done for others, nor any unjust discrimination in charges.

The necessary result of these considerations is that the respondent's contention with regard to its relations to the Law, and its corresponding duties, must be overruled. Its position is, in brief, that it is a carrier wholly in one State, and therefore is not subject to the Act. The fact that the particular transportation demanded in this case is wholly in one State is true, but the conclusion deduced from it is erroneous. It is one of the admitted facts in the case that the respondent is engaged in interstate transportation, and the traffic in question is interstate traffic. These facts are controlling, and make it the duty of the respondent to receive and forward it.

To this extent the requirements of the Act are plain. But at this point a difficulty is encountered, and, owing to the omission of some provisions in the Act, the order asked by the complainant cannot be made. He asks a through route for the cars containing his goods from one carrier over the tracks of the respondent to another carrier, to be taken by the latter further on toward their destination. This claim is founded on the third section of the Act. It is to be regretted that the language of that section with regard to exchanges between connecting lines is not clearer and more definite. Whatever may have been intended to be expressed by the greatly condensed language of that section, it apparently contains no provisions for a compulsory ordering of through routes or through rates over lines that physically connect. The provisions of the English Statute, which are full and specific for these purposes, were before the law-making body when the Act was framed, and they were not incorporated. This would seem to indicate that, for reasons deemed satisfactory, they were not intended to be adopted. The Commission has given full consideration to this point in the case of *Little Rock & M. R. Co. v. East Tenn. V. & G. R. Co.*, 2 Inters. Com. Rep. 454, 3 I. C. R. Rep. 1, and there ruled that the authority to order a through route was not conferred by the Act. The conclusion then reached is adhered to in this case.

The point was considered and passed upon by the United States Circuit Court for the Sixth Circuit, in the case of *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, ante, p. 351, 37 Fed. Rep. 567, and the court held that this "Commission is not invested with authority to establish through routes nor to fix through rates between connecting lines. The English Act of 1873, amendatory of the Act of 1854,

did confer such authority upon the English Commission; but our Act to Regulate Commerce contains no such provision and confers no such authority."

A decision upon the same point has recently been announced by the United States Circuit Court for the Eighth Circuit. The court held that "a court of equity has no power either at common law or under the Interstate Commerce Act to compel a railroad company to enter into a contract with another company for a joint through rate or joint through routing of freight or passengers." *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763.

Until there shall be further legislation or more authoritative judicial interpretation the point may be regarded as adjudicated by the rulings of the Commission and as having judicial sanction.

In this case the respondent does not refuse to accept and forward the freight. It professes willingness to do so, but insists on the right to make use of its own line for the purpose, and denies that the shipper can require a through routing over only a part of the respondent's line to transfer freight between two other lines with which the respondent has no arrangement for through routes. It is not a question, therefore, of forwarding or not forwarding interstate traffic to its destination, but of the manner of doing it, and whether the shipper can determine that for himself irrespective of the objections of the carrier, and call upon the Commission and the courts to enforce his claim.

The Commission not having the power under the Statute to make the order asked by the complainant, *the complaint must be dismissed.*

EDWARD KEMBLE

v.

THE LAKE SHORE AND MICHIGAN SOUTHERN R. CO., The New York Central and Hudson River R. Co. and The Boston and Albany R. Co.

(No. 251.)

THE SEPARATE ANSWER of the New York Central and Hudson River Railroad Company to the petition of Edward Kemble, filed Feb. 24, 1890; abstract of complaint, *ante*, p. 720.

First. This respondent has no knowledge or information other than that furnished by the petition as to the allegations that the petitioner is located at Boston, Mass., and engaged in carrying on the flour and grain business in said City of Boston, under the firm name of Kemble & Hastings.

Second. This respondent admits that the respondents are Railway Companies duly incorporated, as alleged in the section of the petition designated "II."; and, further answering, says and alleges that the railroad of The Lake Shore and Michigan Southern Railway Company, extending from its western terminus in the City of Chicago to its eastern terminus in the City of Buffalo, 538 miles, forms, with the railroads of this respondent, extending from its western terminus in the City of Buffalo to Al-

bany, and thence over the bridges of the Hudson River Bridge Company to East Albany, and thence to the City of New York, its eastern terminus, 446 miles, a continuous line from Chicago to New York; and that the said railroad of the Lake Shore and Michigan Southern Railway Company forms, with that railroad of this respondent extending from the City of Buffalo to the City of Albany, thence over the bridges of the Hudson River Bridge Company to East Albany, 301 miles, and with the railroad of The Boston and Albany Railroad Company, extending from East Albany to the City of Boston, 201 miles, a continuous line from Chicago to Boston.

Third. This respondent admits the allegations set forth in the sections of the petition designated "III." and "IV."

Fourth. This respondent denies the allegations set forth in the sections of the petition designated "V.", "VI.", "VII.", "VIII.", "IX." and "X.", except that it admits that the rate on sixth-class merchandise made by The Lake Shore and Michigan Southern Railway Company and this respondent, from Chicago to New York, is twenty-five cents per hundred pounds, or seventy-five dollars per carload of thirty thousand pounds; and that the charge for lighterage in the Harbor of New York (when that service is agreed to be performed), at the rate of three cents per hundred pounds, is deducted from the amount earned for transportation before a division thereof between the said The Lake Shore and Michigan Southern Railway Company and this respondent; and that the rate on said sixth-class merchandise from Chicago to Boston, made by the respondents, is thirty cents per hundred pounds, or ninety dollars per carload of thirty thousand pounds; and that the rate from Chicago to Boston for sixth-class merchandise to be from Boston carried by water to points on the coast east of Portland is the same as the rate from Chicago to New York; and this respondent says and alleges that the difference between the Chicago-Boston and the Chicago-New York rate on sixth-class merchandise is just and reasonable, for many reasons, such as the longer distance from Chicago to Boston than from Chicago to New York, the increased cost of service from Chicago to Boston on that portion of the route from East Albany to Boston, by reason of the heavier grades of the Boston and Albany Railroad, the necessity of smaller trains and a greater number of engines, a larger expenditure in fuel and for train service, a longer detention of cars going to Boston, a much greater volume of business from Chicago to New York than Chicago to Boston, the much greater storage facilities in New York than in Boston, and the much greater competition between the greater number of railways reaching New York than Boston, and by the water lines reaching New York; and that the rate from Chicago to points on the coast east of Portland is just and reasonable by reason of the competition of rail and water lines reaching those points; all of which matters and many others were fully proved in the investigation by the Interstate Commerce Commission in the complaint of the Boston Chamber of Commerce against these respondents, discussed and found in the opinion and decision therein [1 Inters. Com. Rep.

754], and by which opinion and decision the above-named petitioner should be estopped, he having been the chief promoter of the complaint of the Boston Chamber of Commerce, and verified the petition therein.

Wherefore, this respondent asks that the complaint of the petitioner be dismissed.

Duly verified.

GEORGE RICE

v.

THE UNION PACIFIC R. CO. *et al.*

(No. 247.)

ANSWER of Wabash Railroad Company, filed March 20, 1890, to the amended petition of George Rice. See complaint, *ante*, p. 638.

Now comes the Wabash Railroad Company, and for answer to the amended petition of George Rice it denies that it is now transporting, or that it has any time within the past two years transported, over its railroad, gasoline or naphtha, or any other product of petroleum, as interstate commerce, and deducted for some shippers twelve or any other per cent from the assumed weight of such product, without making similar deductions of a like proportion for all other shippers of the same product of petroleum carried by it as interstate commerce under similar circumstances and conditions.

Wherefore, having fully answered, said defendant asks to be discharged, with its costs.

Duly verified.

Whereupon at a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of March, A. D. 1890, the following order was made:

Upon reading the amended petition in the above-entitled case and the answer heretofore filed thereto by the Wabash Railroad Company, and it appearing that the said answer is not responsive to the ninth paragraph of the amended petition in that it neither admits nor denies that the said Wabash Railroad Company has made or does make a deduction from the assumed weight of naphtha, gasoline or other products of petroleum, without making the same deduction for all products of petroleum, but says that it makes no such deduction for some shippers without making the same deduction for all shippers of the same products;

On motion of the petitioner, *It is ordered*, That the said Wabash Railroad Company, within twenty days from the service of this order, answer definitely the allegations contained in said paragraph of the amended petition, which is as follows:

'IX. It is assumed by many of the railroads that the average weight of the products of petroleum is six and three tenths pounds per gallon, at which weight it has for two years last past been generally customary to charge for the transportation of gasoline and naphtha, but that the Wabash Railroad Company, and the Dunkirk, Allegheny Valley and Pittsburgh Railroad Company, and the Lake Shore and Michigan Southern Railway Company, and the Pittsburgh, Cincinnati and St. Louis Railway

Company, and the Pittsburgh, Fort Wayne and Chicago Railway Company, during said period of time, or a portion thereof, for some shippers in the transportation over said lines as interstate commerce of gasoline and naphtha, or of one or more of the products of petroleum, have severally made and yet continue to make deductions of twelve per cent or other quantity from the assumed weight of such product, so that charges thereon are collected only for the actual weight so transported, or for less, without making similar deductions of like proportions for all shippers of the products of petroleum carried under similar circumstances and conditions.'

ADVANCES AND REDUCTIONS IN JOINT AND INDIVIDUAL RATES, FARES AND CHARGES.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 1st day of May, A. D. 1890,

Present:

Hon. William R. Morrison,
Hon. Augustus Schoonmaker,
Hon. Walter L. Bragg,
Hon. Wheelock G. Veazey,
Commissioners,

The following order was adopted:

Whereas, the Act to Regulate Commerce, among other things, provides that "the Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs," and also authorizes and requires the Commission to execute and enforce the provisions of that Statute;

And, whereas, some of the carriers subject to the provisions of that Statute, recently, in giving notice to the Commission by telegraph of proposed advances or reductions in joint rates, fares and charges, sometimes fail to give such notice for the requisite time required by the Statute, and in some instances fail to forward to the Commission the printed tariffs evidencing the changes of which notice has been so given by telegram, and sometimes give such brief and indefinite statements in their telegrams relating to the proposed changes by reference to tariffs made by other railroad lines as to be unintelligible, and in other instances fail to state the points at, from or between which such proposed changes are to be effective;

And, whereas, it is distinctly provided by the sixth section of said Statute that it shall be unlawful under the penalties provided by said Statute for any carrier subject to its provisions to make any advance in joint rates, fares or charges, shown upon joint tariffs, except in the manner provided by said Statute, namely, in case of an advance in rates that there must be "ten days' notice to the Commission which shall plainly state the changes proposed to be made in the schedule then in force and the time

when the increase of rates, fares or charges will go into effect," and further that "no reductions shall be made in joint rates, fares and charges except after three days' notice to be given to the Commission as is above provided in case of an advance of joint rates;"

Now, therefore, pursuant to said provisions of said Statute, the Interstate Commerce Commission hereby orders and gives notice to every carrier subject to the provisions of said Statute:

First. That hereafter no notices of advances or reductions by telegraph containing any of the defects or omissions above specified will be recognized or accepted by the Commission as a compliance with the Law. Every telegram sent to the Commission by any of said carriers announcing a proposed advance or reduction, as the case may be, must be given to the Commission for the full time in each instance provided by the Statute, and must plainly state the changes proposed to be made in any such joint rates, fares or charges appearing upon any of their printed tariffs in force, and the date when such changes are proposed to be put into effect, the name of the company or line making them, the official designation of the officer sending the telegram, and the telegram in every instance must be immediately followed by a copy of the printed tariff setting forth the changes proposed to be made, forwarded by mail to the Auditor of the Interstate Commerce Commission, Washington, D. C., to which printed tariff so sent must be attached a copy of said telegram announcing the changes proposed to be made and set forth in said tariff for the purpose of identifying the same.

Second. It is further ordered by the Commission, pursuant to the provisions of the Statute as aforesaid, that any of said carriers giving notice to the Commission by telegraph or otherwise of any proposed advances or reductions in joint rates, fares and charges shown upon joint tariffs in force shall, at the same time, post, for the information of the public, at each station upon its line at which such changes are proposed to be made, in two public and conspicuous places, a brief statement plainly setting forth all changes it proposes to make by advance or reduction in joint rates, fares and charges as shown upon joint tariffs then in force mentioned in its telegram to the Commission,
2 INTER S.

and the day when the same will go into effect and from and to what points on the line covered by said joint tariffs then in force it is proposed that such advances or reductions shall go into effect, which statement shall bear date the day that it is posted and be signed by the general freight agent or traffic manager or general passenger agent, as the case may be, of every company on whose road said stations are situated, and on the day when said joint tariff as so changed shall go into effect it shall be the duty of the carrier to post two copies of such joint tariff as changed by such advance or reduction in a public and conspicuous place at its depot at each station at which such changes are made as aforesaid, and keep the same so posted, as aforesaid, for public information.

Third. It is further ordered by the Commission, pursuant to the provisions of said Statute and the occasional evils resulting from sending telegrams to the Commission by carriers subject to the provisions of the Statute in reference to proposed advances and reductions of rates, fares and charges upon their individual lines, which are not joint rates, fares and charges, and in which telegrams there are sometimes the same defects and omissions as above stated in regard to telegrams sent to the Commission relating to proposed advances and reductions in joint rates, fares and charges, that so much of this order as declares that the Commission will not recognize or accept as a compliance with law telegrams containing such defects or omissions, shall apply also to cases of rates, fares and charges made by a single company over its own lines alone, and telegrams in relation to the same must comply in their details and be forwarded to the Auditor of the Interstate Commerce Commission, Washington, D. C., in the same manner as telegrams are required to be sent in cases of proposed changes of joint rates, fares and charges as above set forth.

Fourth. It is further ordered by the Commission that a printed copy of this order be served by the secretary of the Commission mailing a copy of the same to each of the carriers referred to in this order, properly attested by the seal of the Commission.

(A true copy).

Edw. A. Moseley, *Secretary.*

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APPENDIX IV.

INTERSTATE COMMERCE COMMISSION.

REVISED AND AMENDED

RULES OF PRACTICE

IN

Cases and Proceedings before the Commission

ADOPTED

JUNE 8, 1889.

At a session of the Commission, held at its office in the City of Washington, on the 8th day of June, 1889, it was

Resolved, That the following revised and amended rules of practice in cases and proceedings before the Interstate Commerce Commission be established and printed, and that sections 13 and 17 and part of section 18 of the Act to Regulate Commerce, and sections 863 and 864 of the Revised Statutes of the United States, be printed in connection with the rules.

A true copy of the record.

Attest:

[L. S.]

EDWARD A. MOSELEY,

Secretary.

INTERSTATE COMMERCE COMMISSION.

SECTIONS 13 AND 17 AND PART OF SECTION 18 OF AN ACT TO REGULATE COMMERCE.

(Approved February 4, 1887, amended March 2, 1889.)

SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this Act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission.

If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of Law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

SEC. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business; but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said Commission shall have an official seal, which shall be judi-

cially noticed. Either of the members of the Commission may administer oaths and affirmations and sign subpoenas.

SEC. 18. * * * Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

RULES OF PRACTICE IN CASES AND PROCEEDINGS BEFORE THE COMMISSION.

PUBLIC SESSIONS.

I. The general sessions of the Commission for the hearing of contested cases will be held at its office in The Sun building, No. 1315 F Street, northwest, Washington, D. C., on such days and at such hour as the Commission may designate.

Sessions for receiving, considering and acting upon petitions, communications and applications relating to business before the Commission, and also for considering and acting upon any business of the Commission other than contested cases, will be held at its said office at 11 o'clock A. M. on Monday of every week when the Commission is at Washington.

When special sessions are held at other places such regulations as may be necessary will be made by the Commission.

PARTIES.

II. Where a complaint concerns only anything done or omitted to be done by a single carrier, no other need be made a party; but if it relates to joint tariffs, or matters in which two or more carriers doing business under a common control, management or arrangement, for a continuous carriage or shipment, are interested, all the carriers constituting such line must be made parties.

A complainant may embrace several carriers, or lines of carriers, operated separately, in the same proceeding, when the subject matter of the complaint involves substantially the same alleged violation of the Law by the several carriers or lines.

Persons or carriers not parties may apply, in any pending case or proceeding, for leave to intervene and to be heard upon the questions involved.

COMPLAINTS UNDER SECTION 13.

III. Complaints under section 13 of the Act, of anything done or omitted to be done by any common carrier subject to the provisions of the Act in contravention of the provisions thereof, must be made by petition, which must briefly state the facts which are claimed to constitute a violation of the Act, and must be verified by the petitioner, or by some officer or agent of the corporation, society, or other body or organization making the complaint, to the effect that the allegations of the petition are true to the knowledge or belief of the affiant.

The complainant must furnish as many written or printed copies of the complaint or petition as there may be parties complained against to be served. When a complaint is made the name of the carrier or carriers complained against must be set forth in full, and the address of the petitioner, and the name and address of his attorney or counsel, if any, must be indorsed upon the complaint.

The Commission will cause a copy of the complaint to be served upon every common carrier complained against, by mail or personally, in its discretion, with notice to the carrier or carriers to satisfy the complaint or to answer the same in writing within the time specified.

ANSWERS.

IV. A carrier complained against must answer the complaint made within twenty days from the date of the notice, unless the Commission shall in particular cases prescribe a shorter time for the answer to be served; and in such cases the answer must be made within the time prescribed. The original answer must be filed with the Commission, at its office in Washington, and a copy thereof must at the same time be served upon the complainant by the party answering, personally or by mail, who must forthwith notify the Secretary of the Commission of the fact. The answer must admit or deny the material allegations of fact contained in the complaint, and may set forth any additional facts claimed to be material to the issue. The answer must be verified in the same manner as the complaint. If a carrier complained against shall make satisfaction before answering, a written acknowledgment of satisfaction must be filed with the Commission, and in that case the fact of satisfaction without other matter may be set forth in the answer filed and served on the complainant. If satisfaction be made after the filing and service of an answer, a supplemental answer setting forth the fact of satisfaction may be filed and served.

V. If a carrier complained against shall deem the complaint insufficient to show a breach of legal duty, it may, instead of filing an answer, serve on the complainant notice for a hearing of the case on the complaint; and in case of the service of such notice, the facts stated in the complaint will be taken as admitted. A copy of the notice must at the same time be filed with the Commission. The filing of an answer will not be deemed an admission of the sufficiency of the complaint, but a motion to dismiss for insufficiency may be made at the hearing.

SERVICE OF PAPERS.

VI. Copies of notices or other papers must be served upon the opposite parties to the proceeding, personally or by mail; and when any party shall have appeared by attorney the service upon the attorney shall be deemed proper service upon the party.

AFFIDAVITS.

VII. Affidavits to a petition, complaint, or answer may be taken before any officer of the United States, or of any State or Territory, authorized to administer oaths.

AMENDMENTS.

VIII. Upon application by any petitioner or
2 INTER S.

party, amendments may be allowed by the Commission, in its discretion, to any petition, answer, or other pleading in any proceeding before the Commission.

ADJOURNMENTS AND EXTENSIONS OF TIME.

IX. Adjournments and extensions of time may be granted upon the application of parties in the discretion of the Commission.

STIPULATIONS.

X. Parties to cases and proceedings before the Commission may, by stipulation, duly signed by them and filed with the Secretary, agree upon the facts or any portion of the facts, they deem to be involved in the controversy, which agreed statement shall be regarded and used as evidence. It is desirable that the facts be thus agreed upon whenever practicable.

HEARINGS.

XI. Upon issue being joined by the service of answer, the Commission will assign a time and place for hearing the same, which will be at its office in Washington, unless otherwise ordered. Witnesses will be examined orally before the Commission, unless testimony be taken or facts agreed upon as otherwise provided in these rules. The petitioner or complainant must in all cases prove the existence of the facts alleged to constitute a violation of the Act, unless the carrier complained of shall admit the same, or shall fail to answer the complaint. Facts alleged in the answer must also be proved by the carrier, unless admitted by the petitioner.

In cases of failure to answer, the Commission will take such proof of the charge as may be deemed reasonable and proper, and make such order thereon as the circumstances of the case appear to require.

WITNESSES AND DEPOSITIONS.

XII. Subpoenas requiring the attendance of witnesses will be issued by any member of the Commission in all cases and proceedings before it, and witnesses will be required to obey the subpoenas served upon them requiring their attendance or the production of any books, papers, tariffs, contracts, agreements, or documents relating to any matter under investigation or pending before the Commission. When a subpoena is desired for the production of books, papers, or other documentary evidence, special application must be made to the Commission therefor, specifying the documentary evidence desired.

When a cause is at issue on petition and answer, each party may proceed at once to take depositions of witnesses in the manner provided by sections 863 and 864 of the Revised Statutes of the United States, and transmit them to the Secretary of the Commission, without making any application to, or obtaining any authority from, the Commission for that purpose.* (Sections 863 and 864, Revised Statutes, are appended to these rules.)

*Fees of witnesses are fixed by law at \$1.50 for each day's attendance at the place of hearing or of taking depositions, and 5 cents per mile for going to said place from his place of residence and 5 cents per mile for returning therefrom.

PROPOSED FINDINGS OF FACT.

XIII. Upon the final submission of a case to the Commission, either party may submit proposed findings of fact for the consideration of the Commission, which findings must embrace only the material facts of the case supposed to be established by the testimony.

REHEARINGS.

XIV. Application for a rehearing may be made by either party at any time within sixty days after a decision shall have been filed and made public in any case decided by the Commission. Such application must be by petition, and must state clearly the findings of fact or conclusions of law supposed to be erroneous. If the application be to give further testimony, the nature of the additional testimony must be briefly stated, and it must not be merely cumulative. The petition must be verified in the same manner as a complaint, and a copy thereof, with a notice of the time and place of the application, must be served upon the opposite party at least ten days before the time named for the application.

PRINTING OF PLEADINGS, ETC.

XV. For convenience in reading and filing, it is recommended that when practicable petitions, answers and depositions be printed or in type-writing, and that when in type-writing, or ordinary writing, only one page of the paper be used.*

COPIES.

XVI. Copies of any petition, complaint or answer in any matter or proceeding before the Commission, or of any order, decision or opinion by the Commission, and also of testimony when practicable and desired for use in the case, will be furnished without charge upon application to the Secretary by any person or carrier party to the proceeding.

ADDRESS OF THE COMMISSION.

XVII. All complaints concerning anything done or omitted to be done by any railroad carrier, and all petitions or answers or applications relative to any pending proceeding, and all letters or telegrams relating in any manner to either of these matters, must be addressed to

the Interstate Commerce Commission, Washington, D. C.

Sections 863 and 864 of the Revised Statutes, referred to under Rule XII, are as follows:

"SEC. 863. The testimony of any witness may be taken in any civil cause depending in a district or circuit court by deposition *de bene esse*, when the witness lives at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of the district in which the case is to be tried, and to a greater distance than one hundred miles from the place of trial, before the time of trial, or when he is ancient and infirm. The deposition may be taken before any judge of any court of the United States, or any commissioner of a circuit court, or any clerk of a district or circuit court, or any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the cause. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition; and in all cases *in rem*, the person having the agency or possession of the property at the time of seizure shall be deemed the adverse party, until the claim shall be put in; and whenever, by reason of the absence from the district and want of an attorney of record or other reason, the giving of the notice herein required shall be impracticable, it shall be lawful to take such depositions as there shall be urgent necessity for taking, upon such notice as any judge authorized to hold courts in such circuit or district shall think reasonable and direct. Any person may be compelled to appear and depose as provided by this section, in the same manner as witnesses may be compelled to appear and testify in court.

"SEC. 864. Every person deposing as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or by himself in the magistrate's presence, and by no other person, and shall, after it has been reduced to writing, be subscribed by the deponent."

*It is desirable, if complaints, answers, etc., are in ordinary writing or type-writing, that the size of the pages should conform as near as convenient to 9 by 13 inches, not to exceed same; if printed, 6 by 9 inches.

FORMS.

- No. 1.—Complaint against a single carrier.
 No. 2.—Complaint against joint or connecting carriers.
 No. 3.—Notice to answer.
 No. 4.—Notice to complainant.
 No. 5.—Answer.
 No. 6.—Notice by carrier under Rule V.
 No. 7.—Acknowledgment of answer.
 No. 8.—Notice of hearing.
 No. 9.—Subpœna.
 No. 10.—Notice of taking depositions under Rule XII.

These forms may be used in cases to which they are applicable, with such alterations as the circumstances may render necessary.

No. 1.

Complaint against a single carrier.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
 THE—RAILROAD COMPANY }

The petition of the above named complainant respectfully shows:

I. That (*Here let complainant state his occupation and place of business.*)

II. That the defendant above named is a common carrier engaged in the transportation of passengers and property by railroad between points in the State of — and points in the State of —, and as such common carrier is subject to the Act to Regulate Commerce.

III. That (*Here state concisely the matters intended to be complained of. Continue numbering each succeeding paragraph as in Nos. I, II, and III.*)

Wherefore the petitioner prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order be made commanding the defendant to cease and desist from said violations of the Act to Regulate Commerce, and for such other and further order as the Commission may deem necessary in the premises. (*If reparation for any wrong or injury be desired, the petitioner should state the nature and extent of the reparation he deems proper.*)

Dated at —, —, 18—.

A. B.

(*Complainant's signature.*)

STATE OF —,
County of —, ss:

A. B., being duly sworn, says that he is the complainant in this proceeding, and that the matters set forth in the foregoing petition are true as he verily believes.

A. B.

Subscribed and sworn to before me this— day of —, 18—.

C. D.

Justice of the Peace.

(*Or other officer authorized to administer oaths.*)

2 INTER S.

No. 2.

Complaint against joint or connecting carriers.
 INTERSTATE COMMERCE COMMISSION.

A. B.
against
 RAILROAD COMPANY, }

(*Here set out in full the titles of the several carriers complained against.*)

The petition of the above named complainant respectfully shows:

I. That (*Here let complainant state his occupation and place of business.*)

II. That the defendants above named are common carriers, and, under a common control, management or arrangement, for continuous carriage or shipment, are engaged in the transportation of passengers and property wholly by railroad (*or partly by railroad and partly by water, as the case may be*) between —, in the State of —, and —, in the State of —, and as such common carriers are subject to the Act to Regulate Commerce.

(*Then proceed as in form No. 1.*)

No. 3.

Notice to answer.

THE INTERSTATE COMMERCE COMMISSION,
 Washington, D. C., —, 18—.

To the —, —:

Enclosed please find a copy of a — petition filed against your company, embracing a statement of charges made by — under section 13 of the Act to Regulate Commerce, approved February 4, 1887, and amended March 2, 1889.

You are hereby called upon to satisfy the complaint or to answer the same, in writing, within twenty days from this date.

For the Commission: —, —,

Secretary.

No. 4.

Notice to complainant.

THE INTERSTATE COMMERCE COMMISSION,
 Washington, D. C. —, 18—.

—, —:
 —:

Your petition against the _____ Company, under section 13 of the Act to Regulate Commerce, approved February 4, 1887, and amended March 2, 1889, is received and placed on file.

A statement of the charges made has been forwarded to the carrier for satisfaction or answer within twenty days.

For the Commission:

No. 5.
Answer.

_____,
Secretary.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE _____ RAILROAD COMPANY. }

The above named defendant, for answer to the complaint in this proceeding, respectfully states—

I. That (*Here follow the usual admissions, denials and averments. Continue numbering each succeeding paragraph.*)

Wherefore, the defendant prays that the complaint in this proceeding be dismissed.

THE _____ RAILROAD COMPANY,

By E. F.,

(Title of officer.)

STATE OF _____,
County of _____, ss:

E. F., being duly sworn, says that he is the _____ of the _____ Railroad Company, defendant in this proceeding, and that the foregoing answer is true as he verily believes.

E. F.

Subscribed and sworn to before me this _____ day of _____, 18—.

C. D.,

Justice of the Peace.

(Or other officer authorized to administer oaths.)

No. 6.

Notice by carrier under Rule V.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE _____ RAILROAD COMPANY. }

Notice is hereby given under Rule V of the Rules of Practice in proceedings before the Commission that a hearing is desired in this proceeding upon the facts as stated in the complaint.

THE _____ RAILROAD COMPANY,

By E. F.,

(Title of officer.)

No. 7.

Acknowledgment of answer.

INTERSTATE COMMERCE COMMISSION.

Washington, _____, 188—.

_____,
_____,
_____.

The Commission acknowledges the receipt of an answer made by the _____ Railroad Company to the complaint filed against said company _____ by _____, and the same has been filed.

For the Commission:

Very Respectfully,

_____,
Secretary.

No. 8.

Notice of hearing.

INTERSTATE COMMERCE COMMISSION,

Washington, _____, 188—.

_____,
_____,
_____.
The case of _____ against the _____ Railroad Company _____ is assigned for hearing _____, 188—, at _____ A. M., at _____.

For the Commission:

_____,
Secretary.

No. 9.

Subpoena.

INTERSTATE COMMERCE COMMISSION.

To _____,

You are hereby required to appear before _____ in the matter of a complaint of _____ against _____, as a witness on the part of _____, on the _____ day of _____, 188—, at _____ o'clock at _____, and bring with you then and there—.

Dated _____.

[SEAL.]

_____,
Commissioner.

_____,
Attorney for _____.

[NOTICE.—Witness fees for attendance under this subpoena are to be paid by the party at whose instance the witness is summoned, and every copy of this summons for the witness must contain a copy of this notice.]

No. 10.

Notice of taking depositions under Rule XII.

INTERSTATE COMMERCE COMMISSION.

A. B.
against
THE _____ RAILROAD COMPANY. }

You are hereby notified that G. H. will be examined before C. D., a _____ (title of officer or magistrate), at _____, on the _____ day of _____, 18—, at _____ o'clock in the _____ noon, as a witness for the above named complainant (or defendant, as the case may be), according to the Act of Congress in such case made and provided, and the rules of practice of the Interstate Commerce Commission; at which time and place you are notified to be present and take part in the examination of the said witness.

Dated _____, 18—.

I. J.

(Signature of complainant or defendant, or of counsel.)

To A. B., the above named complainant (or The _____ Railroad Company, the above named defendant; or to K. L., counsel for the above named complainant or defendant.)

NOTE.—The Commission recommends that the conditions upon which witnesses may be examined under sections 863 and 864 of the Revised Statutes before one of the officers designated be waived, and that parties consent in all cases to take testimony in that manner when practicable.

APPENDIX V:

Interstate Commerce Commission,
Washington, June 17th, 1889.
Circular.

IN THE MATTER OF FREE CARTAGE DELIVERY OF FREIGHTS.

To _____

The following information is requested by the Interstate Commerce Commission:

At what stations, if any, on your line or lines, do you make free cartage delivery of any or what class of freights? Are these stations, or any of them, stations which are grouped with any other station, or stations, on your line, or lines, and at which the same transportation rates are charged as to any of such freights so delivered by free cartage? How long has this system of free cartage delivery of such freights been made by your Company? What was its origin and state all the facts, circumstances, and conditions, if any, that have induced it to be done? Has it resulted in your competitors making free cartage delivery at the same stations or not? What effect, if any, has it had upon rates at these stations as compared with rates at other stations on your line, or lines? Do your rate sheets or tariffs make any and what reference to free cartage where it exists? What estimate do you make of the actual cost of such free cartage to you at each of said stations where it is done by your company?

We request that you will furnish the information asked in this circular at your earliest convenience, and have your answer duly verified by some officer of your Company who knows the facts stated to be true.

By order of the Interstate Commerce Commission:

Edw. A. Moseley,
Secretary.

June 17th, 1889.

Circular.

IN THE MATTER OF TRUCKAGE FACILITIES.

To _____

Pursuant to the investigation ordered by the Interstate Commerce Commission on the 8th day of May, 1889, and not then completed, the Commission requests of you the following information:

What allowance, if any, does your Company make, pay, or receive for truckage facilities, and to whom in each instance, and how is this done, and at what stations or places along its line, or any of its lines? The term "truckage facilities," as here used, embraces any part of main or side tracks, switching charges and facilities, and bridge or ferry charges.

You are requested to furnish this information at your earliest convenience in the form of a statement addressed to the Commission and duly verified by some officer of your Company who knows the facts to be true as therein stated.

2 INTER S

By order of the Interstate Commerce Commission:

Edw. A. Moseley,
Secretary.

April 1, 1889.

Dear Sir:

In view of the large number of accidents to railroad employes which occur in coupling and uncoupling freight cars, and of the general belief that these accidents can be greatly diminished by the adoption of suitable automatic appliances, the Commission desires to obtain fuller information regarding the couplers now in use, and to have the benefit of the experience of those directly engaged in building and operating freight cars, in forming an opinion as to what, if anything, is required of legislation. Your answer to the following questions is therefore requested:

I. (a) What number and proportion of the freight cars owned or leased by your road are equipped with some form of automatic coupler? (b) What forms are in use and how many cars are fitted with each? (c) Please state, briefly, what you believe to be the advantages of the automatic couplers in use by you.

II. (a) Which of these couplers, if any, belong to the standard type adopted by the Master Car Builders' Association? (b) Which can be conformed to that type? (c) Is your road taking or contemplating any action towards the adoption of the Master Car Builders' coupler? (d) If there are obstacles to such action what are they?

III. Is it your opinion that a single type of automatic coupler should be aimed at, each form of which couples with every other form, or are there practical reasons which, to your mind, make two or more independent standard types preferable? Please state the considerations upon which you base your opinion.

IV. What bearing would the adoption of a standard coupler have upon the more general use of train brakes?

V. Is it your opinion that the use of good automatic couplers tends, by lessening shocks or otherwise, to diminish the number of that particularly fatal class of accidents caused by falling from trains or engines?

The Commission specially invites any observations that your experience may suggest on the general subject. Comparative statistics bearing upon the question will be of especial value.

Very respectfully,
Edw. A. Moseley,
Secretary.

May 17, 1889.

Dear Sir:

The large number of accidents to employes and passengers occurring on the railroads of this country and the public belief that a great

part of these might be avoided by the use of proper appliances have led many States to make the mechanical features of railroad working the subject of statutory regulation. It is well known, however, that in respect to some, at least, of these features, the conditions are such that regulation if attempted can neither secure adequate benefit to the public nor be just to the railroads themselves unless it be uniform over the whole country.

In view of this fact and of the request of the Railroad Commissioners of the country, as embodied in a resolution adopted at their recent convention, the Interstate Commerce Commission desires to call out as full information and discussion as possible upon the question of Federal regulation of safety appliances on railroads. The following matters seem to be of especial importance, but it is not intended to restrict the discussion to them:

1st. The history in each State of safety-appliance legislation. How far such legislation has been enforced. What have been the means used to enforce it. What obstacles have been met with. What the general effect has been.

2d. What is the present condition regarding automatic couplers. What prospect there is of a uniform and safe coupler coming into use. What progress the standard coupler, adopted by the Master Car Builders' Association, is making, and what is the attitude of railroads towards it.

3d. What progress there is in the use of train-brakes on freight cars. Whether such progress is satisfactory, viewed as a means of

greater safety to train men. To what extent freight trains are run without the necessity of brakemen traversing the tops of cars.

4th. What is being done to introduce safer methods of heating and lighting passenger cars.

5th. What is the state of affairs respecting other safety devices.

6th. Whether legislation looking to Federal regulation of these matters or any of them is desirable, and what the reasons are for and against such regulation.

7th. What such Federal legislation if any be desirable, should attempt to accomplish in regard to couplers; in regard to train-brakes; in regard to car heating and lighting; in regard to other matters. What its provisions should be upon each of these points.

8th. If Federal legislation be expedient, what special administrative agencies, if any, should be provided to carry it out. Whether Federal inspection should be attempted, and to what extent and how. Whether a Board should be created after the analogy of the Steamboat Inspection Service. If so, how such a Board should be constituted in regard to the number and character of its members; what its powers and duties should be; what its connection with other branches of administration.

The Commission believe that justice to railroad employes and to all others concerned requires that this matter receive thorough consideration, and trust that you will be able to give it immediate and careful attention.

Very respectfully,

Edw. A. Moseley,
Secretary

APPENDIX VI.

CALL FOR NATIONAL CONVENTION OF RAILROAD COMMISSIONERS.

At a convention of Railroad Commissioners held at the City of Washington on the 6th day of March, 1889, the following resolution was adopted:

“Resolved, That it is the opinion of the members of this convention that provision should be made for annual conventions of the railroad commissioners of the several States and the members of the Interstate Commerce Commission, to be held at such place as may be agreed upon, with a view of perfecting uniform legislation and regulation concerning the supervision of railroads.”

A resolution was also adopted appointing a committee consisting of the chairman of the Interstate Commerce Commission and three state commissioners to call the next convention, and determine the time and place of holding the same.

Pursuant to the foregoing resolutions the undersigned, the committee then appointed, designate the 28th day of May, A. D. 1890, at 11 o'clock A. M., as the time, and the office of the Interstate Commerce Commission, No. 1317 F Street, Sun Building, in the City of Washington, D. C., as the place for holding said convention.

The railroad commissioners of all the States, and any state officers charged with the supervision of railroads or railroad interests, and the executive committee of the Association of American Railway Accounting Officers, are respectfully requested to attend the convention.

The undersigned respectfully suggest that among the subjects which may properly be considered by the convention are the following:

I. Railway Legislation: How to obtain harmony in.

(Committee appointed by last convention to report at next Convention.)

II. Annual Reports from Carriers: Uniformity in, to state commissions and Interstate Commerce Commission, to what extent desirable.

What further steps may be taken for securing greater uniformity?

III. Uniformity in Railway Accounting: How far it is desirable.

How it may be obtained.

IV. Classification of Railway Statistics: Why should statistics be grouped on the basis of similarity of conditions?

What principles should control in making such groupings?

V. Classification of Freight: Should it be uniform in opposite directions?

Should it be uniform for the whole country?

What should be the unit of classification, *e. g.*, train load, carload or commercial package?

What should be deemed a reasonable difference in the classification of carloads and less than carloads?

VI. Railway Construction: Should state or federal regulation be provided?

What should be the character of such regulation?

VII. State Railroads: Should they be brought under the operation of the Federal Law?

Should subjection of their business to the Federal Law be made a condition of engaging in interstate business in any form,—whether by joint tariffs, through billing of freight or ticketing of passengers, or by accepting traffic for or delivering traffic from their own lines independently of any business connection with other lines?

VIII. Reasonable Rates: What elements should be considered in determining the reasonableness and justice of a rate?

What degree of difference should exist between a joint through rate for a continuous carriage over connecting roads and the local rates of the respective roads?

How are rates to be fixed under legislative authority in view of the rulings of the courts that the rate a carrier may lawfully charge is a judicial question?

IX. Safety Appliances for Railroad Cars: What legislation, if any, should be had by Congress?

The foregoing are only suggestions offered by the committee, and any other topics affecting state and interstate commerce may properly be entertained and discussed by the convention. A permanent record is expected to be made of the proceedings.

Thomas M. Cooley,
Chairman.

George M. Woodruff,
of Connecticut.

Frank T. Campbell,
of Iowa.

John M. Mitchell,
of New Hampshire.

Committee.

Washington, D. C., April 24th, 1890.

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2. On submission of a controversy without action, under N. C. Code, § 567, a complete and concise statement of all the facts necessary to the solution of the controversy is required on appeal; and a statement referring to exhibits which are not annexed, and which leaves to either party to add to the facts in the case agreed, is wholly inadmissible. *Richmond & D. R. Co. v. Reidsville* (N. C.) 416

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NOTES.

See also CONSTITUTIONAL LAW, 3; PRINCIPAL AND AGENT; RAILROADS; RECEIVERS; TRIAL.

I. WHO ARE COMMON CARRIERS; LIABILITIES GENERALLY.

1. A bridge company owning no freight cars, which solicits freight for railway companies who will furnish the cars and over whose lines the freight is to go, and merely transfers such cars over its bridge to the railway companies furnishing them, charging for its service its regular bridge toll, but making no charge for transporting the freight contained or carried in the cars,—is not a common carrier of such interstate freight. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351

2. The franchises and powers of building, maintaining, and operating a bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute the bridge company a common carrier of property; nor do they, by any clear implication, confer upon it authority "to equip its road, and to transport goods and passengers thereon, and charge compensation therefor." *Id.*

3. Where a railroad company, by contract with a bridge company, acquires the right to use a bridge, with its approaches, for its engines, cars, and trains, it is regarded, under the Act to Regulate Commerce, § 1, as the owner or operator of the bridge and approaches, for the time being, as to all freight transported by it over the bridge. And as to all such traffic, it, and not the bridge company, must be regarded as the common carrier. *Id.*

4. A corporation which, being under no legal obligation to do so, voluntarily contracts

to switch cars over its tracks, between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported or transferred in the cars in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351

5. Carriers of interstate traffic are not obliged to pay charges of steamboat lines when no agreement for a through rate exists. *Re Clark* (Com.) 797

6. After a freight tank-car has just returned from one long journey, it is the duty of the carrier, before permitting it to start out loaded on another distant run, in which the lives and safety of brakemen, trainmen, and the property of the shipper will be involved, to have such car carefully inspected by a competent inspector, in order to ascertain whether it is in a safe condition for such service. *Michigan Congress Water Co. v. Chicago & G. T. R. Co.* (Com.) 428

II. GOVERNMENTAL CONTROL; RATES; DISCRIMINATION.

a. In General.

7. Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters. *Dow v. Beidelman* (U. S. Sup. Ct.) 56

8. The duty of a railroad company operating its own road or a road that it controls, to serve the local stations on its line, does not apply to a company that has only a running privilege for through trains to reach points on its own line over a part of the road of another company which it does not control. *Alford v. Chicago, R. I. & P. R. Co.* (Com.) 771

9. The Legislature, in the exercise of its power of regulating fares and freights, may classify the railroads according to the length of their lines. If the same rule is applied to all railroads of the same class, there is no violation of the constitutional provision securing to all the equal protection of the laws. *Dow v. Beidelman* (U. S. Sup. Ct.) 56

10. The South Carolina Railroad Commission has no jurisdiction of a complaint for charges unlawfully made by a railroad partly in North Carolina for transportation which was partly in the latter State, although it was for part of the original transportation by connecting lines between points both in South Carolina, such transportation being interstate commerce. *Sternberger v. Cape Fear & Y. V. R. Co.* (S. C.) 426

11. The Railroad and Warehouse Commission of Minnesota has no authority to prescribe rates for transportation by common carriers in another State. It cannot fix the rates for carriage between two points within Minnesota, over a route extending across a neighboring State. Such power is vested exclusively in Congress. *State v. Chicago, St. P. M. & O. R. Co.* (Minn.) 519

12. Traffic destined to another State is not interstate so as to be within the jurisdiction of the Interstate Commerce Commission, if the

delivery by the carrier is made in the same State where the rates were made and the traffic originated. *New Jersey Fruit Exchange v. Central R. Co.* (Com.) 84

13. When an agent of a railroad is prosecuted under the Interstate Commerce Act, it is not necessary either to allege or prove that the particular unlawful act complained of was done under authority conferred by its principal or by its direction; it is sufficient to show that the accused was in fact an agent of a railroad subject to the Act, and that the wrong was committed under color of his office or agency. *United States v. Tozer* (D. C. E. D. Mo.) 422

14. Passenger excursion rates are required to be published according to the provisions of the Act to Regulate Commerce, § 6. *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* (Com.) 729

15. Where a change of rates would involve a reduction of rates on other competing lines not parties to the proceeding, and unsettle relative rates in a large extent of territory, such a change ought not to be made unless based upon adequate grounds. *Rice v. Western N. Y. & P. R. Co.* (Com.) 298

16. Where an existing classification and rate are not shown to operate injuriously to the carriers from a given point, or to give undue advantage to shippers, a change is not justifiable that materially injures an important industry and a class of shippers at that point who have there built up the industry in reliance on a continuation of the previous classification and rate, first established and long maintained by the carriers themselves without complaint from any quarter. *Bates v. Pennsylvania R. Co.* (Com.) 715

17. Methods generally adopted by carriers in the preparation and publication of rate-sheets, if in substantial compliance with the law and sufficient for purposes of public information, while not necessarily to be accepted by the Commission as a standard, may be acquiesced in until a better mode can be substituted. *Re Passenger Tariffs* (Com.) 445

b. Scope of Interstate Commerce Act.

18. A carrier which has conformed to the ruling of the Commission should not be prosecuted for alleged violation of law in that respect, which occurred before such ruling was made and under a construction of the law then approved by the carrier's counsel. *Slater v. Northern P. R. Co.* (Com.) 243

19. When a state carrier engages in interstate commerce it becomes a national instrumentality for the purposes of such commerce, and is subject to regulations prescribed by the national authority. *Mattingly v. Pennsylvania Co.* (Com.) 806

20. The Interstate Commerce Commission, having no authority to control commissioners of immigration, cannot do so indirectly by inhibiting railroad companies from carrying out arrangements made by them with the commissioners. *Savery v. New York C. & H. R. R. Co.* (Com.) 210

21. A railroad company which transports immigrants in unfit cars will be required to provide better accommodations. *Id.*

22. Common carriers engaged in the transportation of passengers or property, for a continuous carriage or shipment from a place in the United States to a place in an adjacent foreign country, are subject to the provisions of the Act in respect to the printing of schedules of rates, fares, and charges for the traffic they carry, the posting and filing with the Interstate Commerce Commission of copies of such schedules, the notices of advances and reductions, and the maintenance of the rules, fares, and charges established and published and in force at the time; also to the provisions in respect to joint tariffs of rates, fares, and charges for continuous lines or routes. *Re Grand Trunk R. Co.* (Com.) 496

23. The Interstate Commerce Act has not given the Commission jurisdiction to order the carrier to furnish any particular equipment of cars, or in fact any cars at all. *Scotfield v. Lake Shore & M. S. R. Co.* (Com.) 67

24. Under the provisions of the Act to Regulate Commerce, the Grand Trunk Railway Company of Canada is required to print, post, and file its schedule of rates and charges for the transportation of property from points in the United States to points in Canada, and cannot lawfully charge, demand, collect, or receive from any person or persons a greater or less compensation therefor, or for any services in connection therewith, than is specified in such published schedule as may at the time be in force. *Re Grand Trunk R. Co.* (Com.) 496

c. Equal Rights of Passengers.

25. A carrier engaged in interstate travel over its lines must afford the equal protection of the law alike to all passengers, without regard to race, color, or sex, against undue prejudice and disadvantage from disorderly conduct on the part of other passengers or persons. *Heard v. Georgia R. Co.* (Com.) 508

26. A carrier furnishing separate cars to white and colored passengers on its line engaged in interstate travel must make them equal in comforts, accommodation, and equipment, without any discrimination. *Id.*

27. The Mississippi statute of March 2, 1888, § 1, requiring all railroads carrying passengers (other than street railroads) to provide equal but separate accommodations for the white and colored races, by providing two or more passengers cars for each passenger train, or by dividing the cars by a partition, is not invalid as an interference with interstate commerce, as it refers only to the carriage of passengers between points within the State. *Louisville, N. O. & T. R. Co. v. State* (Miss.) 615. Affirmed by U. S. Sup. Ct. 801

28. It is not an unlawful discrimination to refuse to refund money paid by a person who had forgotten his commutation ticket, after the carrier had discontinued a former practice of refunding in such cases, and had given proper notice to that effect, although the passenger supposed the custom was in vogue when he purchased his ticket. *Sidman v. Richmond & D. R. Co.* (Com.) 766

d. Equal Rights to Shippers.

29. Common carriers must take all descriptions of all ordinary traffic from all points, and

the rates should be known and announced publicly in advance of the offering of traffic. *Re Tariffs of Transcontinental Lines* (Com.) 203

30. Under the Act to Regulate Commerce shippers are entitled to equal and open rates at all times, and are not to be required to ask for rates. *Id.*

31. "Any undue or unreasonable preference or advantage," within the meaning of the Act to Regulate Commerce, § 3, includes every form of unjust discrimination, not only in rates, but also in the conveniences and facilities supplied to shippers in any of the details of the carrying service. *Re Morris's Petition* (C. C. N. D. N. Y.) 617

32. The transportation by a railroad company to a certain point on its line, of freight received from a connecting carrier which had reserved the right to forward the property by any carrier it might select, especially where the freight thereon was to be paid at the point of destination by the purchaser, is not a service rendered for the party by whom the through shipment is made, but for the connecting carrier; and therefore there may be an unlawful discrimination between the charges for such service and for a shipment by the same shipper to the same consignee at the same destination over the local line alone. *United States v. Tozer* (D. C. E. D. Mo.) 597

33. Mere inequality between the rate charged a shipper and the published tariff rates does not constitute unjust discrimination, within the meaning of Colo. Const. art. 15, § 6, prohibiting "undue or unreasonable discrimination." *Bayles v. Kansas P. R. Co.* (Colo.) 643

34. A shipper is not entitled to have his cattle carried in cars of a special construction of his selection, belonging to a third party and superior to ordinary cattle cars, by reason of the fact that the carrier transports some cattle in other cars, available to all shippers equally, which have some of the improvements of the former, but are furnished by another party under a special contract, and which, unlike the cars desired by the shipper by reason of their peculiar construction, can be used in the chief business of the road,—that of carrying coal,—when not in use for cattle. The refusal to use the cars desired by the shipper does not constitute unjust discrimination. *Re Morris's Petition* (C. C. N. D. N. Y.) 617

35. A railroad company engaged in the business of transporting livestock is bound to furnish suitable cars therefor upon reasonable notice, whenever it is within its power to do so without jeopardizing its other business. *Scotfield v. Lake Shore & M. S. R. Co.* (Com.) 67

36. A person who has received the benefit of a special rate which unlawfully discriminates in his favor cannot complain because, for the return shipment, he is charged the same as the general public. *Elvey v. Illinois C. R. Co.* (Com.) 804

e. Rates.

1. In General.

37. In the absence of any legislative regulation upon the subject, the courts must decide for the company, as they do for private persons, when controversies arise, what rates are

reasonable. *Dow v. Beidelman* (U. S. Sup. Ct.) 56

38. The Interstate Commerce Commission cannot compel a railroad company to increase its rates, which are supposed to be so low as to be ruinous to itself or its rivals. *Re Chicago, St. P. & K. C. R. Co.* (Com.) 137

39. The provision in the Act to Regulate Commerce, that all rates shall be just and reasonable, was intended for the protection of the general public, and not for that of the carrier against the action of its own officers or the action of rivals. *Id.*

40. To render a preference in rates unlawful, it is not necessary that it should be accomplished by any device. *Scotfield v. Lake Shore & M. S. R. Co.* (Com.) 67

41. The courts have no power to make freight or passenger tariffs. *Pensacola & A. R. Co. v. State* (Fla.) 522

42. The enforcement of a tariff of freight and passenger rates which will not pay the expenses of operating a railroad,—*Held*, upon the pleadings, to show an abuse of the discretion given to railroad commissioners by the statute authorizing them to prescribe reasonable and just rates of freight and passenger transportation, and to amount to a taking of the railroad company's property without just compensation. *Id.*

43. Where a tariff of freight and passenger rates has been established by the railroad commissioners, and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs as fixed by the commissioners must, in so far as the courts are concerned, be left to the test of experiment. *Id.*

44. The courts will not interfere or grant any relief to a railroad company against rates fixed by commissioners, upon a complaint made as to one of several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety. *Id.*

45. Where a schedule of rates for railroad charges, fixed by legislative authority, will not pay the cost of necessary service, appliances, and the repair thereof, interest on bonds, and then leave something for dividends, its enforcement will be enjoined. *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 325

46. In a suit to restrain the enforcement of unreasonable rates, it is no defense that plaintiff is a foreign corporation and may retire when the business ceases to be profitable, or that it operates through other States, where no rates are fixed, which will enable it to make profit. *Id.*

47. In a suit to restrain the enforcement of unreasonable rates it is no defense that the reduced rates may increase the volume of business and make it the more remunerative in the future. *Id.*

2. For Passengers.

48. Rates lower than the established tariff
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are prohibited by law. *Re Passenger Tariffs & Rate Wars* (Com.) 340

49. A passenger rate war in which rates were repeatedly reduced by several competing lines to an exceedingly low basis on a particular class of traffic, without any filing of tariffs, was contrary to the requirements of law, as well as against the true interest of each party thereto. *Id.*

50. Rates obtained from ticket brokers lower than those offered at the regular offices of the company effect unjust discrimination. *Id.*

51. No necessity or compulsion is created by a war of rates, which justifies disobedience of the statute. *Id.*

52. Reductions in competitive passenger rates cannot legally be made without, at the same time, reducing intermediate rates, as required by § 4 of the Interstate Commerce Act. *Id.*

53. When there is no joint rate in effect from a station on the line of one carrier to a station on another carrier's line to which a ticket is applied for, it is competent to name a through rate made up of the sums of rates prevailing on the several roads or parts of roads made use of in the journey; using for such a through rate local rates where there are no joint rates in combination with locals, where they are in effect for any part of the distance. When no joint rates are announced, it is understood that the local rates are employed in arriving at the through rate. *Re Passenger Tariffs* (Com.) 445

54. New individual or joint passenger tariffs must be posted at stations to which they apply, and tickets can legally be sold on combinations of initial or terminal locals therewith. *Id.*

55. Milage, excursion, or commutation passenger tickets must be offered impartially to all who accept the conditions on which they are issued, and the rates at which they are sold must be published. The general requirements of the Act to Regulate Commerce as amended are as applicable to these classes of tickets as to any others. *Id.*

56. Party rates and passenger carload rates lower than contemporaneous rates for single passengers constitute discrimination between persons entitled to transportation at equal rates, and are therefore illegal. *Id.*

57. Party-rate tickets are not commutation tickets; and when party rates are lower than contemporaneous rates for single passengers, they constitute discrimination, and are illegal. *Pittsburgh, C. & St. L. R. Co. v. Baltimore & O. R. Co.* (Com.) 729

58. A railroad company may make a special rate for immigrants as a class, and decline to give the same rate to others for whom different accommodations are furnished. *Savery v. New York C. & H. R. R. Co.* (Com.) 210

59. Under the Interstate Commerce Act, § 2, where passes issued to a company's ex-employé, good for twenty days, were not used, and no one was ever transported upon them, a charge of unjust discrimination cannot be sustained. *Griffée v. Burlington & M. R. R. Co.* (Com.) 194

60. Free transportation issued in the form of an annual pass to a person not in the regular and stated service of the carrier or receiving

any wages or salary under a contract of employment, but requested by him as compensation for throwing in its way what business he conveniently could, is illegal. *Slater v. Northern P. R. Co.* (Com.) 243

61. A regulation published on public tariff schedules, that the conductor shall collect fare on trains from passengers without tickets by adding 25 cents to single-trip rates, does not make an unjust discrimination. *Sidman v. Richmond & D. R. Co.* (Com.) 766

62. One who purchased a quarterly commutation ticket thirteen days after the quarter began is not entitled to recover any portion of the purchase price on account of the fact that a portion of the term had expired. *Id.*

3. For Freight.

a. General Rules; Discrimination.

63. Undue discrimination, within the meaning of the Interstate Commerce Act, § 3, has reference to rates as well as to facilities afforded to shippers. *United States v. Tozer* (D. C. E. D. Mo.) 597

64. The difference in the quantity of shipments is an insufficient and unwarrantable reason for discrimination in rates. *United States v. Tozer* (D. C. E. D. Mo.) 540

65. Carriers must respect the interests of those who may have occasion to employ their services, and conform their charges to the rules of relative equality and justice. *Thurber v. New York C. & H. R. R. Co.* (Com.) 742

66. Cost of service is an important element in fixing transportation charges, and entitled to fair consideration, but is not alone controlling. *Id.*

67. A difference in rates upon carloads and less than carloads of the same merchandise between the same points of carriage, so wide as to be destructive to competition between large and small dealers, especially upon articles of general and necessary use, and which, under existing conditions of trade, furnish a large volume of business to carriers,—is unjust. *Id.*

68. A difference in rate for a solid carload of one kind of freight from one consignor to one consignee, and a carload quantity from the same point of shipment to the same destination, consisting of like freight, or freight of like character, from more than one consignor to one consignee, or from one consignor to more than one consignee,—is not justified by the difference in cost of handling. *Id.*

69. A common carrier may contract to ship freight at a lower rate than the published tariff, but he cannot contract to deny the same reduced rate to other shippers. *Christie v. Missouri P. R. Co.* (Mo.) 22

70. A contract by a railroad company to carry corn at the customary rates, and to grant a rebate to the shipper, is not illegal as being in violation of the law to prevent unjust discrimination; nor is it fraudulent as to the purchaser of the corn. *Id.*

71. An agreement by a railroad company to transport coal at a specified rebate from regular tariff rates, in consideration of the shipper's erecting a dock and coal pockets on the company's land for use by both parties, is not, as a 2 INTER S.

matter of law, void because of unjust discrimination against other shippers; especially where the shipper also agrees to do his own loading and to ship in large quantities. The question of unjust discrimination is one of fact. *Root v. Long Island R. Co.* (N. Y.) 576

72. Prescribing a minimum weight for a carload, and then charging by the hundred pounds in proportion to the car-load rate for any excess over the minimum, is not unlawful. *Leonard v. Chicago & A. R. Co.* (Com.) 599

73. The action of the Grand Trunk Railway Company of Canada in transporting coal and coke under a schedule specifying a total rate of \$1 per ton from Buffalo, Blackrock, and Suspension Bridge, in the United States, to Hamilton, Dundas, and several other points in Canada,—the published tariff rate,—but accepting a reduced charge, or allowing a rebate of 25 cents a ton, in favor of certain consignees at Hamilton, Dundas, and other points in Canada,—is in violation of the Act to Regulate Commerce, and unlawful. *Re Grand Trunk R. Co.* (Com.) 496

74. Special tariffs giving different rates to places named and those not named, to manufactured articles named and those not named, to jobbers at places named and those not named, and to manufacturers and jobbers and other dealers,—discriminate and give undue advantages. *Re Tariffs of Transcontinental Lines* (Com.) 203

75. A system of rates made by a number of carriers, covering a widely extended territory, and relatively fair and reasonable in themselves, will not be ordered by the Interstate Commerce Commission to be changed at one important point, thereby rendering other changes unavoidable at other points and throwing the entire system into confusion, unless this is necessary to be done in order to enforce compliance with the law. *Detroit Board of Trade v. Grand Trunk R. Co.* (Com.) 199

76. In determining the question of undue prejudice from a rate, distance is only one of the factors, and other material facts—such as character and quality of the commodity, cost of production, extent and nature of the competition in the business itself and by other transportation lines, and the interests of the public in the use of the commodity, and its market cost,—are to be considered. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co.* (Com.) 436

77. A carrier is not forbidden from obtaining cars from a shipper for the transportation of freight over its line, but in such case, after deducting reasonable rent published in the tariff as part of the rate and paid by the carrier to the shipper for the use of the cars, the rates must be actually the same as upon freight transported in the same service in the carrier's own cars. *Seofield v. Lake Shore & M. S. R. Co.* (Com.) 67

78. A carrier is not forbidden by the law from obtaining cars from other carriers, but the rates of freight must be exactly the same. *Id.*

79. Taking and billing freight between two points at lower rates if it is destined to another point beyond the original destination is giving

an illegal preference. *Northwestern Iowa Grain & Stock-Shippers Asso. v. Chicago & N. W. R. Co.* (Com.) 431

80. An assurance by the carrier, that if one will locate in business on its line his property shall be taken for transportation as belonging to a specified class, cannot bind the carrier so as to compel a classification accordingly. A right to special rates cannot be made out in this way. *Hurlburt v. Lake Shore & M. S. R. Co.* (Coin.) 81

81. The principle that the ratio of freight rates decreases with the increase of distance is true when the rates are based upon distance and cost alone, and are not affected by other modifying conditions; the extent of traffic carried, and the character of the country traversed, are to be considered. *Lincoln Board of Trade v. Burlington & M. R. Co.* (Com.) 95

82. A long line met at a given point by a short line, and compelled to accept a scarcely remunerative rate, may, when that point is passed, increase its charges, with some consideration of the absolute distance by its own line from the originating point, in a ratio more rapid than if it had been able to grade its own rates continuously throughout its line. *Id.*

83. The application of the above principle is also affected by water competition; and a situation upon a navigable river, although not at present affording active competition with the railroad, is to be considered. *Id.*

84. The question of relative injustice must be viewed upon broader grounds than a mere balancing of one rate against another. A reduction of rates which will throw into confusion an adjustment of rates over a large section of country, which are not claimed to be unreasonable of themselves, should not be required unless a clear right thereto exists under some direct provision of the law. *Rend v. Chicago & N. W. R. Co.* (Com.) 313

85. Whether railroad companies combine or act separately in making rates and charges is not important if they are reasonable of themselves and so fairly adjusted as to be reasonable in their relations to each other and in their results. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 289

86. Unlawful discrimination is not established by proof that a rate of freight on cotton from Vicksburg, Mississippi, to eastern points, given to one, is different from that given to another, when it also appears that such rate is only a part of a uniform through rate from a point beyond. *Cowan v. Bond* (C. C. S. D. Miss.) 542

87. The Act to Regulate Commerce, §§ 2, 3, are not violated by charging a local rate on cotton from a more distant point to Vicksburg, Mississippi, when, after pressing there, it is forwarded to its point of destination at less than Vicksburg rate to such point, the total of such two rates being made to equal the regular rate from such initial point to such destination. *Id.*

88. Whenever a tariff is established for merchandise billed or intended for export by sea, and ocean rates are not specified, either because of fluctuations or for any other reason, so that only the charge for inland transportation is definitely fixed, the tariff as filed and made

public should show the rate charged by the inland carrier or carriers to the point of export, including all terminal charges and expenses, and should also show in what manner the through rate to the point of ultimate destination is to be determined, whether by the addition of the ocean rate from time to time prevailing, or how otherwise. *New York Produce Exch. v. New York C. & H. R. R. Co.* (Com.) 553

89. Under the amendments of March 2, 1889, to the Act to Regulate Commerce, requiring ten days' previous notice of reductions in rates, they cannot be varied from day to day, or oftener, to meet fluctuations in ocean rates. *Id.*

90. In deciding a case against one or more carriers who are charged with making rates which are unjustly discriminating in a certain line of traffic, the decision made upon the facts of the particular case does not necessarily govern rates in other sections of the country, where the facts bearing upon them may be altogether different. *Re Relative Tank & Barrel Rates on Oil* (Com.) 245

91. A discrimination between the rate on corn and its direct products, which subjected persons engaged in the business of manufacturing and selling such products to unreasonable prejudice or disadvantage; and which is without necessity or advantage to the carrier, or any reason founded on the character or condition of the traffic,—is in violation of the Act to Regulate Commerce, § 3, notwithstanding the rate on corn was open to all persons equally and with equal service. *Bates v. Pennsylvania R. Co.* (Com.) 715

92. A special tariff by which a carrier charges a class of persons named, from and to the same points on its lines, less than one half in amount of the rates on the same class of freight that it charges the general public in its general tariffs, makes a discrimination which is unjust and is violative of the Act to Regulate Commerce. *Elvey v. Illinois C. R. Co.* (Com.) 804

93. A discrimination by a special tariff cannot be sustained upon the ground that the special tariff is made to aid "emigrants" in moving from one State to another where land is cheap, and to develop a sparsely settled country, and to build up business along the carrier's lines, and upon the supposition that this constitutes substantially dissimilar circumstances and conditions from those which exist when similar services are rendered by the carrier for the general public. *Id.*

b. Reasonableness.

94. Allowing a charge for weight of oil barrels, where shipment in tanks is less dangerous, and also is more likely to result in return loads, does not authorize such a charge as against tank shipments on lines where these conditions do not exist. *Re Relative Tank & Barrel Rates on Oil* (Com.) 245

95. To determine the reasonableness and justness of any freight rate made by a railroad company, all the surrounding circumstances and conditions must be considered, as well as the rights of the shipper. *Business Mens Asso. v. Chicago, St. P. M. & O. R. Co.* (Com.) 41

96. In arriving at what is a just and reasonable rate on freight transported by a carrier on a short local line having but a small volume of business, where the cost of transportation is exceptionally great, arising from steep grades, sparse population, and light traffic, these are circumstances and conditions of controlling weight in the making of the rates, and cannot be overlooked when a question of their reasonableness is involved; and under such circumstances the fact that an independent pipe line from Titusville to Buffalo transports oil between those points at lower rates than the railroad company constitutes no just reason why the railroad company should be required to reduce its rates to those of the pipe line. *Rice v. Western N. Y. & P. R. Co.* (Com.) 298

97. A railroad company is under special obligation to give reasonable rates for its local business; but there are many influences which may affect through rates while not bearing upon local rates at all, or, if at all, in less degree. *Lippman v. Illinois C. R. Co.* (Com.) 414

98. A former special and preferred rate is not a fair test of the reasonableness of a present rate of freights, under the Act to Regulate Commerce. *Myers v. Pennsylvania Co.* (Com.) 403

99. In determining the reasonableness of rates a comparison of one isolated rate with another is not sufficient; the whole field must be considered in order to approximate justice, and at best the result cannot be regarded as other than an approximation. *Houell v. New York, L. E. & W. R. Co.* (Com.) 162

100. A *prima facie* case of unreasonableness of rates is not made out by showing that the rates for a certain commodity are higher in certain cases than certain other rates, and that they produce a large profit to the carrier. *Id.*

101. The element of value in the commodity transported is taken into consideration in the establishment of a rate, since the greater the value the greater the carrier's liability as an insurer of freight. *Id.*

102. The service of carriers may be rendered under such dissimilar circumstances as to make it lawful to charge more for the same distance on one line or branch than on another line or branch of the same road. *Northwestern Iowa Grain & Stock-Shippers Asso. v. Chicago & N. W. R. Co.* (Com.) 431

103. A railroad company, while long maintaining a rate without the presence of competition on other than equal terms, is making evidence that such rate is not too low. *Id.*

104. Where branch lines of a railway company are crossed by the main line of another company, and from these points the company comes in competition with the other company from its main-line points, the charges on these branches do not establish a standard of reasonable rates for like distances from points on another branch of the same company where no such competition exists. *Id.*

105. Comparisons of rates charged by railroad companies under circumstances and conditions substantially dissimilar cannot be adopted as standards in arriving at the reasonableness and justness of rates. *Business Mens Asso. v. Chicago & N. W. R. Co.* (Com.) 48

106. The reasonableness and justness of rates on other portions of the carrier's line cannot be measured alone by the standard furnished by exceptional rates forced upon him for a portion only of the line, but must be governed by considerations which fairly and justly apply to them. *Business Mens Asso. v. Chicago St. P. M. & O. R. Co.* (Com.) 41

107. If a carrier is in good faith acting under a compulsion of circumstances and conditions beyond his control, and, to avoid large loss, adopts exceptional rates on a portion of his line, not unreasonable in themselves, and forced upon him by the action of an independent state railroad, which is not subject to the Act to Regulate Commerce, and which is operating a slightly shorter and competing line with his own,—these are circumstances and conditions which justify him in adopting such exceptional rates thus forced upon him on this portion of his line. *Id.*

108. Exceptional conditions exist in respect to railroad transportation in proximity to the waterways of the Great Lakes, Michigan and Superior, and to rival competing railway lines operating between the ports on these lakes, as to the method of grouping stations, under the combined effect of the competition of these waterways and of the Act to Regulate Commerce, § 4. *Id.*; *Business Mens Asso. v. Chicago & N. W. R. Co.* (Com.) 48

109. Rates that are just and reasonable from selected manufacturing points east of the Missouri River and west of the Atlantic seaboard are *prima facie* just and reasonable from all other points in the same territory. *Re Tariffs of Transcontinental Lines* (Com.) 203

110. In determining what are reasonable rates the fact that a road earns little more than operating expenses is not to be overlooked, but cannot be made to justify grossly excessive rates. Wherever there are more roads than the business at fair rates will remunerate, they must rely on future earnings for a return of investments and profits. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 289

111. To be reasonable, the rate from Meridian to New Orleans should not exceed \$1.50 per bale, compressed cotton. *Id.*

112. The method of testing the freight rates of a railroad by the rate per ton per mile cannot be considered a controlling rule in determining the reasonableness of rates. *Business Mens Asso. v. Chicago, St. P. M. & O. R. Co.* (Com.) 41; *Business Mens Asso. v. Chicago & N. W. R. Co.* (Com.) 48

113. The fact that the rates of a railroad company are not established on a mileage basis does not necessarily make out their illegality or injustice. *La Crosse M. & J. Union v. Chicago, M. & St. P. R. Co.* (Com.) 9

114. A departure from the rule of equal mileage rates as applied to the several branches of a road is not conclusive that such rates are unlawful; but the burden is on the company making such departure to show its rates to be reasonable, when disputed. *Northwestern Iowa Grain & Stock-Shippers Asso. v. Chicago & N. W. R. Co.* (Com.) 431; *New Or-*

leans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co. (Com.) 289

c. Long and Short Hauls; Through and Group Rates.

115. Through and continuous lines imply through rates, which must be reasonable. *Brady v. Pennsylvania R. Co. (Com.)* 78

116. Railroad companies making through and continuous lines cannot rid themselves of responsibility for unjust charges by breaking the haul in two and calling themselves carriers on the separate ends of their line. *Id.*

117. The carriage of freights cannot be prevented from being treated as one continuous carriage from the place of shipment to the place of destination, by any means or devices intended to evade any of the provisions of the Act. *Re Grand Trunk R. Co. (Com.)* 496

118. When a combined rate, evidenced by a through bill of lading, from the point of origin to destination, has every substantial constituent of a through rate, it is not necessary that it should be formally "quoted" by one of the carriers to another who is engaged in the making of it, in order to constitute it a through rate. Names are nothing in such a transaction; the law looks at the elements and substance of the transaction itself. *Milwaukee Chamber of Commerce v. Flint & P. M. R. Co. (Com.)* 393

119. A rate is none the less a through rate when freight is shipped upon a through bill of lading from the point of origin to destination, accompanied by a way-bill showing the route over which it is to pass, with the percentages of all the other lines set forth on the way-bill, because the initial carrier charges its local rate as part of the total rate, and the remaining lines charge an agreed rate made by percentages. *Id.*

120. Where a rate is in itself a through rate, and made up of percentages to an intermediate point on a long haul, the circumstances and conditions of transportation must be rarely exceptional indeed to be of such controlling force as to warrant any considerable excess of such rate in amount over a percentage of a through rate for an equal distance along the same line, by way of the same point, to a more distant point. *Id.*

121. A through rate does not unjustly discriminate against an intermediate point because less proportionally than the rate from such point to the common destination. *Id.*

122. Property billed from one station to another, with the understanding that it is to be unloaded at an intermediate station, and that whether it shall be reloaded for further carriage will depend upon the volition of the shipper or of anyone who may have become purchaser, does not fall within the reasons governing rates on through transportation; and the carrier is not, at such intermediate points, entitled to have the carriage protected as a through shipment as against competitors. *Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co. (Com.)* 721

123. Through rates are not necessarily illegal which, when divided between carriers, give them less than their local rates, provided that the through rate itself is not less than some one

of the locals, or unjustly discriminating against individuals or localities, or so low as to burden other business with part of the cost of the business upon which it is imposed. *Lippman v. Illinois C. R. Co. (Com.)* 414; *Chicago, R. I. & P. R. Co. v. Chicago & A. R. Co. (Com.)* 721

124. The question of a greater charge in the aggregate for a shorter than for a longer distance over the same line in the same direction is not to be determined by the proportions allotted to different roads on the line, but by the rate as an entirety. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co. (Com.)* 436

125. Through rates are not required to be made on a mileage basis, nor local rates to correspond with the divisions of a joint through rate over the same line. *McMorran v. Grand Trunk R. Co. (Com.)* 604

126. A comparison of rates based upon the doctrine that the rate per ton per mile for each of the different services so performed should be the same is not applicable to cases of competition. *New Orleans Cotton Exch. v. Illinois C. R. Co. (Com.)* 777

127. If the competition of water carriers at any point is such as to be large, active, and of controlling force, all-rail lines competing for the traffic at the same point may make rates that are reasonable and just in view of such competition, and which will enable them to participate in the carriage of the traffic. *Id.*

128. The proportion of one carrier in a through rate upon a long haul may be considerably less than its local rate for the same freight over its own line, without there being any unjust discrimination, unlawful preference, or extortion involved in such a method. *Id.*

129. An intermediate local rate should never exceed the through rate to the terminus of the line plus the local rate back to the intermediate point. *Martin v. Southern P. Co. (Com.)* 1

130. Where the rate of freight charges over one line on similar freight carried from neighboring territory to the same market is considerably greater than over other lines for distances as long or longer, such greater rate is held to be excessive and should be reduced. *James v. East Tennessee, V. & G. R. Co. (Com.)* 609

131. An unreasonable adjustment of joint rates for through transportation may constitute an unreasonable discrimination against local traffic. *United States v. Tozer (D. C. E. D. Mo.)* 597

132. The competition between two roads does not of itself justify the greater charge upon the shorter haul, nor does the fact that one company makes the charges unreasonably low between two points. *Re Chicago, St. P. & K. C. R. Co. (Com.)* 137

133. The presence of combined rail and water competition at a longer-distance point does not justify a greater charge for a shorter distance, where such competition is of greater force and more controlling than at the longer-distance point. *James v. East Tennessee, V. & G. R. Co. (Com.)* 609

134. The fact that freight has paid a local rate over roads of defendants or of other rail-

road companies to a longer-distance point does not justify a greater charge for a shorter distance. *Id.*

135. A difference in the bulk and value of lumber does not justify a greater charge for a shorter distance, when the carriers in their published rate sheets put the lumber in the same class and at the same rate. *Id.*

136. A greater charge for a shorter distance is not justified by the fact that the lumber business of the roads of a connecting line, or any of them, was done in cars which carried machinery to a longer-distance point, where profitable return loads were not always to be had. *Id.*

137. In the absence of competition from Canadian railways (which are not subject to the Interstate Commerce Act), the circumstances and conditions of the traffic from San Francisco to Denver are not so materially different from those of the traffic from San Francisco to the Missouri River as to justify the transcontinental roads subject to the Act in charging a greater sum for the shorter distance. *Martin v. Southern P. Co. (Com.)* 1

138. The only practicable mode yet devised for making through export rates, as appears by past experience, is to add to the established inland rates from the interior to the seaboard the current ocean rates. *New York Produce Exch. v. New York C. & H. R. R. Co. (Com.)* 553

139. When freight is hauled to the seaboard for export, or to New England points, from the Northwestern States or Territories, or *vice versa*, through Detroit, the rule that the estimated portion of the through rate from the starting point to Detroit may be lower in proportion to distance than the rate upon freight from such point destined to Detroit cannot be sustained. *Detroit Board of Trade v. Grand Trunk R. Co. (Com.)* 199

140. The Chicago & Northwestern Railway Company has two routes or lines between Chicago and Sioux City, formed by its main line and different branch lines; and a greater charge for a shorter than for a longer distance in the same direction, the shorter being included in the longer distance, on either of said routes or lines, is unlawful, under the Act to Regulate Commerce, § 4. *Northwestern Iowa Grain & Stock-Shippers Assn. v. Chicago & N. W. R. Co. (Com.)* 431

141. Rates having been established from St. Louis to Omaha in view of the distance over the Wabash line, the action of the Missouri Pacific in meeting the Wabash rates, although too low to be greatly desirable for its longer line, and involving loss of former revenue at intermediate points on the main line south of Omaha, by the application to the situation of the long and short haul clause of the Interstate Commerce Act, cannot be properly criticised. *Lincoln Board of Trade v. Missouri P. R. Co. (Com.)* 98

142. The Pennsylvania Railroad Company, operating a part of a through line which it joins in making, and owning a controlling interest in the capital of the Pittsburgh, Cincinnati & St. Louis Railway Company, by which the other part is operated, cannot free itself

from responsibility of excessive through rates by getting behind the latter company as a separate carrier. *Brady v. Pennsylvania R. Co. (Com.)* 78

143. A group rate for a particular distance, upon a commodity for which a large demand exists, and intended to place producers in the district upon an equality among themselves and with producers of the same commodity from other districts, all competing in a common market, is not unlawful merely on account of differences in the geographical location of different producers and their respective distances from the market. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co. (Com.)* 436; *Howell v. New York, L. E. & W. R. Co. (Com.)* 162

144. Actual undue prejudice or damage of which the rate is the cause must result to the more favorably situated producers, to render a group rate unlawful. *Imperial Coal Co. v. Pittsburgh & L. E. R. Co. (Com.)* 436

145. Under exceptional circumstances requiring through rates via Chicago westward from points in a coal-mining district extending across the whole State of Illinois, which is properly treated as one point in making rates, shippers locally, from Chicago, of Ohio and Pennsylvania coal, cannot justly insist upon rates no higher than the division of such through rates which appertains to the lines running northwest from that city,—the circumstances under which the through rate is made being such that it cannot be differently adjusted. A reduction of their rates on that basis would involve either a general reduction from the entire group, under the short-haul clause of the Interstate Commerce Law, or an abandonment by defendant of the through rates in question, neither of which would benefit complainant, while both would do great injury to all other interests involved. Under such circumstances the preference is not undue, nor is the advantage complained of unreasonable. *Rend v. Chicago & N. W. R. Co. (Com.)* 313

146. Group rates may be properly made from a large number of mines practically composing a coal-mining district extending across the State of Illinois, to points in Western Wisconsin, Minnesota, and Dakota, the distance from each part of the group by some route being substantially a fair equivalent of the distance from other points, and the commercial necessities being substantially the same for all. *Id.*

147. The group rate established from a coal-mining district extending across the whole State of Illinois is properly extended to coal shipped to the same territory locally from Chicago, or by way of Chicago from mines in the eastern part of the group, on account of the operation of § 4 of the Interstate Commerce Act, some of the lines passing through the mining district *en route* from Chicago to the points of distribution. *Id.*

148. A uniform rate upon milk destined for New York city from all stations within 200 miles upon railroads running through the southern counties of New York, west of the Hudson River to Jersey City, is not an unjust discrimination in favor of more distant shipping points, as against those nearer the common terminus. *Howell v. New York, L. E. & W. R. Co. (Com.)* 162

149. Contracts by a railroad company with other companies for the establishment of through routes and through rates for the continuous carriage of interstate traffic do not violate § 7 of the Act to Regulate Commerce, prohibiting a combination to prevent the carriage of freights from being continuous. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351

150. A court of equity has no power, either at common law or under the Interstate Commerce Act, to compel a railroad company to enter into a contract with another company for a joint through rate or a joint through routing of freight and passengers. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (C. C. E. D. Ark.) 763

d. Classification.

151. Classification of freight for transportation purposes is lawful. *Thurber v. New York C. & H. R. R. Co.* (Com.) 742

152. The proper classification of an article for freight rates is to be judged relatively by the classification of other articles similar in character, quality, and conditions of transportation. *Myers v. Pennsylvania Co.* (Com.) 403

153. A classification of freight designating different classes for carload quantities and for less than carload quantities, for transportation at a lower rate in carloads than in less than carloads, is not in contravention of the Act to Regulate Commerce. *Thurber v. New York & H. R. R. Co.* (Com.) 742

154. The use by carriers of different freight classifications, the effect of which is to increase the revenue from local traffic as compared with that obtained from through traffic, is as much a violation of the Act, § 4 (the long and short haul provision), as would be the imposition of a higher tariff upon the same class in the same classification. *Martin v. Southern P. Co.* (Com.) 1

155. The difference in classification adopted by the "western classification" (which applies to business from the Pacific coast to all points west of the Missouri River), between "raisins" and "dried fruits," by which a higher carload rate is imposed on raisins than on other dried fruits, while by the "Pacific coast east-bound classification" (which applies to business over the same roads from the Pacific coast to points on the Missouri River and east thereof) such distinction is not imposed,—is, in connection with the different rules of the two classifications as to mixed carloads, an unreasonable discrimination. *Id.*

156. Under a classification which puts lumber in carloads in the sixth class, and unfinished wagon materials in the fifth class, hub-blocks prepared to be sold to the manufacturers of hubs and of wheeled vehicles, but upon which only so much labor has been expended as is needful to put them in a condition for seasoning, are regarded as raw material, and belong, when not otherwise specified in the classification sheet, with lumber, instead of unfinished wagon materials. *Hurlburt v. Lake Shore & M. S. R. Co.* (Com.) 81

157. The difference in the rate of transportation of compressed and uncompressed cotton 2 INTER S.

by rail carriers should be the actual and necessary cost of compressing. *New Orleans Cotton Exch. v. Illinois C. R. Co.* (Com.) 777

e. Discrimination between Places.

158. Rates must be relatively fair and reasonable as between localities in essential respects similarly situated, having regard to the geographical position and relative positions of the localities, so that one will not be favored to the prejudice of the other. *Detroit Board of Trade v. Grand Trunk R. Co.* (Com.) 199; *Milwaukee Chamb. of Com. v. Flint & P. M. R. Co.* (Com.) 393; *Re Tariffs of Transcontinental Lines* (Com.) 203

159. On the question of what are just and fair rates to any particular locality, it is necessary to see what other rates are given to other localities. *Re Chicago, St. P. & K. C. R. Co.* (Com.) 137

160. Low rates to one place may not be just if still lower rates are given to another. *Id.*

161. In the determination of a complaint of undue preference against Lincoln, Nebraska, in favor of Omaha, in rates from St. Louis, the comparative length of the two pieces of road, the grades, crossings, and bridges, the interest upon the cost, and the facilities with which trains may be handled, must be considered, besides the mere volume of business. *Lincoln Board of Trade v. Missouri P. R. Co.* (Com.) 98

162. The fact that a low rate from St. Louis is forced upon the Missouri Pacific by competition at Omaha cannot be taken advantage of to compel a corresponding reduction upon its Lincoln branch. *Id.*

163. The right of one locality to equal rates with another is not diminished by municipal subscriptions for the building of the road. *Lincoln Board of Trade v. Burlington & M. R. Co.* (Com.) 95

164. The danger from transportation of oil to Washington through the city of Pittsburgh is not sufficient to justify a rate of 50 cents per barrel as against 40 cents for an equal distance to other places. *Brady v. Pennsylvania R. Co.* (Com.) 78

165. Where unreasonableness of freight rate on oil in carload lots is charged on short local hauls,—for example, from Titusville, Pennsylvania, to Buffalo, New York; and the charge is attempted to be sustained on a comparison of these rates with rates on what is usually an inferior grade of oil transported from Titusville, through Buffalo, to Perth Amboy, New Jersey, for export, chiefly in the cars of another company; and it appears that upon such shipments destined to Buffalo there are expensive terminal charges, while upon such shipments to Perth Amboy these terminal charges are far less considerable,—the circumstances and conditions which control the making of the rates in each instance are substantially dissimilar. *Rice v. Western N. Y. & P. R. Co.* (Com.) 293

f. Discrimination as to Other Carriers.

166. The requirement of the Act to Regulate Commerce, that every common carrier shall afford reasonable, proper, and equal facilities

to connecting lines, imposes upon a carrier no duty either to form new connections or to establish new stations, yards, or depots, or to pay any part of the expense of providing such new facilities, either for the convenience of the public or of other carriers; and a carrier cannot be compelled to receive or deliver traffic at a point where another company has made a new connection with its roads, but has not provided proper facilities. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351. Overruling decision of the Interstate Commerce Commission in the same case. 102

167. All discriminations and preferences by one carrier between others are not forbidden or made unlawful by the Interstate Commerce Act, but only such as are unjust or undue or unreasonable. *Id.*

168. Where the charter of a railroad company provided "that any and all such railroad or railroads hereafter constructed may connect and join with the road hereby contemplated," the connection thus authorized is a physical, and not a business connection, and it does not require an interchange of traffic at the point of junction. *Id.*

169. A carrier cannot be compelled by a new connection formed with its road by another railroad, at a point where there are no facilities for handling freight, to concede the use of its own track and terminal facilities to the new company, and accomplish the interchange of traffic at its own yards and with its own employes. The use of such advantages can be acquired only by mutual agreement. *Id.*

170. A bridge company which is not, either in law or in fact, a common carrier of interstate traffic, cannot invoke the provisions of the Act to Regulate Commerce to compel railroad companies to transact business with or through such bridge company. *Id.*

171. The Interstate Commerce Law does not undertake to require a common carrier subject to its provisions to establish through routes and through rates with all connecting lines, merely because it may have done so with some of them. *Id.*

172. Neither at common law nor under the Act of Congress of June 15, 1866 (U. S. Rev. Stat. § 5258), or the Interstate Commerce Act of Feb. 4, 1887, can a common carrier be compelled to make through traffic arrangements with connecting lines. *Id.*; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* (Com.) 454

173. While it is the duty of a state carrier which engages in interstate commerce to forward traffic offered from a connecting line, there is no authority, under the present Act, to compel the carrier to forward the traffic over a route not operated or selected by itself. *Mattingly v. Pennsylvania Co.* (Com.) 806

174. Though rates in interstate traffic are the subject of agreement among carriers who transport the freight, and for their existence are dependent upon such agreement; and one of the features of such rates usually is that each carrier receiving the freight pays the charges upon it of the carrier delivering it. *Re Clark* (Com.) 797

175. No authority to issue through tickets or
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through bills of lading for property, at through rates, over connecting lines, is conferred by the Act to Regulate Commerce upon common carriers of interstate commerce, in the absence of arrangements between the companies. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* (Com.) 454

176. The Act to Regulate Commerce does not empower the Commission to compel railroad companies to enter into joint arrangements with carriers by water for through carriage at through rates. The fact that a railroad company makes such arrangement for one of its branch roads will not charge it with unjust discrimination for refusing to make identical arrangements on other parts of its system, when it appears that from such other parts of its system it actually makes through arrangements by a more direct route and at the same rates, which are presumptively of equal convenience to shippers. *Re Joint Water & Rail Lines* (Com.) 486

177. Where a railroad company has by an arrangement with one car company procured a sufficient supply of sleeping and excursion cars for all the business of its lines, and refuses to haul excursion cars of other private car companies over its track for this reason, it cannot be forced to do so against its objection. *Worcester Excursion Car Co. v. Pennsylvania R. Co.* (Com.) 792

178. A railroad company may acquire cars by construction, by purchase, or by contract for its use, and no one has the power to compel a railroad company to select among these several modes or to contract with all comers. *Id.*

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COMMERCE. See also CARRIERS, 12; CONSTITUTIONAL LAW, 5; TAXES, 6, 7, 10, 13-16, 21; TELEGRAPH COMPANIES, 2.

1. The control of commerce, being in the federal government, is not to be restricted by state authority. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania* (U. S. Sup. Ct.) 24

2. Laws passed by the individual States, under their general authority over internal concerns, may incidentally affect foreign and interstate commerce without conflicting with the Constitution of the United States, provided they do not discriminate against such commerce and are not inconsistent with the Acts of Congress. *State, Waterbury, v. Newton* (N. J.) 63

3. There is a commerce wholly within the State, which is not subject to the constitutional provision, and a distinction between commerce among States and between the citizens of a single State, conducted within its limits. *Louisville, N. O. & T. R. Co. v. Mississippi* (U. S. Sup. Ct.) 801

4. Transportation between points in the same State, but which passes through another State, is interstate commerce, and subject to regulation by the provisions of the Act to Regulate Commerce. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 289. See also, to same effect, *Sternberger v. Cape* 2 INTER S.

Fear & Y. V. R. Co. (S. C.) 426; *Delaware & H. C. Co. v. Com.* (Pa.) 223; *State v. Chicago, St. P. M & O. R. Co.* (Minn.) 519

5. The fact that transportation between two points in one State is accomplished by passing through territory outside of the State does not make the transportation interstate commerce so as to invalidate a law imposing a tax upon receipts derived from such commerce. *Lehigh Valley R. Co. v. Com.* (Pa.) 226

6. Where transportation of goods destined for a point without the State has been actually begun, temporary stoppage within the State, without the intention of abandoning the original movement (which movement is ultimately completed), will not deprive the transportation of the character of interstate commerce. *Delaware & H. C. Co. v. Com.* (Pa.) 222

7. Transportation of persons is as much commerce as transportation of property. *Louisville, N. O. & T. R. Co. v. State* (Miss.) 615

8. Natural gas, when brought to the surface and placed in pipes for transportation, is an article of commerce. *State, Corwin, v. Indiana & O. Oil, G. & Min. Co.* (Ind.) 758

9. The New Jersey Act of March 22, 1886 (P. L. 1886, p. 107), rendering penal the sale of oleomargarine colored with annatto, is valid as applied to a sale made in that State by the agent of the manufacturer in Indiana, although the package sold here was that which had been sent by the manufacturer from Indiana to that State for sale. *State, Waterbury, v. Newton* (N. J.) 63. **But see** the recent case of *Leisy v. Hardin* (U. S. Sup. Ct.) 3 Interstate Com. Rep. 36

10. A state statute prohibiting the sale of dressed meats within the State, unless the animals have been inspected by a state officer within twenty-four hours before slaughter, is unconstitutional as an invasion by the State of the domain of Congress to regulate interstate commerce, and as a discrimination against the citizens of other States. *Swift v. Suthphen* (C. C. N. D. Ill.) 656

11. A statute prohibiting the manufacture of intoxicating liquors is not invalid as a regulation of commerce because it does not except from its operation liquors manufactured for export. *Kidd v. Pearson* (U. S. Sup. Ct.) 232

12. Congress may, in the exercise of its power to regulate interstate commerce, construct or authorize individuals or corporations to construct railroads across the States and Territories of the United States. *California v. Central P. R. Co.* (U. S. Sup. Ct.) 153

13. State legislation as to qualifications, duties, and liabilities of employes on railway trains engaged in interstate commerce, to provide against accidents on trains while within the State, is valid in the absence of legislation on that subject by Congress. *Nashville, C. & St. L. R. Co. v. Alabama* (U. S. Sup. Ct.) 238

14. The State of Texas has the right to prohibit and interfere with a contract in restraint of competition, some of the parties to which are corporations created by the State, although it regulates charges upon freight carried to and fro between Texas and other States. This

agreement, being illegal as to some, is illegal as to all. *Gulf, C. & S. F. R. Co. v. State* (Tex.) 335

15. Iowa Code, § 4059, making the owner of Texas cattle which have not been wintered north liable for any damages from allowing them to run at large and to spread Texas fever, does not conflict with the paramount authority of Congress to regulate interstate commerce. *Kimmish v. Ball* (U. S. Sup. Ct.) 407

16. The Alabama Act of Jan. 15, 1887 (Ala. Acts 1886-1887, p. 36, § 5, subd. 10), which exacts a license fee from itinerant dealers in fruit trees, etc., is an attempted regulation of commerce between the States, and hence in conflict with the Federal Constitution, and therefore void. *State v. Agee* (Ala.) 21

17. The imposition of a license tax upon a foreign traveling agent selling goods by sample for his principal doing business without the State is an attempted regulation of commerce between the States, and is therefore in conflict with the Federal Constitution, and invalid. *Asher v. Texas* (U. S. Sup. Ct.) 241

18. The statute of a State requiring owners of vehicles using the streets of a city to pay an annual license, and providing that the license moneys be placed to the credit of the street-repairing fund of the public treasury of said city, is not repugnant to U. S. Const. art. 1, § 8, cl. 3 (the Interstate Commerce Clause), when enforced upon owners who are nonresidents of the State and not engaged in any business in the State, for vehicles used by them upon such streets in interstate transportation and in prosecution of interstate commerce. Such license fees being intended by the statute for the repair of the streets, their enforced payment must be regarded as compensation for the advantages and facilities afforded to such transportation; and the requirement of license is not a restraint or other form of regulation of interstate commerce. *Bogart v. State* (Ohio C. P.) 297

19. The power to regulate commerce among the several States comprehends the power to regulate the navigable waters of the United States on which such commerce may be or is carried; and to this end Congress may make any regulation concerning such navigation, including the vessels engaged therein, as may be necessary and proper to secure and maintain the safety and convenience of the waterway; which regulations are as applicable to vessels engaged only in intrastate commerce thereon as to those engaged in interstate commerce. *The City of Salem* (D. C. D. Or.) 418

20. The telegraph is an instrument of commerce. *Ratterman v. Western U. Teleg. Co.* (U. S. Sup. Ct.) 59

21. Where a telegraph company transmits messages between different States, and has accepted, and is acting under, the telegraph law passed by Congress July 24, 1866, no State in which it does business can require it to take out a license for the transaction thereof. *Le-loup v. Port of Mobile* (U. S. Sup. Ct.) 134. See also TAXES.

22. A general license tax on a telegraph company doing business in different States 2 INTER S.

affects its entire business, interstate as well as domestic, and is unconstitutional. *Id.*

NOTE.

Commerce; interstate; as affecting telegraph companies. 134

COMMISSION. See INTERSTATE COMMERCE COMMISSION.

COMMISSIONS.

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COMPETITION.

Effect on Rates, see CARRIERS.
See also CARRIERS, 103, 104, 106-108, 127, 132, 133, 141; CONTRACTS.

NOTE.

Constitutional and statutory provisions affecting railroads to prevent competition. 335

COMPLAINT. See INTERSTATE COMMERCE COMMISSION, 6, 7; PLEADING.

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Absorption of weaker lines. 698
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CONSTITUTIONAL LAW. See also CARRIERS, 9; COMMERCE, 10; COURTS, 6.

1. Giving railroad commissioners power to fix rates is not an unlawful delegation of legislative power. *Chicago & M. W. R. Co. v. Dey* (C. C. S. D. Iowa) 325

2. A state law prohibiting the manufacture of liquors does not deprive the owners of a distillery of their property without due process of law. *Kidd v. Pearson* (U. S. Sup. Ct.) 232

3. It does not appear that there has been any such confiscation as amounts to a taking of property without due process of law, because the income of a railroad at the rate of fare fixed by the statute will pay only 1½ per cent on the original cost of the road. *Dow v. Beidelman* (U. S. Sup. Ct.) 56

4. An Act making a railroad commissioners' schedule *prima facie* evidence that the rates fixed thereby are reasonable is not an infringement of the constitutional guaranties of the right to trial by jury and against deprivation of property without due process of law. *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 325

5. The Alabama statute disqualifying persons who are color-blind from certain service

on railroads, and providing for their examination, and providing a fine upon any company employing any person for such service without a certificate from examiners, is not invalid as a regulation of commerce or as depriving any person of property without due process of law. *Nashville, C. & St. L. R. Co. v. Alabama* (U. S. Sup. Ct.) 238

6. Requiring a railroad company to pay fees for employing persons for certain railroad service does not deprive them of property without due process of law. *Id.*

7. No privileges or immunities of citizens are affected by Iowa Code, § 4059, making owners of Texas cattle liable for allowing them to run at large and spread Texas fever. *Kim-mish v. Ball* (U. S. Sup. Ct.) 407

CONTRACTS.

1. An agreement between several railroad companies, some of which own and control competing lines, for the appointment of a common governing committee, or an association composed of one member from every company, to fix the rates for which freights should be carried to and from points within the State of Texas, is illegal because contrary to Tex. Const. art. 10, § 5, which provides that "no railroad, . . . or managers of any railroad corporation, shall consolidate the stock, property, and franchises of such corporation with, . . . or in any way control, any railroad corporation owning or having under its control a parallel or competing line." *Gulf, C. & S. F. R. Co. v. State* (Tex.) 335

2. An agreement by rival lines of railroad to prevent competition is not relieved from illegality by the fact that any company, party to the agreement, has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, or that it has not been shown that the companies have made charges in excess of the limits allowed by law. *Id.*

3. Even in the absence of such constitutional provision, whether action under the agreement could not be enjoined as being in restraint of competition and contrary to public policy.—*Id.* *quere.*

COOLEY, CHAIRMAN.

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CORPORATIONS. See also CITIZENS; TAXES, 4, 20, 22.

1. The word "incorporated," as used in N. Y. Act 1880, § 3, amended by N. Y. Laws 1881, chap. 380, providing that every company incorporated under any law of this State shall be subject to a certain tax, is not to be confined to an association brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations the enabling provisions of the statute. *People, Platt, v. Wemple* (N. Y.) 735

2. The Memphis & Little Rock Railroad Company as reorganized by the purchasers in 1877 at the sale under mortgage foreclosure, if a lawful corporation of Arkansas, was not the same corporation as that chartered by the Legis-

lature in 1853, but was a new corporation subject to the Constitution and laws in force when it came into existence. *Dow v. Beidelman* (U. S. Sup. Ct.) 56

3. A State can make the grant of the privilege to a corporation of having an office within its limits conditional upon the payment of a license tax, and fix the sum according to the amount of the authorized capital of the corporation. *Pembina Consol. Silver Min. & Mill. Co. v. Pennsylvania* (U. S. Sup. Ct.) 24

4. The only limitation upon the power of the State to exclude a foreign corporation from doing business within its limit or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. *Id.*

COUNTERFEITS. See LEGISLATURE, 1.

COUPLERS.

Automatic freight car. 703

COURTS.

1. Congress, in establishing "inferior courts" and prescribing their jurisdiction, must confer upon the judges appointed to administer them the constitutional tenure of office,—that of holding "during good behavior,"—before they can become invested with any portion of the judicial power of the government. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351

2. U. S. Const. art. 3, providing for the trial of all crimes in the State where they were committed, applies only to trials in federal courts, and not to trials in state courts. *Nashville, C. & St. L. R. Co. v. Alabama* (U. S. Sup. Ct.) 238

3. The right asserted by a petitioner asking for the enforcement of an order of the Interstate Commerce Commission arises and is claimed under a law of the United States which relates to a subject over which Congress has exclusive control; and this is sufficient to sustain the jurisdiction of the circuit court, independent of the citizenship of the parties to the controversy, since it involves a federal question. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351

4. Under the Act of Congress of March 3, 1887, a civil action in a federal court for violations of the Interstate Commerce Act can be brought only in the district whereof defendant is an "inhabitant," as jurisdiction is not dependent on citizenship. *Connor v. Vicksburg & M. R. Co.* (C. C. E. D. Mo.) 177

5. A corporation created and existing solely under the laws of a State in which it has its principal office and place of business cannot be said to be an inhabitant of another State so that it can be sued there in the federal court, although it does business there through agents. *Id.*

6. An inquiry by the courts into the reasonableness of rates established by state authority

for railroad transportation is not prevented by the fact that the Legislature has pursued the forms of law in prescribing a schedule of rates; but the question is open and must be decided in each case whether the rates prescribed are within the limits of legislative power, or are mere proceedings which, if not restrained, will work a confiscation of property. *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 325

7. The Mississippi statute of March 2, 1888, as settled by the supreme court of that State, applies solely to commerce within the State; and the Supreme Court of the United States must accept as conclusive such construction of the statute of the State by its highest court. *Louisville, N. O. & T. R. Co. v. Mississippi* (U. S. Sup. Ct.) 801

DEFINITIONS.

1. **Incorporated.** See CORPORATIONS, 1.
2. **Inhabitant.** See COURTS, 5.

DELEGATION OF POWER. See CONSTITUTIONAL LAW, 1; MUNICIPAL CORPORATIONS.

DISCOVERY. See also SUBPENA.

An application to compel parties not carriers, or third parties, to produce books, papers, or documents, should be in writing, and should specify the things whose production is desired, should be accompanied by an affidavit that the things are in the witness's possession or under his control, and should show *prima facie* the materiality and necessity of the evidence. If directed against a carrier who is a party, it is sufficient to indicate the things desired in a general way, and state a belief that they will be of service, and that the application is in good faith. *Rice v. Cincinnati, W. & B. R. Co.* (Com.) 584

DISCRIMINATION. See CARRIERS, II.; EVIDENCE, 7; INDICTMENT; PLEADING.

DISMISSAL.

Of complaint; request for. 661

DISTRICT OF COLUMBIA.

1. Congress has express power to exercise exclusive legislation over the District of Columbia; but in creating the District of Columbia a body corporate for municipal purposes, Congress could only authorize it to exercise municipal powers. *Stoutenburgh v. Hennick* (U. S. Sup. Ct.) 409

2. Congress did not delegate to the Legislative Assembly of the District of Columbia the power to enact clause 3 of § 21 of the Act of that Assembly requiring commercial agents to pay \$200 annually for a license, and, although by several Acts Congress repealed or modified other parts of said Act of said Assembly which were within the scope of municipal action, such congressional legislation did not ratify the above-mentioned objectionable clause. *Id.*

DRUMMER. See COMMERCE, 16, 17.

DUE PROCESS. See CONSTITUTIONAL LAW, 2-6.

2 INTER S.

ELECTRIC WIRES. See TELEGRAPH COMPANIES.

ELEVATED RAILROADS. See TELEGRAPH COMPANIES, 1.

ENGLISH LEGISLATION.

Report on. appx. I. viii.

ESTOPPEL.

Where the state board of railroad commissioners publish, for the length of time required by law, a notice that a schedule of rates will go into effect on a certain day, and the secretary of the commission, on receipt of a telegram from certain railroads asking an extension of time, grants the extension and publishes the following week notice of such change, the commission, on the application of the railroads to restrain the further publication of the notice, cannot urge that the publication is complete, and that the extension of time was unauthorized. *Chicago & N. W. R. Co. v. Dey* (C. C. S. D. Iowa) 325

EVIDENCE.

1. Judicial notice may be taken by the court of the fact that two railroads touching the same point are parallel and competing lines. *Gulf, C. & S. F. R. Co. v. State* (Tex.) 335

2. When rates on the line of a carrier are on their face disproportionate or relatively unequal, the burden is on the carrier to justify them when challenged. *McMorran v. Grand Trunk R. Co.* (Com.) 604

3. Grain and grain products classified alike are presumptively entitled to equal rates; and if a difference is made by a carrier, it assumes the burden of sustaining it by satisfactory evidence. *Id.*

4. A carrier making higher rates upon shorter hauls upon the same line in the same direction has the burden of proving their reasonableness. *Spartanburg Board of Trade v. Richmond & D. R. Co.* (Com.) 193; *Re Chicago, St. P. & K. C. R. Co.* (Com.) 137

5. The common-law rule that he who attacks a contract has the burden to show its invalidity prevails in the Colorado courts. Therefore a contract of rebate must be held valid until shown to be otherwise. *Bayles v. Kansas P. R. Co.* (Colo.) 643

6. Terms of art, or terms peculiar to any occupation or business, used in a classification sheet to designate the product of a particular employment, are supposed to be understood in that employment; and it is not competent for railroad experts, when the meaning of the classification is questioned, to testify in what sense they are understood in classification circles. *Hurlburt v. Lake Shore & M. S. R. Co.* (Com.) 81

7. In proceedings to determine whether there has been discrimination in favor of a certain shipper, it is sufficient to show the rates actually charged, as differing from the public schedule of the rates charged to the public in general, for a reasonable length of time. Innumerable shipments in detail for many years are immaterial. *Rice v. Cincinnati, W. & B. R. Co.* (Com.) 584

EXCURSION RATES. See CARRIERS, 55.

EXPERTS. See EVIDENCE, 6.

EXPORT. See also TARIFFS.

Property intended for. 692

EXPRESS COMPANIES. See also TAXES, 21.

Express companies; report on. 251

FEDERAL COURTS. See COURTS, 1-3.

FILING. See TARIFFS.

FOOD. See also COMMERCE, 9, 10.

1. It is immaterial that a prohibited commodity prepared with deceptive coloring is a wholesome food, since it would be equally wholesome if prepared without deceptive ingredient. *State, Waterbury, v. Newton* (N. J.) 63

2. Under the New Jersey Oleomargarine Act, approved March 22, 1886, § 5 (P. L. 1886, p. 107), it is not essential to the guilt of a person selling oleomargarine colored with annatto, that he should know that the oleomargarine was so colored. *Id.*

3. The form of conviction prescribed by the supplement of the New Jersey Oleomargarine Act, which went into effect May 1, 1887 (P. L. 1887, p. 192), may be used in prosecutions instituted after that date for offenses previously committed. *Id.*

FOREIGN CORPORATIONS. See CORPORATIONS, 3, 4.

FORMS. appx. IV. liii.

Amended. 666

FRANCHISES. See TAXES, 3-6.

FREE CARTAGE. 671

FREE PASSES. See PASSES.

FREIGHT. See CARRIERS, II. e.

GAS. See also COMMERCE, 8.

A State Legislature has no power to prohibit the conducting of natural gas from points within to points without the State. *State, Corwin, v. Indiana & O. Oil, G. & Min. Co.* (Ind.) 758

GOVERNMENT-AIDED RAILROAD AND TELEGRAPH LINES.

Report on. 679

GRAND TRUNK RAILWAY COMPANY. See CARRIERS, 24.

GROUP RATES. See CARRIERS, II. e, 3, c.

HEALTH. See COMMERCE, 10.

2 INTER S.

HEARING. See INTERSTATE COMMERCE COMMISSION, 15.

HEATING OF PASSENGER CARS. Report on. 706

IMMIGRATION. See also CARRIERS, 21, 58, 93.

The Interstate Commerce Commission has no authority to interfere with the regulations of a state board of commissioners of immigration whose control of immigrant transportation has been sanctioned by the federal government. *Savery v. New York C. & H. R. R. Co.* (Com.) 210

Transportation of immigrants; report on. 271

IMMUNITIES. See CONSTITUTIONAL LAW, 7.

INDICTMENT.

1. An indictment, under the Interstate Commerce Act, § 2, for "unjust discrimination," need not aver by what particular device the defendant managed to discriminate in favor of a particular shipper. *United States v. Tozer* (D. C. E. D. Mo.) 422

2. A count under the Interstate Commerce Act, § 9, is sufficient if it shows with requisite certainty, by any apt language, that the accused has committed an act which gives one shipper or class of shippers an advantage, or subjects others to a disadvantage. *Id.*

3. A count under the Interstate Commerce Act, § 3, charging the subjection of a certain locality to an undue prejudice by charging its merchants a higher rate for transporting property to a certain point than was exacted from residents of a certain other locality, must show with precision that the lower rate was for transportation between the same points as the higher rates. *Id.*

4. Counts under the Interstate Commerce Act, § 2, for "undue and unreasonable preference," and "for undue or unreasonable prejudice or disadvantage," need not allege that the service for which a different rate was charged was rendered "under substantially similar circumstances and conditions,"—those words being found only in § 4, in relation to greater charge for shorter haul. *Id.*

5. A count under the Interstate Commerce Act, § 6, alleging the allowance of a rate less than the established and published rate which "was in force on that day," sufficiently negatives the inference that the rate might have been reduced by the carrier without notice, as permitted by that section. *Id.*

INJUNCTION. See also CARRIERS, 45.

1. So long as public officers confine themselves to such duties as are confided to them by law, the court will not interfere to see whether they are acting wisely or judiciously. *Western U. Teleg. Co. v. New York* (C. C. S. D. N. Y.) 533

2. Where the subjects of taxation can be separated, so that that which arises from interstate commerce can be distinguished from that which arises from commerce wholly within

the State, the tax on interstate commerce will be restrained while permitting the State to collect that upon commerce wholly within its own territory. *Ratterman v. Western U. Teleg. Co.* (U. S. Sup. Ct.) 59

3. That the state board of railroad commissioners have advertised in papers that a schedule of rates prepared by them will be put in force on a named day gives equity jurisdiction to restrain the enforcement of the schedule, before the expiration of the time, to prevent a multiplicity of suits. *Chicago & N. W. R. Co. v. Dey* (C. C. D. Iowa) 325

4. Where the probable effect of putting in force a schedule of rates prepared by the state board of railroad commissioners, under Iowa Act of April 5, 1888, would be to destroy all dividends from the operation of the roads, and the Act provides for treble damages to any shipper injured by an overcharge, the preliminary injunction should be granted. *Id.*

NOTE.

Injunction; purpose and object of; to restrain trespass; legal remedy adequate. 325

INSPECTION. See INTERSTATE COMMERCE COMMISSION, 12.

INSURANCE FUNDS.

And the relations of corporations and their employes. 710

INTERSTATE COMMERCE COMMISSION. See also CARRIERS, 15; DISCOVERY; IMMIGRATION; PARTIES; REHEARING.

1. Congress, under its sovereign and exclusive power to regulate commerce among the several States, has the power to create a commission for the purpose of supervising, investigating, and reporting upon matters or complaints connected with or growing out of interstate commerce. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C. C. D. Ky.) 351

2. The Interstate Commerce Commission is invested with only administrative powers of supervision and investigation, which fall far short of making it a court or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive. Nor is it invested with any authority to enforce its decision or award. *Id.*

3. The Interstate Commerce Commission is charged with the duty of investigating and reporting upon complaints; and the facts found or reported by it are only given the force and weight of *prima facie* evidence in such judicial proceedings as may thereafter be had for the enforcement of its recommendation or order. *Id.*

4. The Commission does not give opinions on abstract questions. *Pennsylvania Co. v. Louisville, N. A. & C. R. Co.* (Com.) 603

5. Where a case involving the reasonableness of rates has been disposed of by the carrier assenting to the rates demanded, no opinion will be expressed on the rates which have been abandoned, even though the parties request it. *Lincoln Board of Trade v. Union P.* 2 INTER S.

R. Co. (Com.) 101; *Harris v. Duval* (Com.) 514; *Pennsylvania Co. v. Louisville, N. A. & C. R. Co.* (Com.) 603; *Raueson v. Newport News & M. V. R. Co.* (Com.) 626

6. A complaint, no reasonable ground for investigation of which appears, will not be filed. *La Crosse, M. & J. Union v. Chicago, M. & St. P. R. Co.* (Com.) 9

7. The Interstate Commerce Commission has authority to institute investigations and to deal with violations of the law independently of a formal complaint, or of direct damage to a complainant. *Re Grand Trunk R. Co.* (Com.) 496

8. Investigation by the Commission, on its own motion, concerning a course pursued by certain carriers in respect to compliance with the provisions of the Act to Regulate Commerce. *Re Atlanta & W. P. R. Co.* (Com.) 461

9. A complaint made for the purpose of retaliation for a fancied wrong—as, to get even with a carrier for the revocation of complainant's pass—does not commend itself to the Commission. *Slater v. Northern P. R. Co.* (Com.) 243

10. The Commission will not determine a collateral inquiry or question presented by evidence admissible only for other purposes, until an opportunity has been furnished the parties to be heard in a proceeding such as is provided for by the statute. *Business Mens Asso. v. Chicago & N. W. R. Co.* (Com.) 48

11. The Interstate Commerce Commission will not determine the relative reasonableness of rates at many stations and in a large extent of territory, upon the mere face of tariffs and without further proof. *Spartanburg Board of Trade v. Richmond & D. R. Co.* (Com.) 193

12. The Interstate Commerce Commission may make its own inspection to ascertain the unfitness of cars for transporting immigrants. *Savery v. New York C. & H. R. R. Co.* (Com.) 210

13. A complaint, under the Act to Regulate Commerce, based on acts which were done before the passage of the statute, charges no violation of the Act, within the cognizance of the Interstate Commerce Commission. *White v. Michigan C. R. Co.* (Com.) 641

14. The question whether rates paid ought to be refunded having been presented to a judicial tribunal, where it is now pending, the Interstate Commerce Commission will not take cognizance of it. *Harris v. Duval* (Com.) 514

15. A case involving local rates was ordered to be heard before the Interstate Commerce Commission at a central point in the territory immediately affected by the rates. *Delaware State Grange v. New York, P. & N. R. Co.* (Com.) 187

NOTE.

Interstate Commerce Commission; jurisdiction and power of. 422

INTERVENTION. See PARTIES, 4.

INTOXICATING LIQUORS. See also COMMERCE, 11.

A State has the right to prohibit or restrict the manufacture of intoxicating liquors with-

in its limits, to prohibit all sale and traffic in them in the State, to inflict penalties for their manufacture and sale, and to provide regulations for the abatement, as a common nuisance, of property used for such forbidden purposes. *Kidd v. Pearson* (U. S. Sup. Ct.) 232

INTRASTATE ROADS.

Report on. 250

INVESTIGATIONS.

Report of. 664, 665

JOINT TARIFFS. See TARIFFS.

JUDICIAL NOTICE. See EVIDENCE; 1.

LEGISLATURE.

1. The Legislature may forbid the sale of counterfeits. *State, Waterbury, v. Newton* (N. J.) 63

2. Where property has been clothed with a public interest, the Legislature may fix a limit to that which in law shall be reasonable for its use. This limits the courts as well as the people. If it has been improperly fixed, the Legislature, not the courts, must be appealed to for the change. *Dow v. Beidelman* (U. S. Sup. Ct.) 56

LETTERS. See CIRCULARS.

LICENSE. See also COMMERCE, 16-18, 21, 22; CORPORATIONS, 3.

1. An ordinance charging license fees to an amount much greater than the cost of controlling and supervising the licensee cannot be sustained on the ground that demands might be made against the municipality on account of the licensee. *Philadelphia v. Western U. Teleg. Co.* (C. C. E. D. Pa.) 728

2. An ordinance charging a corporation occupying the streets of a municipality license fees amounting in all to \$16,000 per annum, where the cost of supervising and controlling the corporation for the protection of persons and property had for several years been only \$3,500 annually, levies a tax, and the ordinance is unreasonable and void. *Id.*

LOCALITIES.

Discrimination between, see CARRIERS, II. e, 3, e.

LONG AND SHORT HAULS. See CARRIERS, II. e, 3, c.

MANDAMUS.

The discretionary power of the court, under the Interstate Commerce Act, to grant a mandamus to prevent unjust discrimination by a carrier, although some question of fact is undetermined, does not apply where no case of unjust discrimination is shown to exist. *Re Morris's Petition* (C. C. N. D. N. Y.) 617

MAXIMS.

Damnum absque injuria. *Atkinson v. Atlanta* (Ga.) 7 S. E. 692; *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.* (Ky.) 515

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MEAT. See COMMERCE, 10.

MILAGE. See CARRIERS, 55.

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MUNICIPAL CORPORATIONS.

While the power to make laws cannot be delegated, the creation of municipalities exercising local self-government cannot be held to trench upon that rule. *Stoutenburgh v. Hennick* (U. S. Sup. Ct.) 409

NAVIGATION. See SHIPPING; WATERS.

NEGROES. See CARRIERS, 25-27.

OFFICERS. See INJUNCTION, 1.

OLEOMARGARINE. See COMMERCE, 9; FOOD, 2, 3.

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PARTIES.

1. The reasonableness of rates cannot be fairly determined in a proceeding to which some of the parties responsible for such rates are not parties. *New Orleans Cotton Exch. v. Cincinnati, N. O. & T. P. R. Co.* (Com.) 289; *Michigan Congress Water Co. v. Chicago & G. T. R. Co.* (Com.) 428; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (Com.) 102

2. Where a complaint is made against the reasonableness of through rates agreed upon by several competing lines, it is necessary to make all of such connecting lines parties defendant. *Michigan Congress Water Co. v. Chicago & G. T. R. Co.* (Com.) 423

3. In a proceeding to correct a classification by the initial carrier of freight which, before reaching its destination, must pass over the roads of several carriers, all such carriers should be made parties; but if the initial carrier alone is made defendant, the proceeding is not therefore defective. *Hurlburt v. Lake Shore & M. S. R. Co.* (Com.) 81

4. Persons having an interest in a question pending before the Commission may appear when the case is submitted, without being

made formal parties. *Id.*; *Spartanburg Board of Trade v. Richmond & D. R. Co.* (Com.) 193

5. When carriers other than the respondents of record are committing the same violations of the Act to Regulate Commerce as the respondents, an order may issue against the respondents, and the cause be held for the purpose of bringing such other carriers into it to be proceeded against unless they comply with the order. *Bates v. Pennsylvania R. Co.* (Com.) 715

6. The receiver of a railroad company is not, after his discharge, either a proper or necessary party defendant to an action for a rebate of freight under a contract made by him. *Bayles v. Kansas P. R. Co.* (Colo.) 643

PARTY RATES. See CARRIERS, 56, 57.

PASSENGERS. See also CARRIERS, II. c, e, 2.

Free transportation of. 254
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PLACES.

Discrimination between, see CARRIERS, II. e, 3, e.

PLEADING.

1. The fact that a complaint fails to show that plaintiff is entitled to all the relief asked does not make it demurrable as failing to state facts sufficient to constitute a cause of action. *Bayles v. Kansas P. R. Co.* (Colo.) 643

2. An averment that parties are interstate common carriers subject to the Act to Regulate Commerce is not sufficient to warrant an inference, under a motion to dismiss the complaint for insufficiency, that wheat delivered to their elevator was for interstate commerce. *White v. Michigan C. R. Co.* (Com.) 641

3. The Interstate Commerce Commission is liberal in allowing amendments to complaints, but will not allow one that would be in effect making a new case. *Delaware State Grange v. New York, P. & N. R. Co.* (Com.) 187

4. Where a petition alleges that a contract was made with the agent of a railroad company regarding the shipment of grain, states its terms, avers a breach thereof, and states the amount of damages claimed, the defendant is not entitled, under Mo. Rev. Stat. § 3529, to require the petition to be made more definite. *Christie v. Missouri P. R. Co.* (Mo.) 22

5. Under the rules of practice issued by the Commission, a replication to an answer is not required or allowed. *Oregon S. L. R. Co. v. Northern P. R. Co.* (Com.) 639

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Unauthorized declarations of a depot agent, implying that a tank car which has returned from one long journey is in a safe condition to be loaded and started on another long run, are not binding upon the railway company. *Michigan Congress Water Co. v. Chicago & G. T. R. Co. (Com.)* 428

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RAILROADS. See also CARRIERS; COMMERCE, 12, 13; CONSTITUTIONAL LAW, 3; CONTRACTS, 1; TAXES, 2, 5, 7-9, 11, 19, 20.

In the absence of statutory provision, the rights of a railroad company under a lawful agreement for a specified use of the tracks of another railroad company are measured, in respect to the track used, by the terms of the contract. *Alford v. Chicago, R. I. & P. R. Co. (Com.)* 771

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See CARRIERS, II. e, 3, b; COURTS, 6; EVIDENCE, 4.

REBATE. See CARRIERS, 70, 71.

RECEIVERS. See also PARTIES, 6.

It cannot be assumed that a receiver operating a railroad had no power to make a contract for rebate to a shipper, where his lack of authority is not shown. *Bayles v. Kansas P. R. Co. (Colo.)* 643

REHEARING.

1. After a case has been decided by the Interstate Commerce Commission, a petition to open it for further testimony and a rehearing should be verified, and should indicate the nature of the new testimony and its purpose. *Rice v. Western New York & P. R. Co. (Com.)* 496

2. When a question of general public interest is involved, the Commission, in its own discretion and in furtherance of justice, may open a case to give parties the benefit of a more extended investigation of the same subject matter in other pending cases. *Id.*

3. After a complaint upon elaborate pleadings and proofs has been heard and determined by the Commission, an application for a rehearing, made only by those who were not parties to the proceeding, will not be granted, although, if upon a new or different complaint it should appear that any conclusion in the case so decided has been erroneous, the Commission would feel it to be a duty to correct such conclusion. *Re Petition of Toledo Produce Exchange (Com.)* 412

4. A petition to reopen a case that has been decided, and for a rehearing, should show *prima facie* that some material testimony has been overlooked or misapprehended, or some error in the findings of fact or conclusions of law. *Myers v. Pennsylvania Co. (Com.)* 544

5. When the application is insufficient in these respects, and only asks for a rediscussion of the facts and law already considered, with no offer of new evidence that can change the result, the application will be denied. *Id.*

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SHIPPING. See also TAXES, 18, 23.

The regulation contained in U. S. Rev. Stat. § 4465, forbidding a steamboat to carry more passengers than allowed in her certificate of inspection, applies to such boats engaged in carrying passengers on a navigable water of the United States, between ports of the same State only. *The City of Salem (D. C. D. Or.)* 418

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See also TAXES.

Regulations of steam vessels; regulations of supervising inspectors; inspection; examination of applications for license; provisions against carrying excess of passengers; remedy by action for penalty; proceedings *in rem*; prohibition of petroleum on passenger vessels; injury to employes. 418

STATE. See also WATERS, 1.

A federal court has jurisdiction of a suit by a railroad company chartered in one State to restrain the railroad commissioners of another State from putting in force a schedule of rates, since such a suit is not one against a State, within the 11th Amendment of the United States Constitution. *Chicago & N. W. R. Co. v. Dey (C. C. S. D. Iowa)* 325

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STATUTES.

1. The Act to Regulate Commerce should be liberally construed in favor of commerce among the States; but when complaint is made or relief sought solely or mainly in the interest of common carriers, the act complained of or the right asserted must clearly appear to have been forbidden or conferred; and where the complaining carrier is not in a position to commend itself to the favorable consideration of a court of equity, no strained construction of the law will be made in its favor. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co. (C. C. D. Ky.)* 351

2. The words "right of way." in a grant to a railroad company, describe the tenure, and not the land, granted. *Atlantic & P. R. Co. v. Lesueur (Ariz.)* 189

Act to Regulate Commerce, amendment of. 287, 393, 713

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SUBPŒNA.

In prescribing the contents of an application for *subpœna duces tecum*, the Commission, while guided by the Interstate Commerce Act, will consider and apply rules of the United States courts and those laid down by the federal statutes, so far as applicable. *Rice v. Cincinnati, W. & B. R. Co.* (Com.) 584

SUPREME COURT OF THE UNITED STATES.

See APPEAL AND ERROR, 1.

TARIFFS. See also CARRIERS, 22, 41, 54, 88, 89.

Carriers should bring their tariffs into conformity with the statute, without suggestions from the Commission as to details. *Re Tariffs of the Columbus & W. R. Co.* (Com.) 11

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TAXES. See also CORPORATIONS, 1; INTERJUNCTION, 2; LICENSE.

1. Exemptions from taxation, being exceptions to the rule of taxation, are strictly construed. *Atlantic & P. R. Co. v. Lesueur* (Ariz.) 189

2. Exemption from taxation of a railroad right of way does not carry with it improvements to such right of way. *Atlantic & P. R. Co. v. Lesueur* (Ariz.) 189

3. Franchises conferred by Congress cannot, without its permission, be taxed by the State. *California v. Central P. R. Co.* (U. S. Sup. Ct.) 153

4. The taxation, by a Territory, of the franchise of a corporation incorporated by Act of Congress, is not unconstitutional as the taxation of a federal agency, in the absence of such restriction in the grant of the taxing power to the Territory, as Congress may permit the Territory to do so. *Atlantic & P. R. Co. v. Lesueur* (Ariz.) 189

5. Taxation of the franchise of a railway granted by Act of Congress, by the Territories, does not conflict with the commercial clause of the United States Constitution. *Id.* But see next case following.

6. An assessment, by the State Board of Equalization of California, of all the franchises of a railroad company, including franchises conferred by the United States for constructing a railroad from the Pacific Ocean across the State as well as across the Territories of the United States, and of taking toll thereon,—is repugnant to the commercial clause of the United States Constitution. *California v. Central P. R. Co.* (U. S. Sup. Ct.) 153

7. A municipal ordinance levying a tax of \$50 upon every railroad running through the corporate limits, whether it be called a privilege tax or by some other name, being a tax imposed upon business in the town, if authorized by the State law, is not void as a tax on interstate commerce. *Richmond & D. R. Co. v. Reidsville* (N. C.) 416

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8. An ordinance levying a tax of \$50 on every railroad running through the corporate limits does not violate the principle of uniformity of taxation. *Id.*

9. The payment of the whole of the annual tax on gross earnings of a railroad company on the date upon which, under the Dakota Act of March 9, 1883, only the first installment thereon had become due, is a valid payment and a satisfaction of the whole tax for the year, and not merely of the first installment. *Northern P. R. Co. v. Raymond* (Dak.) 321

10. A state statute taxing gross receipts of transportation companies derived "from tolls and transportation," telegraph business or express business, is not valid, so far as the receipts are derived from commerce between points within and points without the State, or between points without the State but passing through the State on its way. *Delaware & H. C. Co. v. Com.* (Pa.) 222; *Northern P. R. Co. v. Raymond* (Dak.) 321

11. Such statute is valid as to all receipts derived from commerce wholly within the State, although the company doing the business is a foreign corporation. *Delaware & H. C. Co. v. Com.* (Pa.) 222

12. The city of Philadelphia is not authorized to tax a telegraph company occupying its streets, and could not, even if authorized, tax a company engaged in interstate commerce. *Philadelphia v. Western U. Teleg. Co.* (C. C. E. D. Pa.) 728

13. Telegraphic communications carried on between different States are interstate commerce; and any state tax on the business is unconstitutional. *Leloup v. Port of Mobile* (U. S. Sup. Ct.) 134; *Western U. Teleg. Co. v. Pennsylvania* (U. S. Sup. Ct.) 241; *Western U. Teleg. Co. v. Seay* (U. S. Sup. Ct.) 726

14. But such taxes may be levied upon all messages carried and delivered exclusively within the State. *Western U. Teleg. Co. v. Seay* (U. S. Sup. Ct.) 726

15. A single tax assessed, under the statute of Ohio, upon the receipts of a telegraph company which were derived partly from interstate commerce and partly from commerce within the State, but which were returned and assessed in gross and without separation or apportionment, is not wholly invalid, but is invalid only in proportion to the extent that such receipts were derived from interstate commerce. *Ratterman v. Western U. Teleg. Co.* (U. S. Sup. Ct.) 59

16. The property of a telegraph company, situated within a State, may be taxed therein as all other property is taxed; but its business of an interstate character cannot be taxed. *Leloup v. Port of Mobile* (U. S. Sup. Ct.) 134

17. The situs, for taxation, of tangible personal property temporarily in another State, but not permanently located there, is the State of the domicile of the owner. *Com. v. American Dredging Co.* (Pa.) 221

18. The situs, for taxation, of unregistered vessels (including dredges and scows) engaged in interstate commerce, is the State of the domicile of their owner, although they may never have been within that State,—in the ab-

sence of anything to show that they are so permanently located in another State as to be liable to taxation there. *Id.*

19. The situs of the rolling-stock of a railroad company for the purpose of taxation is where it is habitually used; and if the specified property be constantly changing, the amount may be fixed by the average amount so used. *Atlantic & P. R. Co. v. Lesueur* (Ariz.) 189

20. The tax upon railroad gross receipts from transportation, etc., prescribed by Pa. Act 1879, § 7 (P. L. 116), if valid in other respects, cannot be evaded by the fact that the railroad company is a foreign corporation and has sent such receipts to its home office, so that they are not physically within Pennsylvania. *Delaware & H. C. Co. v. Com.* (Pa.) 222

21. A tax upon the corporate franchise or business of express companies organized or doing business within the State, to be computed upon their capital stock or its valuation, is neither in form nor in substance obnoxious to the Federal Constitution, as interfering with commerce. *People, Platt, v. Wemple* (N. Y.) 735

22. A company formed and doing business within the State of New Jersey, which was organized by a number of individuals signing articles of agreement by which the concern was described as a "joint-stock company," and which provided for continuance a certain number of years, for a capital stock divided into shares, represented by certificates or script and assignable in the usual manner; which provided, further, that the business should be managed by a board of directors; that suits should be brought in the name of the president, and all deeds should run to and be made by him; and that the death of members less than a majority of the interest of the whole should not dissolve the company,—is either a "corporation, joint-stock company, or association," within the provisions of N. Y. Laws 1880, chap. 542, which provides for the taxation of such concerns, and is therefore liable to taxation under that Act, although the articles of agreement contain no reference to any statute under which the company was organized, and the statute providing for such organizations was not in fact passed until after the agreement was prepared. *Id.*

23. An assessment of the steamers of a railroad company by the State Board of Equalization in California is in violation of the Constitution and void, and, being inseparably blended with the other property assessed, the whole assessment is void. *California v. Central P. R. Co.* (U. S. Sup. Ct.) 153

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| on franchise or business of express companies. | 735 |

TELEGRAPH COMPANIES. See also COMMERCE, 20-22; TAXES, 12-16.

1. The privilege of a telegraph company which is a business agency of the general government, to maintain its wires along the structure of an elevated railroad in the streets of a
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city, such railroad being an independent post road of the United States, cannot be destroyed by state legislation. *Western U. Tele. Co. v. New York* (C. C. S. D. N. Y.) 533

2. State legislation compelling electric wires in the streets of a city to be placed under the surface of the streets, although such streets, being letter-carrier routes, are all post roads, is an exercise of police power, and is not an unlawful attempt to regulate commerce, or an invasion of the rights of a telegraph company as a business agency of the general government, under the Act of Congress of July 4, 1866 (U. S. Rev. Stat. tit. 65), to operate its lines over "any post road of the United States. *Id.*

3. A statute confirming a contract between commissioners for placing electric wires under ground and a subway company, to lay subways for such wires, is none the less an exercise of police power because it gives to such company special privileges, but no exclusive privileges or franchise. *Id.*

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TRANSPORTATION. See also CARRIERS.

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TRIAL. See also CARRIERS, 71.

Whether the difference in rates for transportation for local traffic and through traffic is reasonable or unreasonable is a question of fact for the jury. *United States v. Tozer* (D. C. E. D. Mo.) 597, aff'g *Same v. Same*, 540

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WAIVER.

The party to whom or for whose benefit a right or privilege is given by statute may waive or surrender it in whole or in part, if he does not thereby destroy the rights and benefits conferred upon or flowing to another in or from said statute or other legal or equitable source. *Northern P. R. Co. v. Raymond* (Dak.) 321

WATERS. See also COMMERCE, 19.

1. A State Legislature may authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river which is altogether within its own boundary; and it is only when Congress, by virtue of the constitutional provision, acts as to such obstructions, that its will must be obeyed so far as may be necessary to ensure free navigation. *Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co. (Ky.)* 515

2. The Green & Barren River Navigation Company, by the Kentucky Act of March 9, 1868, leasing to it the "Green & Barren River line of navigation and their tributaries, together with the grounds, houses, waterworks, rents, profits, tools, machinery, implements, and appurtenances, and all the franchises thereunto belonging or appertaining," acquires only the improvements belonging to the State in its corporate capacity, as distinguished from what was subject to public use under common right, and does not acquire any exclusive right of navigation. Therefore it has no right of action against a railroad company for the obstruction of navigation by repairing a bridge, where this was done under a license which was valid against the public, and the improvements in-
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cluded in the lease were not injured or interfered with. *Id.*

3. The obstruction of navigation by the repairing of a bridge over a river in replacing a draw span, which bridge is maintained under lawful authority, creates no right of action in favor of parties entitled to navigate the river, if the repairs are made in such a manner as not unreasonably to obstruct the navigation, although it was possible to have opened the draw and constructed the new one upon the edge of the river, thus avoiding all obstruction to navigation, but which would have involved unreasonable delay and expense. *Id.*

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Waters; navigable; bridges over; legalizing bridge over; bridge not necessarily a nuisance; bridges constructed under state authority; railroad bridges over. 515

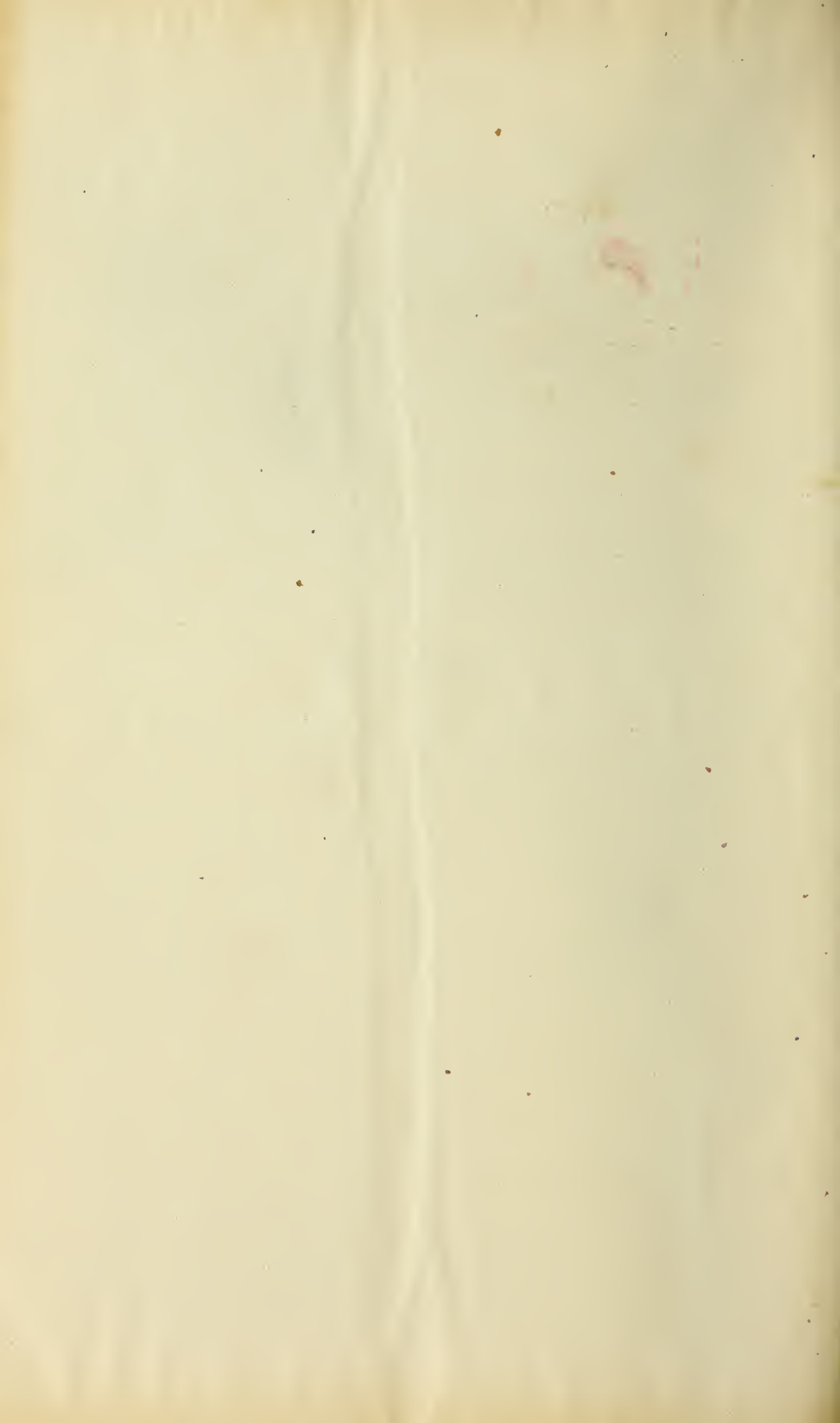
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